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CASES REPORTED

	Vol.		Page
Adams; Howard v., App.	98	P.2d	1057
Aggie; People v., App.	98	P.2d	806
Akers v. Veitch, App.	97	P.2d	987
Allen; Downey v., App.	97	P.2d	515
Alturas, City of, v. Superior Court in and for Modoc County, App.	97	P.2d	816
American Trust Co. v. California Western States Life Ins. Co., Sup.	98	P.2d	497
Andreani, In re, Sup.	97	P.2d	456
Anglo-California Nat. Bank v. Cohn, App.	98	P.2d	521
Autry v. Patteson, Sup.	97	P.2d	240
Baertschiger v. Leffler, App.	97	P.2d	501
Baldy; Marshall v., App.	97	P.2d	998
Bank of America Nat. Trust & Savings Ass'n v. Gillett, App.	97	P.2d	875
Bay Cities Transit Co.; Harman v., App.	98	P.2d	226
Bechtold v. Bishop & Co., App.	98	P.2d	575
Benguet Consol. Mining Co. v. Industrial Accident Commission, App.	97	P.2d	267
Benson v. Burk, App.	97	P.2d	858
Berger; Cline v., App.	97	P.2d	855
Bishop & Co.; Bechtold v., App.	98	P.2d	575
Bishop & Co.; McKinley v., App.	98	P.2d	575
Blankenfeld v. Industrial Accident Commission, App.	98	P.2d	584
Blanton v. Curry, App.	98	P.2d	221
Board of Directors of City of Pasadena; Rubin v., App.	97	P.2d	485
Board of Education of San Francisco Unified School Dist.; Leonard v., App.	97	P.2d	1032
Board of Education, San Francisco Unified School Dist.; Ingram v., App.	98	P.2d	527
Board of Medical Examiners; Leo v., App.	97	P.2d	1046
Boljat; People v., App.	98	P.2d	513
Boljat; People v., Sup.	98	P.2d	1025
Bowling; Ehrhart v., App.	97	P.2d	1010
Brittain; Macklin v., App.	98	P.2d	749
Brown v. Murphy, App.	97	P.2d	281
Brunvold v. Johnson, App.	97	P.2d	489
Burk; Benson v., App.	97	P.2d	858
California Water Service Co.; Juchert v., App.	97	P.2d	259
California Western States Life Ins. Co.; American Trust Co. v., Sup.	98	P.2d	497
California Western States Life Ins. Co. v. Pacific American Co., Sup.	98	P.2d	511
California Western States Life Ins. Co. v. Tucker, Sup.	98	P.2d	511
Calkins v. Newton, App.	97	P.2d	523
Callaghan; Ivory v., App.	98	P.2d	761
Campbell, Ex parte, App.	97	P.2d	482
Carpenter, Ex parte, App.	97	P.2d	476
Carpenter; Hamilton v., Sup.	98	P.2d	1027
Casner v. Daily News Co., App.	98	P.2d	537
Caspar Lumber Co. v. Stowell, App.	98	P.2d	744
Casselman v. Hartford Accident & Indemnity Co., App.	98	P.2d	539
Chandler, Ex parte, App.	97	P.2d	1048
Chinnis v. Pomona Pump Co., App.	98	P.2d	560
Church v. Payne, App.	97	P.2d	819
Church Home for Children of Protestant Episcopal Church in Diocese of Los Angeles, Appeal of, App.	97	P.2d	850
City Commission of City of Fresno; Nider v., App.	97	P.2d	293

	Vol.		Page
City of Albany; Mathews v., App.	97	P.2d	266
City of Albany; Mathews v., Sup.	98	P.2d	1025
City of Alturas v. Superior Court in and for Modoc County, App.	97	P.2d	816
City of Anaheim; Heinz v., App.	97	P.2d	980
City of Elsinore v. Temescal Water Co., App.	97	P.2d	274
City of Los Angeles v. Superior Court in and for Los Angeles County, Sup.	98	P.2d	207
City of Modesto; Keeley v., App.	97	P.2d	468
City of Vernon; Lummus v., App.	97	P.2d	838
Claasen, Ex parte, App.	97	P.2d	254
Cline v. Berger, App.	97	P.2d	855
Cohen v. Gump, App.	97	P.2d	301
Cohn, Ex parte, App.	98	P.2d	769
Cohn; Anglo-California Nat. Bank v., App.	98	P.2d	521
Cohn v. Cohn, App.	98	P.2d	521
Cohn's Estate, In re, two cases, App.	98	P.2d	521
Coon; People v., App.	97	P.2d	1006
Copeland v. Raub, App.	97	P.2d	859
Credit Discount Co.; Rosenblatt v., App.	98	P.2d	747
Crocker First Nat. Bank v. Waite, Sup.	97	P.2d	238
C. S. Smith Metropolitan Market Co. v. Superior Court in and for Los Angeles County, App.	98	P.2d	555
Curry; Blanton v., App.	98	P.2d	221
Curtis; People v., App.	98	P.2d	228
Daily News Co.; Casner v., App.	98	P.2d	537
Dawes; People v., App.	98	P.2d	787
Dawson v. Los Angeles County, Sup.	98	P.2d	495
Day v. Yamaguchi, App.	97	P.2d	833
Deininger; People v., App.	98	P.2d	526
De La Roi; People v., App.	97	P.2d	836
Denman v. Smith, Sup.	97	P.2d	451
Department of Public Works; Romero v., App.	97	P.2d	871
District Bond Co. v. Hilliker, App.	98	P.2d	782
Dobbins v. Title Guarantee & Trust Co., App.	97	P.2d	1051
Dobbins' Estate, In re, App.	97	P.2d	1051
Downey v. Allen, App.	97	P.2d	515
Doyle v. Great Western Power Co. of California, App.	97	P.2d	1022
Doyle v. McPherson, App.	97	P.2d	249
Dunbar; Wilson v., App.	97	P.2d	262
Dunlavy v. Nead, App.	97	P.2d	1003
Ehrhart v. Bowling, App.	97	P.2d	1010
Elsinore, City of, v. Temescal Water Co., App.	97	P.2d	274
Emmons; McNamara v., App.	97	P.2d	503
England v. Hospital of the Good Samaritan, Sup.	97	P.2d	813
Farmers Automobile Inter-Insurance Exchange; Votaw v., Sup.	97	P.2d	958
Feraut v. Sackett, App.	98	P.2d	795
Feraut's Estate, In re, App.	98	P.2d	795
First Bond & Mortgage Co. of Glendale v. Malouf, App.	98	P.2d	824
Fletcher's Estate, In re, App.	97	P.2d	1039
French v. Mortgage Guarantee Co., App.	97	P.2d	852
Garcia; People v., Super.	98	P.2d	265
Garcia v. State Department of Institutions, App.	97	P.2d	264
George; Robinson v., App.	98	P.2d	519
Ghirardelli v. Peninsula Properties Co., App.	98	P.2d	734
Gillett; Bank of America Nat. Trust & Savings Ass'n v., App.	97	P.2d	875
Gordon; Home Owners' Loan Corporation v., App.	97	P.2d	845
Graf; People v., App.	97	P.2d	1001
Great Western Power Co. of California; Doyle v., App.	97	P.2d	1022
Great Western Power Co. of California; Marshall v., App.	97	P.2d	1025

	Vol.		Page
Great Western Power Co. of California; Raynsford v., App.	97	P.2d	1029
Great Western Power Co. of California; Rose v., App.	97	P.2d	1022
Great Western Power Co. of California; West v., App.	97	P.2d	1014
Gump; Cohen v., App.	97	P.2d	301
Gump's Estate, In re, App.	97	P.2d	301
Hamburger; Matthews v., App.	97	P.2d	465
Hamilton v. Carpenter, Sup.	98	P.2d	1027
Hanna; People v., App.	97	P.2d	847
Hansen's Estate, In re, App.	98	P.2d	797
Hargreaves; Pacific Indemnity Co. v., App.	98	P.2d	217
Harman v. Bay Cities Transit Co., App.	98	P.2d	226
Harmon v. San Joaquin Light & Power Corporation, App.	98	P.2d	1064
Harris v. Larter, App.	97	P.2d	1035
Hartford Accident & Indemnity Co.; Casselman v., App.	98	P.2d	539
Head v. Wilson, App.	97	P.2d	509
Heinz v. City of Anaheim, App.	97	P.2d	980
Higgins v. Pacific Electric R. Co., App.	97	P.2d	844
Hill v. State Bar of California, Sup.	97	P.2d	236
Hilliker; District Bond Co. v., App.	98	P.2d	782
Hobbs; People v., App.	98	P.2d	775
Home Owners' Loan Corporation v. Gordon, App.	97	P.2d	845
Hospital of the Good Samaritan; England v., Sup.	97	P.2d	813
Howard v. Adams, App.	98	P.2d	1057
Huey; Pacific Venture Corporation v., App.	97	P.2d	877
Hunter v. Superior Court in and for Riverside County, App.	97	P.2d	492
Ice Palace; Thurman v., App.	97	P.2d	999
Industrial Accident Commission; Benguet Consol. Mining Co. v., App.	97	P.2d	267
Industrial Accident Commission; Blankenfeld v., App.	98	P.2d	584
Industrial Accident Commission; Limited Mut. Compensation Ins. Co. v., App.	98	P.2d	827
Industrial Accident Commission; Lyydikainen v., App.	97	P.2d	993
Industrial Accident Commission; Rich v., App.	98	P.2d	249
Industrial Accident Commission; Witt's Dairy v., App.	98	P.2d	812
Ingram v. Board of Education, San Francisco Unified School Dist., App.	98	P.2d	527
Isreal; Prager v., Sup.	98	P.2d	729
Ivory v. Callaghan, App.	98	P.2d	761
Ivory's Estate, In re, App.	98	P.2d	761
Jensen v. Martin, App.	97	P.2d	1039
Johnson; Brunvold v., App.	97	P.2d	489
Juchert v. California Water Service Co., App.	97	P.2d	259
Katenkamp v. Union Realty Co., two cases, App.	98	P.2d	239
Keeley, In re, App.	97	P.2d	468
Keeley v. City of Modesto, App.	97	P.2d	468
Kehlor v. Satterlee, App.	98	P.2d	759
Ketchum v. Pattee, App.	98	P.2d	1051
Kinney's Estate, In re, App.	97	P.2d	478
Kirkpatrick v. Stelling, App.	98	P.2d	566
Klepsch's Estate, In re, App.	97	P.2d	987
Kyne v. Kyne, App.	98	P.2d	738
Kynette; People v., App.	97	P.2d	287
Labarthe v. McRae, App.	97	P.2d	251
La Belle, Ex parte, App.	98	P.2d	778
Larter; Harris v., App.	97	P.2d	1035
La Vine; Wallace v., App.	97	P.2d	879
Lawrence's Estate, In re, App.	97	P.2d	850
Leaf; McComsey v., App.	97	P.2d	242
Leffler; Baertschiger v., App.	97	P.2d	561
Leo v. Board of Medical Examiners, App.	97	P.2d	1046

	Vol.		Page
Leonard v. Board of Education of San Francisco Unified School Dist., App.	97	P.2d	1032
Limited Mut. Compensation Ins. Co. v. Industrial Accident Commission, App.	98	P.2d	827
Los Angeles, City of, v. Superior Court in and for Los Angeles County, Sup.	98	P.2d	207
Los Angeles County; Dawson v., Sup.	98	P.2d	495
Los Angeles County; Southern Service Co. v., Sup.	97	P.2d	963
Lummus v. City of Vernon, App.	97	P.2d	838
Lyydikainen v. Industrial Accident Commission, App.	97	P.2d	993
McCarthy's Estate, In re, App.	97	P.2d	480
McComsey v. Leaf, App.	97	P.2d	242
McKinley v. Bishop & Co., App.	98	P.2d	575
Macklin v. Brittain, App.	98	P.2d	749
McMillan v. Siemon, App.	98	P.2d	790
McNamara v. Emmons, App.	97	P.2d	503
McNutt v. McNutt, two cases, App.	98	P.2d	253
McNutt's Estate, In re, App.	98	P.2d	253
McPherson; Doyle v., App.	97	P.2d	249
McPherson v. Mutual Benefit Health & Accident Ass'n, App.	98	P.2d	777
McRae; Labarthe v., App.	97	P.2d	251
McRae; Western Canal Co. v., App.	97	P.2d	1031
Malouf; First Bond & Mortgage Co. of Glendale v., App.	98	P.2d	824
Manning; People v., App.	98	P.2d	748
Marshall v. Baldy, App.	97	P.2d	998
Marshall v. Great Western Power Co. of California, App.	97	P.2d	1025
Martin; Jensen v., App.	97	P.2d	1039
Martin v. Miqueu, App.	98	P.2d	816
Martinez, Ex parte, App.	98	P.2d	528
Mathews v. City of Albany, App.	97	P.2d	266
Mathews v. City of Albany, Sup.	98	P.2d	1025
Matthews v. Hamburger, App.	97	P.2d	465
Miqueu; Martin v., App.	98	P.2d	816
Monaci v. Turner, App.	98	P.2d	755
Moore; Pacific Gas & Electric Co. v., App.	98	P.2d	819
Moore v. Purse Seine Net, App.	98	P.2d	766
Moose; Myers v., App.	98	P.2d	551
Mooro, In re, App.	98	P.2d	552
Morro v. Morro, App.	98	P.2d	552
Mortgage Guarantee Co.; French v., App.	97	P.2d	852
Mortimer v. Young, App.	98	P.2d	1061
Mulholland; People v., App.	98	P.2d	261
Murphy; Brown v., App.	97	P.2d	281
Murphy v. Murphy, App.	98	P.2d	523
Murphy's Estate, In re, App.	98	P.2d	523
Mutual Benefit Health & Accident Ass'n; McPherson v., App.	98	P.2d	777
Myers v. Moose, App.	98	P.2d	551
Nead; Dunlavy v., App.	97	P.2d	1003
Nelson; People v., App.	97	P.2d	1043
Newland; People v., App.	97	P.2d	972
Newton; Calkins v., App.	97	P.2d	523
Nider v. City Commission of City of Fresno, App.	97	P.2d	293
Nilsson v. State Personnel Board, App.	97	P.2d	843
Ocean Park Bath House & Amusement Co. v. Pacific Auto Park Co., App.	98	P.2d	1068
O'Connor's Estate, In re, App.	98	P.2d	769
One 1937 Plymouth 6 4-Door Sedan, Engine No. P4–211565; People v., App.	98	P.2d	750
Pacific American Co.; California Western States Life Ins. Co. v., Sup.	98	P.2d	511

	Vol.		Page
Pacific Auto Park Co.; Ocean Park Bath House & Amusement Co. v., App.	98	P.2d	1068
Pacific Electric R. Co.; Higgins v., App.	97	P.2d	844
Pacific Electric R. Co.; Tice v., App.	97	P.2d	844
Pacific Gas & Electric Co. v. Moore, App.	98	P.2d	819
Pacific Indemnity Co. v. Hargreaves, App.	98	P.2d	217
Pacific Venture Corporation v. Huey, App.	97	P.2d	877
Palm Springs Land & Irrigation Co.; Palm Springs-La Quinta Development Co. v., App.	98	P.2d	530
Palm Springs-La Quinta Development Co. v. Palm Springs Land & Irrigation Co., App.	98	P.2d	530
Parámount Productions; Reeves v., App.	98	P.2d	1050
Parchen; People v., App.	98	P.2d	1045
Passarelli v. Souza, App.	98	P.2d	809
Pattee; Ketchum v., App.	98	P.2d	1051
Patteson; Autry v., Sup.	97	P.2d	240
Payne; Church v., App.	97	P.2d	819
Peckham v. Warner Bros. Pictures, App.	97	P.2d	472
Peninsula Properties Co.; Ghirardelli v., App.	98	P.2d	734
People v. Aggie, App.	98	P.2d	806
People v. Boljat, App.	98	P.2d	513
People v. Boljat, Sup.	98	P.2d	1025
People v. Coon, App.	97	P.2d	1006
People v. Curtis, App.	98	P.2d	228
People v. Dawes, App.	98	P.2d	787
People v. Deininger, App.	98	P.2d	526
People v. De La Roi, App.	97	P.2d	836
People v. Garcia, Super.	98	P.2d	265
People v. Graf, App.	97	P.2d	1001
People v. Hanna, App.	97	P.2d	847
People v. Hobbs, App.	98	P.2d	775
People v. Kynette, App.	97	P.2d	287
People v. Manning, App.	98	P.2d	748
People v. Mulholland, App.	98	P.2d	261
People v. Nelson, App.	97	P.2d	1043
People v. Newland, App.	97	P.2d	972
People v. One 1937 Plymouth 6 4-Door Sedan, Engine No. P4-211565, App.	98	P.2d	750
People v. Parchen, App.	98	P.2d	1045
People v. Rasmussen, App.	97	P.2d	1014
People v. Santos, App.	97	P.2d	1050
People v. Savin, App.	98	P.2d	773
People v. Schneider, App.	98	P.2d	215
People v. Smith, App.	97	P.2d	867
People v. Snyder, App.	97	P.2d	976
People v. Tepper, App.	97	P.2d	1002
People v. Wallace, App.	97	P.2d	256
People v. Warren, App.	97	P.2d	464
People v. Zimmerman, App.	97	P.2d	262
Pomona Mut. Building & Loan Ass'n; State Bonded Audit Bureau v., Super.	98	P.2d	829
Pomona Pump Co.; Chinnis v., App.	98	P.2d	560
Prager v. Isreal, Sup.	98	P.2d	729
Providence Hospital of Oakland; Silva v., Sup.	97	P.2d	798
Purse Seine Net; Moore v., App	98	P.2d	766
Rasmussen; People v., App.	97	P.2d	1014
Raub; Copeland v., App.	97	P.2d	859
Raynsford v. Great Western Power Co. of California, App.	97	P.2d	1029
Reeves v. Paramount Productions, App.	98	P.2d	1050

	Vol.		Page
Regan v. San Mateo County, Sup.	97	P.2d	231
Rich v. Industrial Accident Commission, App.	98	P.2d	249
Robinson v. George, App.	98	P.2d	519
Rogers v. Transamerica Corporation, App.	97	P.2d	517
Romero v. Department of Public Works, App.	97	P.2d	871
Rose v. Great Western Power Co. of California, App.	97	P.2d	1023
Rosenblatt v. Credit Discount Co., App.	98	P.2d	747
Rubin v. Board of Directors of City of Pasadena, App.	97	P.2d	485
Sackett; Feraut v., App.	98	P.2d	795
San Joaquin Light & Power Corporation; Harmon v., App.	98	P.2d	1064
San Mateo County; Regan v., Sup.	97	P.2d	231
Santa Barbara County; Weber v., Sup.	98	P.2d	492
Santos; People v., App.	97	P.2d	1050
Satterlee; Kehlor v., App.	98	P.2d	759
Savage v. Superior Court in and for City and County of San Francisco, App.	97	P.2d	990
Savin; People v., App.	98	P.2d	773
Schneider; People v., App.	98	P.2d	215
Siemon; McMillan v., App.	98	P.2d	790
Silva v. Providence Hospital of Oakland, Sup.	97	P.2d	798
Silver Burdett Co. v. State Board of Education of California, two cases, App.	98	P.2d	533
Silvers; Wood v., App.	97	P.2d	265
Smith; Denman v., Sup.	97	P.2d	451
Smith; People v., App.	97	P.2d	867
Smith v. Western Pac. R. Co., App.	97	P.2d	863
Smith Metropolitan Market Co. v. Superior Court in and for Los Angeles County, App.	98	P.2d	555
Snyder; People v., App.	97	P.2d	976
Snyder v. Valinder, App.	97	P.2d	997
Southern Service Co. v. Los Angeles County, Sup.	97	P.2d	963
Souza; Passarelli v., App.	98	P.2d	809
State Bar of California; Hill v., Sup.	97	P.2d	236
State Board of Education of California; Silver Burdett Co. v., App.	98	P.2d	533
State Bonded Audit Bureau v. Pomona Mut. Building & Loan Ass'n, Super.	98	P.2d	829
State Department of Institutions; Garcia v., App.	97	P.2d	264
State Personnel Board; Nilsson v., App.	97	P.2d	843
Stelling; Kirkpatrick v., App.	98	P.2d	566
Stepsay, In re, Sup.	98	P.2d	489
Sternbeck v. Valinder, App.	97	P.2d	997
Stevenson v. Stevenson, App.	97	P.2d	982
Stowell; Caspar Lumber Co. v., App.	98	P.2d	744
Superior Court in and for City and County of San Francisco; Savage v., App.	97	P.2d	990
Superior Court in and for Los Angeles County; City of Los Angeles v., Sup.	98	P.2d	207
Superior Court in and for Los Angeles County; C. S. Smith Metropolitan Market Co. v., App.	98	P.2d	555
Superior Court in and for Los Angeles County; Times-Mirror Co. v., Sup.	98	P.2d	1029
Superior Court in and for Modoc County; City of Alturas v., App.	97	P.2d	816
Superior Court in and for Riverside County; Hunter v., App.	97	P.2d	492
Superior Court in and for Sacramento County; Waterland v., Sup.	98	P.2d	211
Superior Court in and for San Diego County; Young v., App.	98	P.2d	770
Temescal Water Co.; City of Elsinore v., App.	97	P.2d	274
Tepper; People v., App.	97	P.2d	1002
Texas Co. v. Wieczorek, App.	98	P.2d	547
Thurman v. Ice Palace, App.	97	P.2d	999

	Vol.		Page
Tice v. Pacific Electric R. Co., App.	97	P.2d	844
Times-Mirror Co. v. Superior Court in and for Los Angeles County, two cases, Sup.	98	P.2d	1029
Title Guarantee & Trust Co.; Dobbins v., App.	97	P.2d	1051
Toth; Upton v., App.	98	P.2d	515
Transamerica Corporation; Rogers v., App.	97	P.2d	517
Tucker; California Western States Life Ins. Co. v., Sup.	98	P.2d	511
Turner; Monaci v., App.	98	P.2d	755
Tutt v. Van Voast, App.	97	P.2d	869
Union Realty Co.; Katenkamp v., App.	98	P.2d	239
Upton v. Toth, App.	98	P.2d	515
Valinder; Snyder v., App.	97	P.2d	997
Valinder; Sternbeck v., App.	97	P.2d	997
Van Voast; Tutt v., App.	97	P.2d	869
Veitch; Akers v., App.	97	P.2d	987
Votaw v. Farmers Automobile Inter-Insurance Exchange, Sup.	97	P.2d	958
Waite; Crocker First Nat. Bank v., Sup.	97	P.2d	238
Waite's Guardianship, In re, Sup.	97	P.2d	238
Wallace v. La Vine, App.	97	P.2d	849
Wallace; People v., App.	97	P.2d	253
Warner Bros. Pictures; Peckham v., App.	97	P.2d	472
Warnock v. Warnock, App.	97	P.2d	831
Warnock's Estate, In re, App.	97	P.2d	831
Warren; People v., App.	97	P.2d	464
Waterland v. Superior Court in and for Sacramento County, Sup.	98	P.2d	211
Weber v. Santa Barbara County, Sup.	98	P.2d	492
West v. Great Western Power Co. of California, App.	97	P.2d	1014
Western Canal Co. v. McRae, App.	97	P.2d	1031
Western Pac. R. Co.; Smith v., App.	97	P.2d	863
Wieczorek; Texas Co. v., App.	98	P.2d	547
Wilson v. Dunbar, App.	97	P.2d	262
Wilson; Head v., App.	97	P.2d	509
Winters v. Yamaguchi, App.	97	P.2d	833
Witt's Dairy v. Industrial Accident Commission, App.	98	P.2d	812
Wood v. Silvers, App.	97	P.2d	265
Yamaguchi; Day v., App.	97	P.2d	833
Yamaguchi; Winters v., App.	97	P.2d	833
Young; Mortimer v., App.	98	P.2d	1061
Young v. Superior Court in and for San Diego County, App.	98	P.2d	770
Zimmerman; People v., App.	97	P.2d	262

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14 Cal.2d 713

REGAN et al. v. SAN MATEO COUNTY et al.

S. F. 16274.

Supreme Court of California.

Dec. 15, 1939.

1. Officers ⚷100(1)

The 1931 amendment to the County Government Act increasing county treasurer's salary without a finding that increase was to offset commissions to which county treasurers had previously been entitled constituted an increase in compensation and could not become effective during incumbent's term. Pol.Code, § 4244, subds. 5, 17, as amended by St.1931, p. 1168; § 4250; Const. art. 11, § 9.

2. Constitutional law ⚷48

Where statute increases or decreases salary for county officials, or changes method of compensation without provision as to effect upon incumbents, it will be presumed that legislature intended change should not take effect until expiration of term of office of incumbent.

3. Counties ⚷24

Where 1931 amendment to County Government Act increasing county treasurers' compensation, and requiring payment to county of commissions to which treasurers had previously been entitled, did not state that it was intended to affect incumbents, and county charter thereafter becoming effective authorized receipt by incumbents of compensation which they were then entitled to receive, incumbent was entitled to collect and retain commissions on inheritance and transfer taxes collected by him prior to expiration of his term. Pol.Code, § 4244, subds. 5, 17, as amended by St.1931, p. 1168; § 4250; St.1927, p. 1095, § 20; St.1933, pp. 2966, 2967, 2976, art. 6, §§ 12, 13, and art. 13, § 5; Const. art. 11, § 9.

HOUSER, J. dissenting.

◆

In Bank.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by H. W. Regan and others against the County of San Mateo and others, to recover commissions on inheritance and transfer taxes collected by plaintiffs' assignor as county treasurer. From an adverse judgment, the plaintiffs appeal.

Judgment reversed with directions.

For prior opinion, see 90 P.2d 366.

Carl W. Anderson, of Burlingame (Charles N. Kirkbride, of San Mateo, of counsel), for appellants.

Gilbert D. Ferrell, Dist. Atty., and Daniel E. Sullivan, Asst. Dist. Atty., both of Redwood City, for respondents.

CARTER, Justice.

This is an appeal by plaintiffs from a judgment rendered against them by the superior court of San Mateo county denying recovery in an action brought against said county and its board of supervisors for certain commissions on inheritance and transfer taxes collected by their assignor, Harry E. Jenkins, as treasurer of said county between August 14, 1931, and January 7, 1935.

The facts of this case are undisputed and are substantially as follows:

At the general election in 1930, Harry E. Jenkins was elected county treasurer of San Mateo county for a full four-year term. He took office as such county treasurer on January 5, 1931. At the time of his election, San Mateo county was a county of the twenty-first class and the compensation of the county treasurer was an annual salary of $3,500, Pol. Code, sec. 4250, and a commission on all inheritance and transfer taxes collected by him. Stats. 1921, p. 1500, as amended by Stats. 1927, p. 1094.

At the session of the legislature in 1931, the classification of San Mateo county was changed from the twenty-first to the fifteenth class. Pol. Code, secs. 4005c, 4006. At said session, the County Government Act of said county was amended by providing for an increase in the compensation of several of the officials of said county. Pol. Code, sec. 4244. Subdivision 5 of said section provided that "The county treasurer shall receive three thousand nine hundred dollars per annum"; and subdivision 17 of said section provided in part as follows:

"Provided, that the salaries and compensation, as herein provided for, shall be in full for all compensation to said officials, their deputies, employees or appointees.

"All fees, perquisites, commissions, and other moneys received by any county official, his deputy, employee or appointee, by virtue of the office or employment of such county officer, deputy or employee, shall each month be paid into the county treasury, and shall belong to the county; * * *."

Chap. 551, p. 1168, Stats. 1931. This statute became effective August 14, 1931. Pol. Code, § 323.

Jenkins served his full term as county treasurer and was paid the salary of $3,500 per annum provided for at the time he took office. He also received the commissions provided for by section 20 of the Inheritance Tax Act above mentioned until August 14, 1931. Thereafter he paid said commissions into the county treasury and did not withdraw any portion thereof for his own use. He assigned all of his claim to said commissions to plaintiffs who brought this action against San Mateo county and its supervisors to recover said commissions.

The record discloses that between August 14, 1931, and January 7, 1935, Jenkins collected as commissions authorized by section 20 of the Inheritance Tax Act and paid into the treasury of San Mateo county the sum of $4,573.85; none of which sum was withdrawn by him. The trial court rendered judgment in favor of defendants denying plaintiffs' recovery.

The question presented by this appeal is whether or not the amendment covered by subdivision 17 of section 4244 of the Political Code became effective during the term for which Jenkins was elected county treasurer of San Mateo county at the general election in 1930, so as to deprive him of his right to the commissions authorized by section 20 of the Inheritance Tax Act, which accrued between August 14, 1931, and January 7, 1935.

On July 1, 1933, the San Mateo county charter became effective. St.1933, p. 2953 et seq. Section 5, article XIII provides: "Compensation in Full for Services. The compensation provided to be paid to all elective and appointive county and township officers, boards and commissions shall, when so paid, be in full for all services rendered."

Section 13, article VI of the charter provides: "Payment of Fees Into County Treasury. Every county officer, board or commission, authorized to collect fees or moneys must pay into the county treasury all such fees and moneys collected by him or them, as the case may be, not later than the next business day following their receipt. * * *"

However, the charter becomes unimportant in determining the problem before us in view of the following provision of section 12, article VI, thereof: "All county officers who, immediately prior to the time this charter goes into effect are holding * * * elective offices, shall, during the remainder of their respective terms of office, have and receive the same salary and compensation to which they, severally, are now entitled to receive under provisions of general law, anything herein stated to the contrary notwithstanding."

Neither the amendment to the San Mateo County Government Act of 1931 nor the county charter stated that a decrease in compensation for the county treasurer was intended, or that the change in compensation was intended to affect incumbents. Section 20 of the Inheritance Tax Act, under which the commissions in question were collected, was not repealed or amended, and the commissions provided for therein continued to be collected by Jenkins during his term as such county treasurer, but after August 14, 1931, were paid into the county treasury by him.

[1, 2] It is obvious that the 1931 amendment to the San Mateo County Government Act fixing the salary of the county treasurer at $3,900 per year without a finding by the legislature that the increased salary was intended to offset the commissions on inheritance taxes, constituted an increase in the compensation of the county treasurer and could not become effective during the term for which Jenkins was elected. Art. XI, sec. 9, Cal.Const. Smith v. Mathews, 155 Cal. 752, 103 P. 199; Galeener v. Honeycutt, 173 Cal. 100, 159 P. 595; Keith v. Ramsey, 34 Cal.App. 340, 167 P. 408; Applestill v. Gary, 18 Cal.App. 385, 123 P. 228; Williams v. Garey, 19 Cal.App. 769, 127 P. 824. It appears to be well settled by the above-mentioned authorities that when the legislature amends a County Government Act by providing an increase or reduction in salary for certain county officials, or changing the method of compensating certain county officials from a fee to a salary basis, or vice versa, and the act creating such amendment contains no provision to the effect that it is intended to affect incumbents, it will be presumed that the legislature intended that such amendment should not take effect until the expiration of the term of office of

the incumbent thus affected and that the incumbent should continue to be compensated in accordance with the law in effect at the time he took office. The rule laid down in the above-mentioned cases appears to be clearly applicable to the facts of the case now before us. We can perceive no good reason why a different rule should be applied to this case simply because the law in force at the time Jenkins was elected provided that he should receive a portion of his compensation by way of a fixed salary of $3,500 per year, and a portion by way of commissions derived from the inheritance taxes collected by him. Let us assume a situation where the major portion of the compensation of a county official would be paid to him in the way of fees or commissions and only a small part in salary; for instance, if a county official were allowed a salary of $600 a year and fees or commissions which would average $3,000 a year, making the total amount of his compensation $3,600 a year, and the legislature should amend the County Government Act so as to increase his salary to $3,600 a year and provide that all fees and commissions collected by him be paid into the county treasury, and no finding was made by the legislature that the change would not effect an increase or reduction in the compensation of the official and no provision was made therein for the amendment taking effect during the term of the incumbent, the rule contended for by respondents in the instant case would have the effect of depriving the official of his right to fees and commissions during his term and prohibit him from accepting the increased salary, hence he would be required to serve out the remainder of his term at a salary of only $600 per annum, or resign.

[3] The foregoing illustration demonstrates the wisdom of the rule of construction enunciated in the above-mentioned cases, which has the effect of protecting both the public officials and the political subdivision which they have been chosen to serve.

This rule of construction is clearly stated in the decision of this court in the case of Smith v. Mathews, supra, which we quote as follows:

At page 759 of 155 Cal., at page 203 of 103 P.: "* * * the question which we have to decide is the proper construction of an act which, without repealing the County Government Act, merely amends it by increasing the salaries of certain officers, and by changing the compensation of other officers from fees to salary, or from salary to fees, in such a manner as to leave the courts no means of determining whether these amendments will operate an increase or reduction of compensation. The true construction of such an act, in my opinion, is to treat all its provisions alike, and, knowing that such of them as increase salaries could have been intended to apply only to officers elected subsequent to the amendment, to conclude, in the absence of express and specific declaration to the contrary, that other amendments which may or may not have the effect of increasing compensation were likewise intended to operate only in favor of or against officers to be thereafter elected."

And we quote with approval from the concurring opinion of Mr. Justice Shaw in the Smith case, 155 Cal. at page 760, 103 P. at page 203, as follows:

"The point upon which the case is now decided is that the provisions of the act of 1907, in so far as they operate to increase the compensation of officers for terms running at the time the act took effect, are not to be given a retroactive operation; that is, that those provisions do not apply to the compensation for the then existing terms, and that in those cases where the act makes a change in the mode of measuring the compensation, from fees to salaries, and where, consequently, it cannot be ascertained in advance that there is no increase, it is to be presumed, from this uncertainty and the absence of an express statement otherwise, that the Legislature intended thereby to provide only for officers to be elected for subsequent terms."

And 155 Cal. at page 761, 103 P. at page 203: "The Constitution forbids a legislative increase in the compensation of any county or township officer during his term of office. Article 11, § 9. This prohibition, in effect, and with regard to legislation on the subject, makes the entire term of an office, with the concurrent right of the incumbent to compensation, a matter which occurs and a right which exists as soon as the term begins, and which are thereafter, in that aspect, past transactions. *Any legislation affecting the compensation of such officer is to be deemed as operating upon an existing right, and the Legislature will not be presumed to have attempted to change the compensation during the term,* *unless it expressly so declares.* If such intent does not appear, the law will be construed as intended to apply only to officers elected for subsequent terms. This construction is just both to the officer and to the public. *If it intends to reduce the compensation of officers* in any class of counties, during the pending terms, as it may constitutionally do, *the legislature can say in plain words that the change applies to present incumbents.* If it changes from fees to salaries, as it may if it finds that the salary allowed will not increase the compensation, *it can declare that there is no increase, and that it is to apply immediately to the present incumbents.* Perhaps the fact of no increase would be inferred from the declaration that it should apply to present incumbents; *but, where neither statement appears, it is to be inferred that an increase was contemplated and that it was intended to apply prospectively only."* (Italics ours.)

The case of Applestill v. Gary, supra, involved a change of sheriff's compensation from a $5,000 annual salary plus mileage fees to a $5,000 annual salary plus fees and mileage for service outside his county plus an annual salary of $1,500 for an under sheriff and an annual salary of $900 for a court deputy. The court followed the reasoning in the Smith case and held that the change in compensation could not be applied to the incumbent.

In support of the judgment of the trial court in the case at bar, counsel for respondents rely upon the following cases: County of Kern v. Fay, 131 Cal. 547, 63 P. 857; County of San Diego v. Schwartz, 145 Cal. 49, 78 P. 231; Lesem v. Getty, 23 Cal.App.2d 57, 72 P.2d 183; Matter of Dodge v. City and County of San Francisco, 135 Cal. 512, 67 P. 973; City and County of San Francisco v. Mulcrevy, 15 Cal.App. 11, 113 P. 339; Mulcrevy v. San Francisco, 231 U.S. 669, 34 S.Ct. 260, 58 L.Ed. 425; County of Alameda v. Cook, 32 Cal.App. 165, 162 P. 405; County of Los Angeles v. Cline, 37 Cal.App. 607, 174 P. 73; Winter v. DeShields, 46 Cal.App. 574, 189 P. 703; County of Tehama v. Winter, 56 Cal.App. 341, 205 P. 97 and Jones v. DeShields, 187 Cal. 331, 202 P. 137.

None of these cases involve the problem here under consideration as the statute or charter provision there under consideration was adopted prior to the election and taking of office of the officer concerned.

In the case at bar it cannot be denied that the treasurer's compensation was changed by the 1931 amendment from salary plus commission to an increased salary alone. Under the Smith case this change constituted an increase. In view of this fact, it was constitutionally impossible for this increase to affect the incumbent county treasurer during the balance of his elective term.

The record in this case discloses that upon the expiration of Jenkins' term as county treasurer on January 7, 1935, he continued to fill the position of county treasurer of San Mateo county under an appointment from the board of supervisors of said county until October 28, 1935, and the present action was commenced to recover all commissions on inheritance and transfer taxes collected by him between the 14th day of August, 1931, and the 28th day of October, 1935. However, appellants have expressly waived all claim to such commissions collected by Jenkins during his appointive term subsequent to January 7, 1935, and we have therefore not given consideration to the question of whether or not appellants are entitled to recover such commissions during said last-mentioned period.

We think it is clear that in the absence of a declaration in the 1931 amendment to the San Mateo County Government Act, that it was intended to affect incumbents, there is no escape from the conclusion that Jenkins was entitled to collect and retain as his own, the commissions on inheritance and transfer taxes collected by him between August 14, 1931, and January 7, 1935, pursuant to section 20 of the Inheritance Tax Act (Stats.1921, p. 1500, as amended by Stats.1927, p. 1094), and, therefore, the judgment is reversed with directions to the trial court to enter judgment in favor of plaintiffs for the amount of commissions to which Jenkins was entitled pursuant to said act between August 14, 1931, and January 7, 1935, the date of the expiration of his term as such county treasurer for which he was elected in the year 1930.

We concur: WASTE, C. J.; SHENK, J.; GIBSON, J.; CURTIS, J.; EDMONDS, J.

HOUSER, Justice (dissenting).

I dissent:

In this case, a judgment that was rendered by the superior court was affirmed on appeal to the District Court of Appeal.

Regan v. County of San Mateo, 90 P.2d 366. Although, thereafter, a petition for hearing by this court was granted, on further consideration of the appeal, I find that I am in accord with the opinion which was prepared by Mr. Justice Ward of the First District Court of Appeal, and believe that it should meet with the approval of this court, and consequently that it should be adopted as its opinion. It is as follows:

"This is an appeal by the assignees of Harry E. Jenkins, formerly treasurer of the county of San Mateo, from an adverse judgment in an action against the county for inheritance and transfer tax commissions.

"Harry E. Jenkins was the duly elected, qualified and acting treasurer of San Mateo county from January 5, 1931, until January 7, 1935. Thereafter, under the provisions of a county charter which had in the meantime become effective, for the appointment of a treasurer, he was selected, duly appointed and served in that capacity until October 28, 1935. From the date of his election until August 14, 1931, Jenkins, as treasurer, collected and retained certain commissions on inheritance and transfer taxes to which he was entitled under the provisions of section 4290 of the Political Code. On this last-mentioned date there became effective the County Government Act. (Stats.1931, p. 1168.) Section 17 of this act (page 1174) provided that all fees, perquisites, commissions and other moneys received by any county official, excepting the coroner, public administrator and certain county clerk registration deputies, should be paid into the county treasury and belong to the county. This provision is explicit. It prohibits the retention by any county officer of commissions, fees, perquisites or any other moneys received by any officials other than those specifically excepted. In the same year the county of San Mateo was raised from the twenty-first to the fifteenth class (secs. 4005c and 4006, Pol.Code) and the salaries of certain county officers were raised, including that of the county treasurer, but the act provided that the salaries 'shall be in full for all compensation to said officials'. (Stats.1931, p. 1168, at pp. 1170 and 1174.) The salary was, therefore, the only compensation the treasurer could accept for his official service. (County of Kern v. Fay, 131 Cal. 547 [63 P. 857]; County of San Diego v. Schwartz, 145 Cal. 49 [78 P. 231].)

"Appellants contend that the change in the classification of the county did not confer upon the treasurer the benefit of the increased salary during his unexpired term (art. XI, sec. 9, Const. of Cal.; Smith v. Mathews, 155 Cal. 752 [103 P. 199]), and that his salary for that period remaining the same he was officiating under the previous statute (Pol.Code, sec. 4250); that the Inheritance Tax Act (Stats.1921, as amended) permitted the collection of inheritance tax commissions and that therefore the privilege of collecting them could not be affected before the end of his elective term. The right or privilege to the commissions was entirely independent of the statute fixing the salary of the county treasurer. The legislature had the power to bestow this perquisite and by the same token the right to take it away.

"On July 1, 1933, the new charter of San Mateo county became effective. Section 13 of article VI of the charter (Stats. 1933, p. 2967) provides that a county officer authorized to collect fees or moneys must on the next business day pay into the county treasury the receipts so collected. The charter relative to the salaries of certain county officers, etc., superseded the statute, but the right to retain the commissions here in question had already been abrogated. The county charter did not countenance the retention of the inheritance tax commissions during the elective or appointive terms of the treasurer.

"Appellants contend that the charter does not prohibit the retention of inheritance tax commissions by ex-officio officers. Section 5 of article XIII (Stats. 1933, p. 2976) provides that the compensation paid to elective and appointive officers shall be in full for all services rendered. A county charter provision dealing with matters of compensation controls over a general law. Section 13 of article VI (Stats. 1933, p. 2967) applies to 'every county officer'. Lesem v. Getty, 23 Cal.App.2d 57, [72 P.2d 183]; Matter of Dodge v. City and County of San Francisco, 135 Cal. 512 [67 P. 973]; City and County of San Francisco v. Mulcrevy, 15 Cal.App. 11 [113 P. 339]; Mulcrevy v. San Francisco, 231 U.S. 669 [34 S.Ct. 260, 58 L.Ed. 425]; County of Alameda v. Cook, 32 Cal.App. 165 [162 P. 405]. If the freeholders in framing the San Mateo county charter desired that its officers, ex officio or otherwise, should pay to the county all the perquisites over the salaries fixed in the charter, they had a right to so provide.

"In Reuter v. Board of Supervisors, 220 Cal. 314, 326 [30 P.2d 417], the court in dealing with another question arising out of the provisions of this same charter, said: 'The general purpose of section 7½ of article XI of the Constitution was to give local self-government or county home rule to counties of the state by means of charters framed under said constitutional amendment. That this was the intent and purpose of the section clearly appears from the language of the section itself, which declares that, after the charter has been approved by the legislature "such charter shall become the charter of such county and shall become the organic law thereof relative to the matters therein provided * * * and shall supersede all laws inconsistent with such charter relative to the matters provided in such charter."'"

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14 Cal.2d 732

HILL v. STATE BAR OF CALIFORNIA.

L. A. 17323.

Supreme Court of California.

Dec. 19, 1939.

1. Attorney and client 🔑54

Where an attorney fails to pay his State Bar dues, action of board of governors in recommending his suspension from membership in the State Bar shall be treated as a finding of fact and recommendation that Supreme Court make such order of suspension, and his suspension shall be made by an order of that court. St.1927, pp. 44, 45, §§ 46, 49.

2. Attorney and client 🔑1

The State Bar Act is valid as a regulatory measure under the police power, and is not open to criticism that an unregulated discretion to fix dues is conferred upon an executive body. St.1927, p. 38.

3. Attorney and client 🔑60

Where an attorney had been suspended from practice by order of Supreme Court for failure to pay dues as required by State Bar Act, the attorney, during his suspension, was precluded from practicing and was guilty of a misdemeanor when he practiced during such period. Code Civ.Proc. § 299; St.1927, p. 38; pp. 44, 45, §§ 46, 49.

4. Attorney and client 🔑53(2)

Evidence authorized suspending an attorney from practice for three months for disregarding Supreme Court's order that he be suspended for failure to pay dues as required by State Bar Act, as against contention that attorney did not have knowledge of his suspension for nonpayment of dues. Code Civ.Proc. § 299; St.1927, p. 38; pp. 44, 45, §§ 46, 49.

In Bank.

Proceeding by Leigh Hummer Hill against the State Bar of California for a review of a recommendation of the Board of Governors of the State Bar recommending to the Supreme Court that petitioner be suspended from the practice of law for a period of three months.

Petitioner suspended for three months.

Hal Hughes, of Los Angeles, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent State Bar of California.

WASTE, Chief Justice.

Petitioner seeks a review of a recommendation of the board of governors of The State Bar made to the Supreme Court that petitioner be suspended from the practice of the law for a period of three months.

Petitioner failed to pay his dues to The State Bar in 1937. On March 31 of that year a notice of delinquency was mailed to him at his office in Los Angeles. A copy of the sixty-day statutory notice (sec. 46, State Bar Act, St.1927, p. 44) was sent to him by registered mail. A final delinquent notice was also mailed to him in October of that year. By this he was informed that a certification of his delinquency had been made by the board of governors and would be forwarded to the Supreme Court. Such certificate having been received by the clerk's office, the clerk of the Supreme Court mailed a notice to petitioner advising him that on December 15, 1937, the court would act upon the recommendation of the board of governors and that he would be suspended for failure to pay his dues unless prompt action was taken by him and payment of all fees and penalties was made at the main office of The State Bar on or before that date. Petitioner, having ignored this notice, he was suspended by order of this court on December 15, 1937, and the period of suspension remained in effect until June 7, 1939, when he was reinstated by payment of dues and arrears.

On April 26, 1939, petitioner was directed to appear before local administrative committee No. thirteen of The State Bar for Los Angeles county, to show cause why he should not be disciplined for professional misconduct in having engaged in the practice of the law during the period of his suspension, in violation of section 6153 of the Business and Professions Code of the state of California (Stats.1939, chap. 34 [sec. 49 of the State Bar Act, St.1927, p. 45]). After a hearing at which petitioner appeared in his own behalf, the local administrative committee found that petitioner had practiced law following the date of his suspension and prior to his reinstatement, and submitted the matter to the board of governors without recommendation. At the hearing before the board of governors, petitioner was represented by counsel. That board after finding that petitioner had practiced law on two occasions specifically referred to, while he was under suspension, recommended to the Supreme Court that he be suspended from the practice of the law for a period of three months.

Petitioner challenges the validity of his suspension, and urges that his evidence was uncontroverted to the effect that he was unaware of his earlier suspension and received no notice thereof. All of the notices were sent by United States mail to the office regularly maintained by petitioner, and it does not appear that any were returned for failure of delivery. When appearing before the board of governors, petitioner testified with reference to the receipt by him of the various notices above mentioned bearing on his failure to pay his dues, that he shared a suite of offices with some fourteen attorneys, and that although there was an arrangement for the receipt and delivery of mail, there was considerable confusion in the office and there were times when mail was not received by the addressees. He admitted, however, that he received several delinquent notices and knew that under the Bar Act a person would be suspended if his dues were not paid; but he claimed that he did not know when the suspension would be enforced.

Petitioner charges that the recommendation of respondent that he be suspended for three months is excessive and shocking to the conscience; that the suspension so recommended deprives him of his right to practice his profession without due process of law; that the board of governors acted in excess of its authority; that the evidence does not support its finding to the effect that he knowingly practiced law when he was suspended; and that the findings do not support the recommendation.

[1] These and many similar contentions have been considered and passed upon by this court in review of many proceedings brought by other members of the bar who have been suspended since the passage of the State Bar Act. Where an attorney at law fails to pay his State Bar dues, the action of the board of governors in recommending his suspension from membership in The State Bar shall be treated as a finding of fact and recommendation that the Supreme Court make such order of suspension, and his suspension shall be made by an order of that court.

[2, 3] The State Bar Act is valid as a regulatory measure under the police power and is not open to the criticism that an unregulated discretion to fix dues is conferred upon an executive body. Carpenter v. State Bar, 211 Cal. 358, 295 P. 23, and cases therein cited; Johnson v. State Bar, 4 Cal.2d 744, 758, 52 P.2d 928. During his suspension, petitioner was precluded from practicing as an attorney at law. Sec. 299, Code Civ.Proc.; State Bar Act, sec. 46. He admitted, in fact stipulated, that during his suspension he did so practice and maintained an office in Los Angeles for that purpose. He was, therefore, guilty of a misdemeanor. Sec. 49, State Bar Act.

[4] We are not impressed with petitioner's persistent denials concerning his knowledge of his suspension for nonpayment of dues. He had practiced law nearly ten years, and admitted that he had several times been delinquent in payment of his dues before the present instance. Although the record is not entirely satisfactory, we feel the showing is sufficient to warrant the action of the board of governors of The State Bar in recommending to this court that petitioner should be penalized for his disregard of the order of this court suspending him from practice.

It is ordered that petitioner, Leigh Hummer Hill be and he is hereby suspended from the practice of law in this state for a period of three months from and after the first day of January, 1940.

We concur: CURTIS, J.; HOUSER, J.; SHENK, J.; EDMONDS, J.; CARTER, J.; GIBSON, J.

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14 Cal.2d 727

In re WAITE'S GUARDIANSHIP.

CROCKER FIRST NAT. BANK OF SAN FRANCISCO et al. v. WAITE.

S. F. 16152.

Supreme Court of California.

Dec. 18, 1939.

1. Insane persons 🔑20, 27

In proceeding to appoint guardian of estate and person of alleged incompetent, where record clearly showed that alleged incompetent was of sound mind, refusal to permit her to testify in her own behalf was prejudicial error. Code Civ.Proc. §§ 1879, 1880; Probate Code, § 1461.

2. Insane persons 🔑20

In proceeding to appoint guardian of estate and person of alleged incompetent, testimony of alleged incompetent could not properly be excluded upon the sole ground that she was a lay witness. Code Civ.Proc. §§ 1870, 1879, 1880; Probate Code, § 1461.

3. Witnesses 🔑83

The right of a person to testify in his own behalf is fundamental.

4. Evidence 🔑555

In proceeding to appoint guardian of estate and person of alleged incompetent, opinions of doctors as to the lack of judgment and "intelligence defect" of alleged incompetent were to be tested by consideration of the facts from which those opinions were derived, and if the facts did not justify the conclusions, the opinions were arbitrary and were not of substantial value as evidence. Probate Code, § 1461.

5. Insane persons 🔑2

The fact that alleged incompetent at age of 76 married her third husband, aged 45, but lived with him only about two months, and that marriage and subsequent divorce cost her about $4,000, was not substantial evidence of incompetency. Probate Code, § 1461.

6. Insane persons 🔑2

Arrangement which alleged incompetent made with man to manage and care for her ranch and act as her chauffeur in return for half-interest in ranch, although it might indicate poor business judgment, did not establish her incompetency. Probate Code, § 1461.

7. Insane persons 🔑2

More than poor business judgment is required to establish incompetency. Probate Code, § 1461.

8. Insane persons 🔑1

A property owner is entitled to manage her property either personally or through agents and to dispose of it as she sees fit unless her mental faculties are impaired to such extent as to make her unable to properly manage and care for it, or to render her liable to imposition by artful or designing persons. Probate Code, § 1461.

9. Insane persons 🔑2

In proceeding to appoint guardian of person and estate of alleged incompetent, evidence did not sustain finding of incompetency. Probate Code, § 1461.

◆

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Proceeding in the matter of the guardianship of Fannie Rollins Waite, incompetent. From an order appointing the Crocker First National Bank of San Francisco, guardian of the estate, and Pearl Stewart, guardian of the person of Fannie Rollins Waite, the alleged incompetent appeals.

Reversed.

Prior opinion, 91 P.2d 617.

Clarence E. Rust, of Oakland, for appellant.

James E. Colston, of San Francisco, (Richard C. O'Connor, of San Francisco, of counsel), for respondents.

GIBSON, Justice.

This is an appeal from a decree of the superior court of San Francisco, declaring Fannie Rollins Waite, incompetent, and granting letters of guardianship of her person and estate.

On August 15, 1938, Pearl Stewart, daughter of the alleged incompetent, filed a petition praying for the issuance of letters of guardianship of the person and estate of appellant, aged 78. At the hearing two doctors, appointed by the trial court, were called by the respondent and testified. Upon the conclusion of the doctors' evidence the court having been informed by counsel for respondent that there were eight lay witnesses in the matter, said: "I am prepared to make the order in this matter right now, and I am relying on the testimony of the doctors * * * I don't want to hear any lay witnesses."

Counsel for appellant requested permission of the court to call appellant as a witness. The court replied: "I don't want to hear from her." Counsel for appellant then called appellant to the stand and offered her to be sworn. The court said: "If you have any medical testimony I will be glad to hear it, but I don't want to hear from the lady. I don't know anything personally about her mental condition."

The court thereupon made the decree appointing Pearl Stewart, the daughter, guardian of the person, and Crocker First National Bank, guardian of the estate.

Appellant complains: (1) that the court erred in refusing to permit her to testify in her own behalf; and (2) that the evidence is not sufficient to justify the finding of incompetency.

[1, 2] On the evidence presented it was prejudicial error for the court to refuse to permit appellant to testify in her own behalf. The record clearly shows that she was of sound mind and qualified to testify under sections 1879 and 1880 of the Code of Civil Procedure. The only reason assigned by the court for refusing to permit her to testify was that it did not want to hear any evidence except medical testimony. Appellant's testimony could not be properly excluded upon the sole ground that she was a lay witness. Code Civ.Proc. § 1870, subd. 1; see Atkins Corp. v. Tourny, 6 Cal.2d 206, 57 P.2d 480.

[3] This proceeding was commenced pursuant to section 1461 of the Probate Code, which provides that notice shall be given to the alleged insane or incompetent person of the time and place of hearing, and that such person, if able to attend, "must be produced at the hearing." As this court observed in Matter of Coburn, 165 Cal. 202, 217, 131 P. 352, 358, such language "seems to contemplate an examination". The section has been amended since that decision, but the quoted language remains unchanged. Apart from the provisions of the statute applicable to this proceeding, it is the general rule that the right of a party to testify in his own behalf is fundamental. See McClatchy v. Superior Court, 119 Cal. 413, 51 P. 696, 39 L.R.A. 691; Calder v. Levi, 168 Md. 260, 177 A. 392, 97 A.L.R. 880; 49 Harv.L.Rev. 499.

It is difficult to conceive of a situation in which a party has a greater right to, or need for, his own testimony than in the type of proceeding considered here. The right to control her own person and affairs was taken from appellant upon the testimony of two strangers whose conclusions were based upon acts and circumstances she was not permitted to explain or controvert, and she was denied the opportunity to show by testimony her capacity for rational thought and intelligent action.

The second ground of appeal relates to the sufficiency of evidence to prove incompetence. The testimony of the doctors, in so far as it was based upon their observation of appellant, was entirely favorable to her. They testified that she was in fine physical condition and was very well preserved for her age; that she was clear mentally and that her memory was very clear as to transactions occurring over a period of four or five years previous to the examination; that she knew the nature of the transactions in which she engaged, and understood the nature, status and title of her property; that she knew who her relatives were and gave intelligent answers to questions concerning them.

The doctors examined appellant separately. Each testified to certain facts related to them by appellant which they refer to in their testimony as her "past history", and each of the doctors gave these facts as the basis for his conclusion relative to appellant's competency. The facts so related are in substance as follows:

At the time of the hearing appellant was 78 years old. Her second husband had died about 3 years previously leaving her $31,000. At the age of 76 she married her third husband, aged 45. She lived with him about two months and the marriage and subsequent divorce cost her about $4,000. Appellant had always wanted to live on a ranch, and about one month before the hearing she purchased a ranch in Dublin canyon, where she resided at the time of the hearing. She paid $8,000 for the ranch and stocked it with cattle for which she paid $850. She gave a one-half interest in the ranch and the income therefrom to a man under an arrangement whereby the latter would take care of the cattle, do all the work on the ranch, and serve her as chauffeur. At the time of the hearing she was dissatisfied with the ranch and wanted to get rid of it.

One doctor testified that these facts showed "a serious defect in judgment insofar as the handling of her affairs is concerned", and stated that he thought she was liable to be imposed upon or deceived by artful or designing persons. The other doctor testified that "considering her recent past history" he believed "that she is over credulous and has shown a lack of judgment" and that her marriage to a man of 45 "is a subnormality" and shows "intelligence defect".

[4-8] This testimony is inadequate to support the order. The opinions of the doctors as to her "lack of judgment" and "intelligence defect" are to be tested by a consideration of the facts from which those opinions are derived; and if those facts do not justify the conclusions, the opinions are arbitrary, and without substantial value as evidence. There was no evidence that the price paid for the ranch was in excess of its real value, or that it was a bad investment. The fact that appellant may have been disappointed in her hope for happiness in her third marriage to a man much younger than herself could hardly be considered substantial evidence of incompetency. The arrangement which appellant made with a man to manage and care for her ranch and act as her chauffeur in return for the half interest in the ranch might indicate poor business judgment, but such conclusion does not necessarily follow. Moreover, there must be something more than poor business judgment to establish incompetency. As the court remarked in Estate of Watson, 176 Cal. 342, 345, 168 P. 341, 343, speaking of the alleged incompetent: "She was the owner of the property. It was her right to manage it as she pleased, either personally or through agents of her choice, and to dispose of it as she saw fit, unless her mental faculties were impaired to such an extent as to make her unable to properly manage and take care of it or to render her liable to imposition by 'artful or designing persons' ".

[9] In our opinion the finding of incompetency is not supported by any substantial evidence.

The decree and order are reversed.

We concur: WASTE, C. J.; SHENK, J.; HOUSER, J.; CURTIS, J.; EDMONDS, J.; CARTER, J.

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14 Cal.2d 723

AUTRY et al. v. PATTESON, Sheriff, et al.

Sac. 5271.

Supreme Court of California.

Dec. 18, 1939.

1. Judgment 🔑668(2)

Where decree in consolidated action to foreclose mortgage and mechanics' liens determined issue with respect to extent of land involved in mortgage foreclosure, clarified and made certain the description, and went into effect without objection by any of the parties, persons who were parties by reason of mechanics' lien proceedings were bound by decree and must be deemed to have acquiesced in the determination, and hence they could not contend in an action to quiet title that mortgage foreclosure decree described land not contained in mortgage and was therefore void.

2. Mortgages 🔑486

In a consolidated action to foreclose mortgage and mechanics' liens, the trial court had power to clarify an uncertainty in description in mortgage and in so doing to look to the common name and the recital of approximate acreage as a means of ascertaining parties' intention.

◆

In Bank.

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Action by W. A. Autry and another against Harry Patteson, as Sheriff of the County of Sonoma, and others, to quiet title to realty and to enjoin sale thereof under a decree of foreclosure of mechanics' liens. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Bryce Swartfager, of Santa Rosa, for appellants.

Stoney, Rouleau, Stoney & Palmer and Royal E. Handlos, all of San Francisco, for respondents.

GIBSON, Justice.

This is an action to quiet title to real property and to enjoin sale of the same under a decree of foreclosure of mechanics' liens. In order to understand the issue presented here, it is necessary to review certain prior proceedings. Lottie L. Ewing and her husband made a note to J. Scharer and wife, secured by a mortgage on real property located in Sonoma county and known as the Fitch Mountain Tavern. The Ewings conveyed the property to Fitch Mountain Development Company, a corporation, which erected certain improvements thereon. Thereafter, the Scharers brought suit to foreclose the mortgage, and subsequent to the commencement of that action the Healdsburg Lumber Company and William Henry Chaney brought separate actions to foreclose mechanics' liens resulting from the improvements referred to. By stipulation, the three actions were consolidated and tried together. In the consolidated action, the court rendered a decree which directed a foreclosure of the mortgage and sale of the property, and having determined that the lien of the mortgage was superior and senior to the mechanics' liens, directed foreclosure of the mechanics' liens subject and subservient to the lien of the mortgage. The property was sold under the mortgage foreclosure decree to the Scharers and, there being no redemption, a commissioner's deed was executed to the Scharers, as grantees, who later conveyed to the plaintiffs, W. A. Autry and May C. Autry.

Thereafter, Joseph D. Cox, as trustee in bankruptcy of the estate of William Henry Chaney, sued to renew the mechanics' lien judgment and to foreclose and sell the property included in that judgment. An order of sale was issued and the sheriff advertised the property for sale, whereupon the plaintiffs, the purchasers of the title resulting from the mortgage foreclosure, brought this action to quiet title to the property and enjoin its proposed sale. The suit of Cox was brought upon the theory that the mortgage covered only a portion of the property which was subject to the mechanics' liens, that the additional property did not pass to the purchasers at the mortgage foreclosure sale, and that therefore it could be reached by the mechanics' lien claimants. The trial court in the present action found that the property involved in the mortgage, the conveyance, and the foreclosure actions, was the same, and rendered judgment for the plaintiffs. The defendants appealed.

The appellants contend that the mortgage foreclosure decree describes lands not contained in the mortgage, that the land described in the mortgage limits the power of the court to act in the foreclosure suit, and that the decree covering land wholly outside the mortgage is void. The respondents do not dispute the propositions of law presented by appellants, but they claim that the description in the mortgage was uncertain and that the court in the foreclosure action determined the scope of the description and the extent of the land to be affected by the decree. They further contend that since this decree has become final, the present collateral attack upon it must fail.

It appears from the record that considerable testimony was introduced in an effort to determine the land covered by the metes and bounds description contained in the mortgage, to ascertain the monuments therein referred to and their location, and to carry out certain lines and interpret certain designations. The metes and bounds description in the mortgage was followed by this recital: "Containing ten (10) acres, more or less, and known as the Fitch Mountain Tavern, which includes all buildings on said described property." The metes and bounds description as interpreted by appellants contains approximately seven acres. The Fitch Mountain Tavern property as described in the deed from the Ewings to the Fitch Mountain Development Company, and in the mechanics' liens suits, contains approximately ten acres.

The decree of foreclosure rendered in the consolidated action sets forth the metes and bounds description, followed by the recital of the common name and acreage, just as in the mortgage, and thereafter reads as follows: "and being the same lands and premises as were conveyed by Lottie L. Ewing and A. M. Ewing to the Fitch Mountain Development Company, Inc., a corporation, by deed which said deed is duly recorded in the office of the county recorder of said Sonoma county excepting the lots as therein mentioned and also as set forth and described in the complaint of the Healdsburg Lumber Company, a corporation, against the Fitch Mountain Development Company, Inc., a corporation now on file in this said Court in cause numbered 18453, excepting the lots as therein mentioned which said deed and complaint are hereby referred to for a more particular description of the lands and premises directed to be sold by this said decree".

[1] It is apparent that the court in the foreclosure action was fully aware of the uncertainty of the description in the mortgage, and undertook quite clearly to point out that the tract involved was the same ten-acre area which had theretofore been known by the common name of Fitch Mountain Tavern, and which was the subject-matter of the mortgage, the deed, and the mechanics' lien foreclosure actions. This decree determined the issue as to the extent of the land involved in the mortgage foreclosure, clarified and made certain the description, and went into effect without objection by any of the parties to the proceedings. The present appellants were, by reason of the mechanics' lien suits, parties to the consolidated action. They must be deemed to have acquiesced in that determination, and are bound by the final judgment therein.

[2] The court undoubtedly had power in the foreclosure action to clarify the uncertainty in the description, and in doing so to look to the common name and the recital of approximate acreage as a means of ascertaining the intention of the parties. See Doe v. Vallejo, 29 Cal. 385; Hall v. Shotwell, 66 Cal. 379, 5 P. 683; Hostetter v. Los Angeles, etc. Railway Co., 108 Cal. 38, 41 P. 330; Matteson v. McCarty, 98 Cal.App. 45, 276 P. 414.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; HOUSER, J.; CURTIS, J.; EDMONDS, J.; CARTER, J.

36 Cal.App.2d 132

McCOMSEY v. LEAF.

Civ. 12344.

District Court of Appeal, Second District, Division 2, California.

Dec. 15, 1939.

Hearing Denied Feb. 10, 1940.

1. Judgment 🔑185

The validity of a summary judgment was to be determined by the sufficiency of the affidavits considered upon the hearing of motion for summary judgment. Code Civ.Proc. § 437c.

2. Judgment 🔑185

To warrant a summary judgment, there must be a failure on the part of defendant to satisfy the court that there is any basis for his denial or any truth in his defense, and, unless the defendant does so fail, the case should proceed to a deliberate trial in the usual course. Code Civ.Proc. § 437c.

3. Judgment 🔑185

An affidavit opposing a motion for summary judgment must be liberally construed. Code Civ.Proc. § 437c.

4. Judgment 🔑185

Where plaintiff suing for money loaned filed motion for summary judgment and defendant filed opposing affidavit stating that about April 1, 1937, plaintiff "agreed" to give defendant approximately $10,000 if defendant would marry plaintiff's daughter, that defendant on April 5 married the daughter, that defendant purchased a lot, erected a studio building, and equipped it with money which had been given him by plaintiff totaling $7,255, and that on December 23, 1938, the daughter left defendant and sued for divorce and then for first time plaintiff claimed that money was a loan, affidavit was sufficient to avoid a summary judgment. Code Civ.Proc. § 437c.

5. Judgment 🔑185

Where defendant was competent to testify to all the contents of his affidavit filed in opposition to plaintiff's motion for summary judgment, conclusions contained in affidavit would not vitiate the particularities nor nullify their force. Code Civ.Proc. § 437c.

6. Judgment 🔑185

The fact that marriage between defendant and plaintiff's daughter was promptly celebrated following a conference which was suggested by plaintiff, that money was immediately thereafter paid to defendant, an impoverished stranger of limited experience, to invest in land, building, and equipment, and that relation of borrower and lender arose from passing of money, was denied by defendant under oath, authorized the presumption that money was due defendant as regards sufficiency of affidavit setting up such facts in opposition to plaintiff's motion for summary judgment in action for money loaned. Code Civ.Proc. §§ 437c, 1963.

7. Frauds, statute of ⚷139(2)

Where defendant filed an affidavit in opposition to plaintiff's motion for summary judgment in action for money loaned and averred in affidavit that there was an agreement to give money in consideration of defendant's marriage to plaintiff's daughter, that marriage was celebrated, and thereafter money was paid, defendant was competent to testify to all contents of his affidavit. Code Civ.Proc. §§ 437c, 1937; Civ.Code, § 1624.

8. Frauds, statute of ⚷139(2)

The statute providing that evidence of an agreement made upon consideration of marriage other than a mutual promise to marry cannot be received without the writing or secondary evidence of its contents merely contemplates testimony in an action arising out of an executory contract. Code Civ. Proc. § 1973.

9. Frauds, statute of ⚷139(2)

The statute requiring an agreement made upon consideration of marriage other than a mutual promise to marry to be in writing has no application to an executed agreement. Civ.Code, § 1624.

McCOMB, J., dissenting.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by T. H. McComsey against Maurice M. Leaf to recover for money loaned and advanced. From a summary judgment for plaintiff, defendant appeals.

Judgment reversed and cause remanded.

Entenza & Gramer, of Los Angeles, for appellant.

Milton M. Cohen and Milton M. Cohen, Jr., both of Los Angeles, for respondent.

MOORE, Presiding Justice.

[1] Appeal from a summary judgment under section 437c of the Code of Civil Procedure for the sum of $7,255. The validity of the judgment is to be determined by the sufficiency of the affidavits considered upon the hearing of the motion. Plaintiff pleads the common count "that within two years last past plaintiff loaned and advanced to defendant at the latter's specific instance and request $7,311.75, which said sum defendant promised and agreed to repay". The answer denies the loan of any sum of money or that he ever promised or agreed to repay any sum to plaintiff.

I. The code section provides that "when an answer is filed in an action to recover upon a debt * * * if it is claimed that there is no defense to the action * * * on motion of either party * * * supported by affidavit of any person or persons having knowledge of the facts, the answer may be stricken out * * * and judgment may be entered, in the discretion of the court unless the other party, by affidavit * * * shall show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact. * * * The affidavit * * * in support of the motion must contain facts sufficient to entitle plaintiff * * * to a judgment in the action, and the facts stated therein shall be within the personal knowledge of the affiant, and shall be set forth with particularity, and each affidavit shall show affirmatively that affiant * * * can testify competently thereto. The affidavit or affidavits in opposition to said motion shall be made by the * * * defendant, or by any person having knowledge of the facts, and together shall set forth facts showing that the party has a good and substantial defense to the plaintiff's action * * * upon the merits. The facts * * * shall be within the personal knowledge of the affiant, shall be set forth with particularity, and each affidavit shall show affirmatively that the affiant * * * can testify competently thereto. * * *"

II. In his affidavit, plaintiff avers that defendant visited plaintiff's home at Salt Lake City about April 1, 1937; that they had a long conversation relative to defendant's future in business; that plaintiff's wife and daughter were present; that defendant stated that he could not make the most of his vocation as a photographer since his rented studio was unsatisfactory in construction and equipment; that, if plaintiff could finance the building and equip a studio, defendant would see that he was protected in every way for the loan; that he was certain that he could commence repaying plaintiff in a very short time; that plaintiff stated he would let him have the money if he would hold down the cost to $5,000 or $6,000; that plaintiff would pay him the money as the work progressed; that defendant assented and shortly after left Salt Lake City; that defendant selected a lot in Brentwood as a situs for his studio; that plaintiff inspected the lot; that he advanced the defendant moneys for the purchase of photographic supplies, for the purchase of the lot, for the construction of the studio, and for furnishings, draperies, furniture and color camera equipment; "that the whole thereof totaling the sum of $7255 is now due, owing and unpaid".

Defendant's answering affidavit, among other things, says that Helen J. Leaf is the daughter of plaintiff; that, on or about April 1, 1937, affiant and said Helen at the expense of plaintiff and upon his invitation visited him at Salt Lake City; that plaintiff and his wife agreed to give to affiant the sum of approximately $10,000 if and when he would marry said Helen; that affiant * * * on the 5th day of April, 1937, did marry the said Helen; that thereupon defendant and the said Helen came to Los Angeles and resided together; that affiant purchased a lot, erected a studio building, and equipped it with the moneys which had been given him by the plaintiff, totalling $7255; that the title to said property was taken in the name of defendant and said Helen as joint tenants and the said moneys were deposited in their bank account as joint tenants; that plaintiff was present during the construction of the said studio and approved of affiant's expenditures; that on December 23, 1938, the said Helen left defendant and sued him for divorce; that prior to the filing of said divorce action, plaintiff never made any demand or suggestion that defendant repay plaintiff any part of said sum; but that then for the first time plaintiff claimed that the said money was a loan.

III. Proceeding upon the hypothesis that all of the averments of defendant's affidavit are ultimate facts or conclusions of law, plaintiff contends that the writing is wholly insufficient to avoid a summary judgment and relies upon two California decisions in support of his position, namely, Gardenswartz v. Equitable Life, etc., Co., 23 Cal.App.2d, Supp., 745, 68 P.2d 322, and Cowan Oil & Refining Co. v. Miley Petroleum Corporation, Ltd., 112 Cal.App., Supp., 773, 295 P. 504, 507, both by the appellate division of the superior court.

As to the Gardenswartz case, the affidavit was insufficient because of its hearsay character. In the Cowan case, the defendant operated oil wells while plaintiff conducted an extraction plant. A contract subsisted between the parties providing for plaintiff to extract gasoline from the gas delivered to it by defendant. Plaintiff sued defendant for dry gas alleged to have been delivered to defendant from its extraction plant. Defendant filed a general denial and in a counter claim sued plaintiff for the value of an unreasonable amount of gas alleged to have been converted during the extraction process. While plaintiff was authorized under said contract to use a reasonable amount of gas in its own burners, the quantity used "in excess of a reasonable amount necessary to operate plaintiff's plant" was of the value of $1,897.35. The decision approving of the summary judgment was based upon the absence from its affidavit of any facts in support of the answer. While we are not called upon here to pass upon the merits of that decision and the facts of that case, we are satisfied that the opinion filed therein declared a rule more severe than was contemplated by the legislature and not supported by the authorities cited in the opinion. The rule there announced was that "the effect of these provisions is to require a defendant, in order to defeat a motion for summary judgment, to present an affidavit * * * setting forth *evidentiary* facts sufficient, if accepted as true * * * to show that the defendant has a defense to the plaintiff's claim" etc., and the following authorities are cited: Sher v. Rodkin, N.Y.Sup., 198 N.Y.S. 597; O'Meara Co. v. National Park Bank, 239 N.Y. 386, 146 N.E. 636, 39 A.L.R. 747; Galusha Stove Company v. Pivnik Construction Co., 132 Misc. 875, 230 N.Y.S. 720; Webster & Co. v. Pelavin, 241 Mich. 19, 216 N.W. 430. In Sher v. Rodkin, supra [198 N.Y.S. 598], it was held that the affidavit consisted of "ultimate facts which, if established at the trial, would constitute a defense". In the O'Meara case, defendant's affidavit consisted of nothing but denials of facts in plaintiff's affidavit, which evoked the announcement of the court that the rule requires facts in the affidavit rather than mere denials. In the Galusha case, plaintiff obtained a summary judgment on a negotiable note because defendant's affidavit averred nothing but conclusions such as "understand" and "with knowledge" in an attempt to prove the plaintiff was not a holder in due course. The defendant's affidavit in the Webster case averred that "plaintiff failed to perform an agreement" and the "notes are void", which in all respects failed to comply with the Michigan statute which is substantially the same as our section 437c.

IV. Because of the importance of the subject to bench and bar, we have explored the decisions of other jurisdictions with a view of exposing the practice most nearly consonant with constitutional provisions and with accepted fundamental principles. The subject received its earliest treatment by the courts of New York in Dwan v. Massarene, 199 App.Div. 872, 192 N.Y.S. 577, 578. That action was to recover on two promissory notes. After defendant answered that the delivery of the note was conditional, plaintiff moved for a summary judgment based upon his affidavit "that there is no defense to the action". Defendant's affidavit tended to show that the delivery of the notes was conditional upon the sale of certain property and payment out of the avails thereof. In affirming an order denying summary judgment, it was said: "The court is not authorized to try the issue, but is to determine whether there is an issue to be tried. If there is, it must be tried by a jury. * * * The defendant must show that he has * * * a plausible ground of defense, something fairly arguable and of a substantial character * * * that his denial or his defense is not false and sham, but interposed in good faith and not for delay."

Gravenhorst v. Zimmerman, 236 N.Y. 22, 139 N.E. 766, 772, 27 A.L.R. 1465, involved a transaction in foreign exchange. Plaintiff sued defendant for $8,500 which had been deposited with defendant for the purpose of having 47,222 marks placed to the credit of a designated payee in Berlin, on the theory that the original contract had been rescinded by reason of defendant's failure to comply with its terms. In the answering affidavit, defendant presents four defenses: (1) That the transaction was an executed, present sale of exchange; (2) that certain banking customs relieved it from responsibility; (3) that a modified contract had been substituted; and (4) that no rescission was ever effected. In passing upon the sufficiency of this affidavit, the court decided that it was a matter of legal interpretation for the court to determine whether the plaintiff or the defendant was correct in his contention, and concluded with the following:

"One person may argue that, as matter of law, the assignor abandoned and lost the benefit of his rescission; another might think that such abandonment was a question of fact for the jury. But upon one proposition we are all agreed, and that is the primary one presented upon this appeal, the right to a summary judgment. *It never could have been, or in justice ought to have been, the intention of those who framed our Practice Act and rules thereunder that the decision of such a serious question as this should be flung off on a motion for summary judgment.* (Italics ours.) Whatever the final judgment may be, the defendants were entitled to have the issue deliberately tried, and their right to be heard in the usual manner of a trial protected."

In Bloom v. Hershowitz, N.Y.Sup., 202 N.Y.S. 298, 299, the action was based upon the lease of a loft which provided that defendant was to pay, besides the stipulated monthly rental, a sum equal to one-third of the cost of installing a burglar protection device and its maintenance. This motion for judgment was supported by an affidavit "that payment of the sum demanded * * * was never made, and that the answer * * * is interposed for delay". Defendant in reply denied the reasonableness of the $375, averred the subsistence of a new agreement with plaintiff's assignor to the effect that if defendant continued to occupy the loft for another year, plaintiff's assignors agreed to waive payment of such maintenance charge upon defendant's paying one-third of the water charge and that thereafter the security deposited on the original lease was applied on the new lease. The court held that two substantial issues were raised by defendant's affidavit which entitle her to a trial, namely (1) Is $375 one-third of the reasonable maintenance charge? and (2) was it waived by plaintiff's assignor as a consideration for defendant's execution of said new agreement?

In the case of Dempsey v. Langton, 266 Mich. 47, 253 N.W. 210, 211, a summary judgment was granted. Plaintiff declared on the common counts for money had and received and declared that the money is due upon request. Defendant answered that the money is not due until February 15, 1933, or sixty days after the filing of the complaint. In his answering affidavit, defendant averred that prior to September 25, 1932, the defendant was negotiating with the plaintiff for a loan of $950 or for the sale of her business to the plaintiff by making a cash payment of $950, the defendant to have the use of the money until February 15, 1933, when the sum should be applied on the purchase price or returned to the plaintiff in the event of his purchase; that as a result of said negotiations, plaintiff gave defendant two checks, to-wit: $600 check September 25, 1932, and a $350 check October 5, 1932; that defendant gave plaintiff her note for $950 on said September 25th, payable February 15, 1933; that said note was returned to defendant November 17, 1932; that it was *understood and agreed* by and between the said plaintiff and this deponent that the said sums of money were to be used in the business of "Therese Company" (a name for defendant's business) until February 15, 1933, at which time plaintiff agreed to pay the balance of $10,000 or have the return of the money she had deposited; "that shortly after the plaintiff *agreed* to purchase" defendant's business and deposited said $950, plaintiff "requested" deponent to give her a promissory note "in payment of the sum of nine hundred fifty ($950) dollars"; that deponent "granted the request and executed a promissory note in said sum of $950"; that plaintiff "*accepted*" "the promissory note" in payment of said $950 and "retained" it for four weeks and "returned" it to deponent, tendering the note back to plaintiff "but she *refused to accept* it". The court said "In our opinion these statements above quoted are not conclusions, but are statements made by the defendant of what she expected to prove, and as such under the pleadings in this case were admissible in evidence. We must therefore find that the defendant's affidavit of merits did comply with section 3 of rule 30 of the Michigan Court Rules of 1931. As to the second question, this court has repeatedly held that it is improper to grant a summary judgment where there is a dispute as to the facts. In other words, a *summary judgment in favor of the plaintiff may not be given unless, granting the truth of all the facts alleged in the defendant's affidavit of merits, plaintiff would still be entitled to recover.*" (Authorities cited.) "The province of the court, on motion for summary judgment, is to determine judicially whether there is an issue of fact which, if resolved in favor of defendant, would preclude a verdict for plaintiff in whole or in part of his demand." Baxter v. Szucs, 248 Mich. 672, at page 675, 227 N.W. 666, 667.

In Maser v. Gibbons, 280 Mich. 621, 274 N.W. 352, 353, plaintiff sued defendant upon his warranty to recover unpaid taxes found to be a lien upon the property sold by defendant to plaintiff. In his answering affidavit, defendant averred that for four years prior to said conveyance by defendant to plaintiff, the property had been sold on a land contract to one George Spanos; that thereafter plaintiff took an assignment of the vendee's interest in said contract as security for loans to said Spanos; that thereafter plaintiff agreed to loan said Spanos monies to pay off said land contract provided defendant would assign the vendor's interest in the contract and deed the premises to plaintiff; that "said $200.00 deduction was made because * * * plaintiffs agreed to pay the taxes due". The lengthy affidavit contains both averments of hearsay and conclusions. The supreme court of Michigan again announcing that a summary judgment should not be entered where the issue as to a material fact is raised by the affidavit, held that an issue was framed by the pleadings on whether the conveyance in question was made in fulfillment of the Spanos contract.

In the case of Wyatt v. Madden, 59 App. D.C. 38, 32 F.2d 838, 839, in a suit brought by plaintiff to recover on two promissory notes, the defendant in his answering affidavit to the motion for summary judgment alleged that she was induced to execute and deliver to plaintiff said notes in reliance upon certain material representations made by plaintiff's agent; that the said representations were false; that they were made with intent to deceive, and numerous other conclusions. The Court of Appeals of the District of Columbia reversed the summary judgment and declared that the enforcement of rule 73 deprives a defendant of a trial on the merits. "Therefore, we have ruled that *plaintiff's affidavit must be strictly construed. * * * An affidavit of defense, on the contrary, is to be liberally construed, and, if its terms reasonably warrant the inference that the defendant has a substantial defense to plaintiff's claim.*

summary judgment ought not to be entered."

[2] Upon a consideration of these authorities and the statute, the better rule appears to be that to warrant a summary judgment there "must be a failure on the part of the defendant to satisfy the court * * * that there is any basis for his denial or any truth in his defense" (Cardozo in Curry v. MacKenzie, 239 N.Y. 267, 146 N.E. 375) and that unless the defendant does so fail, the case should proceed to a deliberate trial in the usual course. Krieger v. Dennie, 123 Cal.App., Supp., 777, 10 P.2d 820.

[3, 4] V. In the light of the foregoing authorities, we return now to a review of the affidavits considered on the motion for a summary judgment. Defendant's affidavit is not inherently improbable. It contains sufficient to satisfy a court that there is an "arguable defense". Upon reading it, the court cannot say, as a matter of law, "that the issue is not genuine, but feigned, and that there is in truth nothing to be tried". Curry v. MacKenzie, supra. The "particulars" recited in said affidavit meet the requirements of the code section. The inadvertent use of the word "agreed" is not sufficient to void the averments of the gift of $10,000 as a consideration for the marriage. It must be "liberally construed". Wyatt v. Madden, supra. Granting the truth of defendant's affidavit, it surely will not be said that "plaintiff would still be entitled to recover". Dempsey v. Langton, supra. Such "conclusions" creep into the language of trained lawyers on the witness stand as well as into their pleadings. It is not strange then that, out of the presence of a critical adversary and away from the kindly admonition of a trial court, one should use such popular conclusions as "agreed" and "gift" each of which is in popular usage to betoken an occurrence. Certainly, under either affidavit, there was an agreement of some sort made. Plaintiff himself avers "a long conversation with defendant"; impliedly avers that he promised to loan money and that defendant promised to repay it. The marriage followed. The money was paid to defendant. Only a trial can determine whether it was a loan. Notwithstanding the presence of the words criticized as conclusions, the vice, if any there be, is cured by the further recital of simple and intelligible facts.

[5] Since defendant is competent to testify to all the contents of his affidavit, the traditional conclusions there included will neither vitiate his particularities nor nullify their force in a summary proceeding. But, on the contrary, the details related vitalize and picturize the meeting of the parties and evince with emphasis the existence of an arguable fact.

[6] The facts that plaintiff paid a large sum of money to an impoverished stranger of limited experience, to invest in land and building without requiring a mortgage or any other security; that such payment followed a conference which was suggested by plaintiff and which occurred in plaintiff's home; that it was attended by defendant from afar; that the marriage was thereupon promptly celebrated; that a large sum of money was immediately paid to defendant without exacting a mortgage on the land it purchased; that the relation of borrower and lender arose from the passing of the money is denied under oath; these facts encourage the application of the presumption that money paid to another is due him. (Code Civ.Proc., sec. 1963) and they demand that the court hear the witnesses speak.

[7, 8] VI. But plaintiff contends that the defendant would not be competent to testify to an oral contract in consideration of marriage. Code Civ.Proc., sec. 1973. If this were an action to recover upon a promise made as a consideration for a marriage, plaintiff would be exactly correct. Defendant is not seeking to recover anything. He avers in his affidavit that there was an agreement to give the money in consideration of his marriage to Helen but he also avers that the marriage was celebrated and thereafter the money was paid. Said section 1973 Code of Civil Procedure merely contemplates testimony in an action arising out of an executory contract. According to defendant's contention, after the marriage had been effected and the money paid, the parties themselves had thereby disposed of all controversies arising out of "an agreement made upon consideration of marriage". Nothing remained to litigate. The defendant then had both his money and his wife. Therefore, while the oral contract averred by defendant is invalid under the statute (Civ.Code, sec. 1624) yet, after its mutual execution and consummation, it is vain to object for want of a writing.

Freitas v. Freitas, 31 Cal.App. 16, 159 P. 611.

[9] In the Freitas case, the court found that the ante-nuptial agreement was not written but it was there held that after a conveyance has been made pursuant to an oral agreement required to be in writing by Civil Code, section 1624, it cannot be objected that such conveyance could not have been compelled. The statute has no application to an executed agreement. Bates v. Babcock, 95 Cal. 479, at page 488, 30 P. 605, 16 L.R.A. 745, 29 Am.St.Rep. 133; James v. Hall, 88 Cal.App. 528, 534, 264 P. 516.

On the contrary, plaintiff contends that mutual and complete performance of such a contract by both parties does not dispose of the statute of frauds, citing Sudbrock v. Kroener, 136 Cal.App. 624, 29 P. 2d 435; Hughes v. Hughes, 49 Cal.App. 206, 193 P. 144; Swift v. Swift, 46 Cal. 266, 267; and Trout v. Ogilvie, 41 Cal. App. 167, 182 P. 333. A study of these authorities discloses that they have no application. In the Sudbrock case, while Mr. Sudbrock was indebted to Mrs. Kroener under a judgment, he conveyed the last of his property to his newly-wedded wife, pursuant to a prenuptial arrangement, which operated a fraud upon his creditor. In the Hughes case, Mrs. Hughes sued to recover certain lands promised in an oral antenuptial, executory agreement only partially performed. In the Swift case, a son sued his father for moneys advanced for the improvement of the farm occupied by the son. A defense that the money was not to be repaid until the farm should yield an income sufficient for that purpose was untenable because a number of years would necessarily elapse before the farm could yield sufficient to pay the advances and was, therefore, within the statute of frauds. In Trout v. Ogilvie an attempt was made to recover property which deceased had orally promised to devise to plaintiff in consideration of marriage and of fulfilling her marital obligations. Clearly, none of these cases except the first mentioned presents a situation where the oral contract had been wholly performed.

We are not concerned with a case of partial performance of an oral contract or with a contract wholly executory. According to the defendant's affidavit the only contract mentioned had passed into history because it had been reciprocally performed long prior to the filing of plaintiff's complaint.

For the reasons indicated, the judgment of the superior court is hereby reversed and the cause remanded.

I concur: WOOD, J.

McCOMB, Justice (dissenting).

I dissent. As pointed out in the majority opinion, the present holding is contrary to the rule as announced by the appellate department of the superior court of Los Angeles county in two well-considered opinions by Mr. Presiding Judge Shaw, to-wit, in Cowan Oil & Refining Co. v. Miley Petroleum Corp., 112 Cal.App., Supp., 773, 295 P. 504, and Gardenswartz v. Equitable Life, etc., Co., 23 Cal.App.2d, Supp., 745, 68 P.2d 322. In both of the cases just cited the rule, supported by authority, is announced that in considering affidavits on a motion for a summary judgment the facts must be set forth and conclusions of law will be disregarded. Should I entertain any doubt, which I do not, as to the correctness of these two decisions, I still would be inclined to follow them, in view of the fact that in this case we are prescribing a rule of procedure to be followed in the superior court. It is my opinion that the rules of procedure, so far as practicable, should be identical in the municipal and superior courts. The appellate department of the superior court of Los Angeles county has for a number of years last past prescribed for the municipal court the rule of procedure set forth in the cases just cited. If the majority opinion in the instant case is to stand, a different rule will be applied in the superior court. This tends to complicate instead of to simplify the practice and procedure, and has a tendency to entrap attorneys and litigants rather than to cause their cases to be tried upon the merits.

For the foregoing reasons, in my opinion the judgment appealed from should be affirmed.

36 Cal.App.2d 81

DOYLE et al. v. McPHERSON.

Civ. 10892.

District Court of Appeal, First District, Division 2, California.

Dec. 13, 1939.

1. Pleading ⚿193(1)

In brokerage firm's action on an open and current book account and on an account stated wherein pleading was in the form of a common count, defendant by demurrer could not raise objection based on failure to plead, that account which arose during business operations of predecessors of plaintiffs, was duly transferred to plaintiffs.

2. Appeal and error ⚿882(11)

In brokerage firm's action on an open and current book account and upon an account stated wherein defendant, in his answer put in issue question whether account which arose during business operations of a predecessor of plaintiffs had been transferred to plaintiffs, defendant could not assert insufficiency of proof to establish transfer in view of his admission that account had been transferred to plaintiffs.

3. Account stated ⚿19(3)

Evidence that monthly statements were given to defendant, that letters demanding payment of balance due on brokerage account were mailed to him over period of 2½ years, and that he did not at any time dispute amount due but requested extension of time established an "account stated".

[Ed. Note.—For other definitions of "Account Stated," see Words & Phrases.]

4. Account stated ⚿6(2)

The implied acquiescence arising from failure of a party to object within a reasonable time to a statement of account is all the evidence necessary to prove party's admission of existence of an "account stated."

5. Limitation of actions ⚿53(2)

The four year statute of limitations on a current and open book account begins to run from the time of entry of last item in account. Code Civ.Proc. § 344.

6. Limitation of actions ⚿53(2)

An action on a current and open book account, commenced on June 8, 1937, was not barred by four year statute of limitations where last item on open book account related to a credit entered on August 24, 1934. Code Civ.Proc. § 344.

7. Limitation of actions ⚿53(2)

An action on an account stated commenced on June 8, 1937, was not barred by the four year statute of limitations where last item on the account was entered on August 24, 1934. Code Civ.Proc. § 337.

8. Limitation of actions ⚿53(2)

The statute requiring a written acknowledgment of a debt in order to toll statute of limitations was inapplicable to action on account stated where action on account stated was not barred by limitations because last item on open current account was made less than four years prior to statement of account. Code Civ.Proc. §§ 337, 360.

9. Appeal and error ⚿757(4)

An appellant did not properly present a point based on refusal to give proposed instructions where proposed instructions and given instructions were not printed or referred to in briefs. Rules for Supreme Court and District Courts of Appeals, § 3, rule 8.

10. Judgment ⚿199(1)

Under the statute governing the granting of a judgment notwithstanding the verdict, a motion for a directed verdict must precede one for judgment notwithstanding the verdict. Code Civ.Proc. § 629.

11. Judgment ⚿199(1)

Plaintiffs' motion for a judgment notwithstanding verdict was properly granted despite plaintiffs' failure to move for a directed verdict on defendant's counterclaim since plaintiffs' motion for a directed verdict on its complaint automatically included the counterclaim pleaded by defendant as a defense in his answer. Code Civ.Proc. §§ 437, 629.

12. Judgment ⚿199(5)

A "counterclaim" is but a matter of defense raised by an answer and there is no requirement that it be especially mentioned in a motion for a directed verdict made by plaintiff on his complaint. Code Civ.Proc. §§ 437, 629.

[Ed. Note.—For other definitions of "Counterclaim," see Words & Phrases.]

13. Appeal and error ⚿907(2)

Where record does not contain evidence tending to sustain defendant's counterclaim, reviewing court must assume that allegations of counterclaim were not proved.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action on an open book account and on an account stated to recover balance due upon a brokerage account by Richard E. Doyle and Thomas J. Feeney, individually and as copartners doing business under the firm name and style of Doyle-Feeney Company, against R. B. McPherson, wherein defendant counterclaimed for damages allegedly suffered by reason of plaintiffs' negligence in sale of collateral security. From a judgment for the plaintiffs and against defendant on his counterclaim, defendant appeals.

Affirmed.

Edmund J. Dunning, of San Francisco, for appellant.

Caulfield & Keil and C. Harold Caulfield, all of San Francisco (Edward D. Keil and William J. Dowling, Jr., both of San Francisco, of counsel), for respondents.

NOURSE, Presiding Justice.

Plaintiffs, partners doing business under the name of Doyle-Feeney Co., brought the present action against defendant, stating two causes of action—the first upon an open and current book account and the second upon an account stated—to recover the balance due upon a brokerage account. Defendant pleaded the statute of limitations and counterclaimed for damages allegedly suffered by reason of plaintiffs' negligence in the sale of collateral security, and pleaded a misjoinder of parties plaintiff. The cause was tried with a jury and the verdict was in favor of plaintiffs for $1,500. Thereupon plaintiffs moved for judgment notwithstanding the verdict. Said motion was granted, and judgment entered in favor of plaintiffs for the amount prayed for, $2,319.20. Defendant appeals from the judgment in favor of plaintiffs and from the order denying defendant's motion for a new trial.

Defendant opened the account with Wardell, Taylor, Dunn & Co. in November, 1927. This partnership was succeeded by Bacon, Wardell & Co., Wardell, Doyle & Co., and Doyle-Feeney Co. Each firm was a general partnership engaged in the brokerage business, and each succeeded to the assets and liabilities of its predecessor by purchase and assignment. Defendant terminated his stock transactions in October, 1930, when Bacon, Wardell & Co. sold four bonds which had been held by them as collateral security. These securities, which were sold at a loss, are the basis of the counterclaim that they were held too long after defendant ordered a sale. After this sale no transactions occurred other than the payment of $500 by defendant in 1931 and two other payments of $100 each. Interest was regularly charged to the account upon the balance due. The action was not commenced until June 8, 1937. The last item in the account was a credit of 70 cents resulting from the sale of a fractional share.

[1, 2] The appellant states seven questions which he urges as grounds for a reversal. The first is whether the respondents were not required to both plead and prove an assignment of the claim from their predecessors. The pleading is in the form of the common count—upon an open current book account, and upon an account stated. The sufficiency of the pleading is not open to question. Pike v. Zadig, 171 Cal. 273, 276, 152 P. 923. Proof of the assignment is conceded by appellant in his statement that: "Defendant's account was sold and transferred through the various firms," and that each firm "succeeded by purchase and assignment of the assets and liabilities of its predecessor". A more correct statement of appellant's first assignment of error would be that, since it is conceded that the account arose during the business operations of the predecessors of respondents, and that the account was duly transferred to respondents, therefore they should have pleaded an assignment in their complaint. The objection could not have been raised by demurrer in view of the decision above noted. Having been raised by answer and the facts then having been admitted, the controversy comes to an end.

[3, 4] Appellant attacks the sufficiency of the evidence to prove an account stated. The evidence is that monthly statements were regularly given the appellant, that letters demanding payment of the balance due were mailed to him over a period of two and one-half years; that he did not at any time dispute the amount due, but said that he "would be unable to pay this amount all at once, he wanted time". The implied acquiescence arising from the failure to object within a reasonable time is all the evidence necessary to prove his

admission that the account was stated truly. 1 Cal.Jur., p. 197.

[5-7] It is next suggested that the first cause of action was barred by the statute of limitations. Suit was commenced on June 8, 1937. The last item on the open book account relates to a small credit of August 24, 1934. The next previous item was a charge for interest due, entered in July 31, 1934. Upon this current account the four-year statute would commence to run from the time of the last item, and the cause of action is therefore within time. Sec. 344, Code Civ.Proc. Then, too, the second cause of action which is based upon the account stated is well within the statute of limitations, sec. 337, Code Civ.Proc., and this cause of action alone is sufficient to support the judgment.

[8] In answer to appellant's contention that the second cause of action is barred by section 360 of the Code of Civil Procedure, it is sufficient to say that the evidence does not in any manner support the statement that the last item on the open current account was made more than four years prior to the statement of the account. Therefore, section 360, which would require the statement to be in writing if the current account was barred, is not controlling. The applicable statute is section 337 which fixes the running of the limitation "from the date of the last item".

[9] The refusal of the trial court to instruct the jury on the measure of damages under the appellant's counterclaim is assigned as error. No one of the proposed instructions which was not given, and no one of the instructions given is printed or referred to in the briefs. The point is not properly presented. Sec. 3, rule VIII, Rules for Supreme Court and District Courts of Appeal.

[10-13] The final point urged by appellant is that the trial court erred in granting respondents' motion for judgment notwithstanding the verdict because they had failed to move for a directed verdict on appellant's counterclaim. That a motion for a directed verdict must precede one for judgment notwithstanding the verdict is settled. Sec. 629, Code Civ.Proc. Though respondents' motion for a directed verdict seems to have been confined to the second cause of action on the account stated, it would automatically include the defenses raised by the answer. A counterclaim is but a matter of defense raised by answer, sec. 437, Code Civ. Proc., and we are cited to no authority holding that it must be specially mentioned in the motion for a directed verdict made by plaintiff on his complaint. As this case is presented, we are referred to no evidence tending to prove any damages under the counterclaim. Assuming, therefore, as we must upon this record, that the allegations of the counterclaim were not proved, plaintiffs' motion for judgment notwithstanding the verdict having been made in compliance with section 629, Code of Civil Procedure, was properly granted.

The judgment is affirmed, and the appeal from the order denying a new trial is dismissed.

We concur: STURTEVANT, J.; SPENCE, J.

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35 Cal.App.2d 734

LABARTHE v. McRAE et al.

Civ. 11194.

District Court of Appeal, First District,
Division 1, California.

Dec. 7, 1939.

1. Judgment 🔑276

Under statutes concerning service of notices and other papers by mail, written notice of entry of judgment may be served by mail. Code Civ.Proc. §§ 1012, 1013.

2. New trial 🔑116(2)

Under statute providing that a party intending to move for new trial must file notice of such intention within 10 days "after receiving" written notice of entry of judgment, the Legislature, by use of quoted words, intended that the 10-day period within which to move for new trial should not start to run until physical delivery of written notice of entry of judgment. Code Civ. Proc. §§ 16, 659, 1010, 1012, 1013, 1859.

The word "receive," in its commonly accepted meaning, carries with it the concept that something has been physically delivered, or placed in the hands of the recipient. The concept that something has been "received" when it is deposited in the mail is an artificial concept, and one that is not in accordance with the general and common understanding of the term. The legal definition of the term "receive" seems to be in accord with the general and common meaning of the word.

[Ed. Note.—For other definitions of "Receive," see Words & Phrases.]

3. Statutes 🔑231

A section of the Code referring specifically to a matter, as the section concerning the time within which to file notice of intention to move for new trial, takes precedence over a general section, such as the section providing that service of notices by mail is complete at time of deposit in post office. Code Civ.Proc. §§ 659, 1013, 1859.

4. Statutes 🔑188

In construing a statute, nontechnical words should be given, if possible, their ordinary and general meaning. Code Civ.Proc. § 16.

5. Appeal and error 🔑2

If there is any ambiguity in a statute pertaining to the right of appeal, that construction should be adopted that protects the right of appeal, since policy of the law favors the hearing of appeals on their merits.

6. New trial 🔑116(2)

The Legislature, in view of amendments to the statute respecting the time within which to file notice of intention to move for new trial, intended to make such statute wholly self-sufficient and independent of statute providing that service of notices by mail is complete at time of deposit in post office. Code Civ.Proc. §§ 659, 1013.

7. Appeal and error 🔑345(1)

Where notice of entry of judgment was deposited May 13 in the mail at Redwood City by respondent properly addressed to appellants' attorneys in San Francisco, and notice was delivered to office of appellants' attorneys on May 15, May 14 being Sunday, and notice of intention to move for new trial was filed by appellants on May 25, notice of intention to file motion for new trial was filed within the statutory 10-day period, and hence, where notice of appeal was filed July 17 after motion for new trial was denied July 11. the appeal was within time. Code Civ.Proc. §§ 16, 659, 939, 1010 et seq., 1012, 1013, 1859.

Appeal from Superior Court, San Mateo County.

Proceeding by Maria Labarthe against Connell C. McRae and another. From an unsatisfactory judgment, defendants appeal. On plaintiff's motion to dismiss the appeal.

Motion denied.

Thomas J. Straub, William B. Kuder, and John J. Briare, all of San Francisco, for appellants.

Wayne R. Millington, of San Francisco, for respondent.

PETERS, Presiding Justice.

Respondent moves to dismiss the above-entitled appeal on the ground that the appeal was not taken within the time provided by law.

The pertinent dates are as follows:

Notice of entry of judgment deposited in the mail at Redwood City by respondent, properly addressed to appellants' attorneys in San Francisco, the two places being about twenty-five miles apart..........	May 13, 1939.
Notice of entry of judgment delivered at the office of appellants' attorneys in San Francisco........... (May 14, 1939, was a Sunday.)	May 15, 1939.
Notice of intention to move for a new trial filed by appellants	May 25, 1939.
Motion for a new trial denied	July 11, 1939.
Notice of appeal filed......	July 17, 1939.

Under the provisions of section 939 of the Code of Civil Procedure, an appeal may be taken within sixty days from the entry of the judgment or order appealed from, but, if proceedings on motion for a new trial are properly pending, the time for appeal is extended until thirty days after entry of the order determining the motion for a new trial. Section 659 of the Code of Civil Procedure provides, in part, that the party intending to move for a new trial must file his notice of intention "within ten (10) days *after receiving written notice of the entry of the judgment*". (Italics ours.) Part 2, title 14, chapter 5, of the Code of Civil Procedure is entitled "Notices, and Filing and Service of Papers", and embraces sections 1010 to 1019, inclusive. So far as pertinent here, section 1010 provides that "Notices and other papers may be served upon the party or attorney in the manner prescribed in this chapter, *when not otherwise provided by this code.*" (Italics ours.) Section 1012 permits service by mail, and section 1013 provides that service by mail "is complete at the time of the deposit" in the post office, "but if, within a given number of days after such service, a right may be exercised * * * the time within which such right may be exercised * * * is extended one day, together with one day additional for every full one hundred miles distance between the place of deposit and the place of address * * *".

As will be noted from the above table of dates, the notice of entry of judgment was mailed from Redwood City on May 13th. If the service is complete when mailed, as provided by section 1013, supra, and if that section is here applicable, the ten-day period within which to move for a new trial would expire May 24th—ten days from May 13th, plus one day mailing time as provided in the section. In that event, the notice of motion of intention to move for a new trial, having been filed on May 25th, was filed too late, and the appeal, not having been taken within the time provided by section 939 of the Code of Civil Procedure, must be dismissed.

As also shown by the above table of dates, the notice of entry of judgment was not *received* at the office of appellants' attorneys until Monday, May 15th, no mail having been delivered on Sunday, May 14th. If the ten-day period is to be computed from the date the notice of entry of judgment was received at the attorneys' office, the notice of motion for a new trial having been filed within ten days thereafter, was filed in time, and, as a result, the time for appeal was properly extended, and the appeal taken within time.

The specific question as to whether the words "within ten (10) days *after receiving written notice* of the entry of the judgment" in section 659 of the Code of Civil Procedure, mean that the ten-day period commences to run after physical delivery of the notice at the attorneys' office, or whether the period is computed as provided in section 1013 of that code, seems never to have been passed on in this state.

There would seem to be little doubt that, if the only section of the code we are here called upon to construe were section 659, the words "after receiving written notice", etc., would necessarily be interpreted to mean that the time started to run from the day such notice was physically delivered. The word "receive", in its commonly accepted meaning, carries with it the concept that something has been physically delivered, or placed in the hands of the recipient. The concept that something has been "received" when it is deposited in the mail, is an artificial concept, and one that is certainly not in accordance with the general and common understanding of the term. The legal definition of the term "receive", seems to be in accord with the general and common meaning of the word. In Barr v. Geldziler, 108 N.J.L. 397, 156 A. 644, page 645, the court stated: "The time began to run from the receipt by him of the notification; it was received, within the meaning of the law, when it was delivered to his office either by messenger or by mail * * *."

[1, 2] Respondent argues that, under sections 1012 and 1013, written notice of entry of judgment may be served by mail (which contention is correct), and that under section 1013 the service of the notice is complete when mailed, and that time runs as therein provided. In other words, it is urged that section 1013 defines when notices required by section 659 are to be deemed received. With this contention we cannot agree. Section 1010 of the Code of Civil Procedure expressly provides that notices may be served as provided in chapter 5 of part 2, title 14, only when "not otherwise provided by this code". We think that the legislature, by the use of the words "after receiving" in section 659 of the Code of Civil Procedure, clearly expressed the intent that the ten-day period within which to move for a new trial should not start to run until physical delivery of the written notice of entry of judgment. This construction of the statute is compelled by at least four different considerations:

[3] In the first place, it is a well-settled and sound rule of construction that a section of the code referring specifically to a matter, as does section 659, takes precedence over a general section such as section 1013. Tousley v. Dishman, 90 Cal. App. 759, 266 P. 373; Estate of Dolbeer, 153 Cal. 652, 96 P. 266, 15 Ann.Cas. 207. This rule of construction is codified in section 1859 of the Code of Civil Proce-

dure, which provides, in part, that in construing a statute, "when a general and (a) particular provision are inconsistent, the latter is paramount to the former".

[4] In the second place, in construing a statute, non-technical words should be given, if possible, their ordinary and general meaning. People v. Stanley, 193 Cal. 428, 225 P. 1; Corbett v. State Board of Control, 188 Cal. 289, 204 P. 823; Universal Pictures Corp. v. Superior Court, 9 Cal.App.2d 490, 50 P.2d 500; sec. 16, Code Civ.Proc. As already pointed out, the ordinary and usual meaning of the term "receive" is that something has been taken into possession. The word clearly implies a delivery.

[5] In the third place, if there is any ambiguity in a statute pertaining to the right of appeal, that construction should be adopted that protects the right of appeal. The policy of the law favors the hearing of appeals on their merits. Manning v. Gavin, Cal.Sup., 92 P.2d 795; Lewith v. Rehmke, 217 Cal. 563, 20 P.2d 687; Wood v. Peterson Farms Co., 214 Cal. 94, 3 P.2d 922; Banta v. Siller, 121 Cal. 414, 53 P. 935.

In the fourth place, the history of section 659 of the Code of Civil Procedure demonstrates that the legislature, by the use of the words "after receiving", in that section must have intended that the time for filing the notice of intention to move for a new trial should not start to run until after physical delivery of notice of entry of judgment. Section 659, as originally enacted in 1872, fixed the time to move for a new trial as "within thirty days after the decision or verdict". In 1874 the time was changed to "within ten days after the verdict of the jury * * * or after notice of the decision of the court * * *". Under section 659 as it read in 1874, and as it read until 1907, it was held that sections 1010 and 1013 of the Code of Civil Procedure were applicable to notices of intention to move for a new trial and that the time began to run from deposit of the notice in the mail, calculated according to the liberal provisions of section 1013 as they then read. Sullivan v. Wallace, 73 Cal. 307, 14 P. 789; Estate of Richards, 154 Cal. 478, 98 P. 528. In 1907 section 659 was again amended to provide that the ten-day period should start to run "after receiving notice of the entry of the judgment", and in 1915 it was provided "The time above specified shall not be extended by order or stipulation." In 1929 the section was again amended to require that the notice given must be a "written" notice, and in the same year section 1013 was amended to provide that one day should be added for every one hundred miles instead of for every twenty-five miles as was formerly the case.

[6, 7] From these amendments it will be seen that there has been a constant and progressive attempt to protect the appellant's right of appeal, while still protecting respondents against unreasonable delay. It also seems to us that the legislature by these amendments has clearly indicated its intention to make section 659 wholly self-sufficient and independent of section 1013. The legislature has clearly indicated by these various amendments that to start the time running, the notice must be physically received. If respondent's contentions were correct, if the notice were lost in the mails, the time would run, even though the attorney for the appellant never received the notice, because, it has been held, that with notices mailed under section 1013 the addressee incurs the risk of the failure of the mail. McKeon v. Sambrano, 200 Cal. 739, 255 P. 178.

For the foregoing reasons the motion to dismiss the appeal is denied.

We concur: WARD, J.; GOODELL, Justice pro tem.

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36 Cal.App.2d 155

Ex parte CLAASEN.

Cr. 2067.

District Court of Appeal, First District, Division 1, California.

Dec. 19, 1939.

1. Contempt 🔑20

Where husband appeared by counsel in response to an order to show cause why he should not be punished for contempt for failure to comply with order for payment of alimony pendente lite, counsel fees, and costs, court was without jurisdiction to adjudge him guilty of contempt for not appearing in person.

2. Contempt ⚷57

One who is ordered to show cause why he should not be punished for contempt may appear by attorney and need not appear personally.

Proceeding in the matter of the application of John H. Claasen, Jr., for a writ of habeas corpus.

Petitioner discharged.

Leo A. Cunningham, of San Francisco, for petitioner.

Joseph A. Brown, of San Francisco, for respondent.

Raymond D. Williamson, of San Francisco, for respondent sheriff.

KNIGHT, Justice.

Petitioner was adjudged guilty of contempt of court and sentenced to five days' imprisonment in the county jail by the superior court in and for the City and County of San Francisco for having failed to appear in person before said court in response to an order to show cause theretofore issued by said court and served on petitioner's attorney, wherein petitioner was directed to "be and appear" at the time and place specified in the order, then and there to show cause why he should not be punished for contempt for failing, neglecting and refusing to comply with a previous order requiring him to pay alimony pendente lite, counsel fees and costs. Following such adjudication and sentence a commitment was issued and petitioner was taken into custody by the sheriff; whereupon he applied for and obtained a writ of habeas corpus, the basis for the application being that the judgment of contempt is void. The proceeding came on for hearing at the time fixed by the writ, and petitioner's wife was represented by counsel; but no oral argument was presented in support of the judgment of contempt, nor was any attempt made to answer the points and authorities submitted in behalf of petitioner; and although additional time was granted to file a respondent's brief none has been presented or filed.

[1,2] After having examined the record we are convinced that the judgment of contempt cannot be upheld. As stated, it was based upon the failure of petitioner to appear in person in response to said order to show cause; but the record affirmatively shows that in response thereto he did appear by counsel at the time and place specified in said order, and that his counsel participated in the hearing had at that time relating to petitioner's failure to pay said sums of money. Therefore, as petitioner contends, having appeared by counsel, the court was without jurisdiction to adjudge him guilty of contempt for not appearing in person. California Jurisprudence (vol. 5, p. 943) gives the rule thus "Anyone who is ordered to show cause why he should not be punished for contempt may appear by attorney. It is not necessary that he appear personally" (citing Ex parte Gordon, 92 Cal. 478, 28 P. 489, 490, 27 Am.St.Rep. 154). In that case, as here, a husband was ordered to "be and appear in person" before the court, at a time and place specified in the order, to show cause why he should not be punished for failing to obey a prior order requiring him to pay alimony pendente lite and costs; and, as here, in response to such order to show cause he appeared by counsel; nevertheless he was adjudged guilty of contempt for failing to appear in person; and in discharging him from custody on habeas corpus the court said: "The alleged contempt for which Gordon is held in custody is not the refusal to obey an order requiring him to pay money, but his failure to appear in person in response to the notice to show cause. In civil proceedings, and even in many criminal proceedings not involving a felony, a party may appear in person or by counsel. Of course, in proper cases, he may be taken under attachment or warrant of arrest; and, within certain territorial limits, a person may be compelled to attend court as a witness by the process of subpœna. But in the case at bar Gordon was merely summoned to appear in court on a certain day, and show cause why a certain thing should not be done. He appeared on said day by counsel, and offered to show cause. This he had a right to do, and the court should have proceeded to hear and determine the issue before it. That part of the order which commanded him to appear in person the court had no power to make; and the subsequent order for his arrest for not appearing personally had no jurisdictional basis." The factual situation in that case, as will be seen, was the same as the one here presented; and the rule there declared has apparently never been modified or abrogated. Quite to the contrary it has been restated and applied in later cases,

notably Foley v. Foley, 120 Cal. 33, 52 P. 122, 65 Am.St.Rep. 147; Bakeman v. Superior Court, 37 Cal.App. 785, 174 P. 911.

In the Foley case the court goes on to hold in effect that where the order to show cause is served on the attorney of record instead of the party against whom it is directed, the appearance by the attorney without objection to the want of personal service on his client gives the court jurisdiction over the client. And so in the present case, the appearance by counsel in response to said order to show cause, gave the court jurisdiction over petitioner to take appropriate action against him for any failure to comply with the order directing him to pay the sums of money set forth in said order. But that was not done. As in the Gordon case, the adjudication of contempt was founded upon the failure of petitioner to appear in person in response to the order to show cause; therefore, since he did appear by counsel, the court was without jurisdiction to adjudge him guilty of contempt for not appearing in person.

In view of the conclusion reached on this point it is unnecessary to inquire into the remaining two urged by petitioner in support of his application for the writ.

The petitioner is discharged from custody.

I concur: PETERS, P. J.

WARD, J., deeming himself disqualified, did not participate.

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36 Cal.App.2d 1

PEOPLE v. WALLACE et al.

Cr. 3253.

District Court of Appeal, Second District, Division 1, California.

Dec. 8, 1939.

Hearing Denied Jan. 4, 1940.

1. Robbery ⚷11

Where defendants robbed filling station attendant without use of deadly weapon, but loaded revolver was taken from attendant during commission of offense, robbery was "perpetrated" by persons armed with deadly weapon, so as to make offense that of robbery of first degree. Pen.Code, §§ 211, 211a.

[Ed. Note.—For other definitions of "Perpetrate; Perpetration," see Words & Phrases.]

2. Robbery ⚷11

As regards issue whether defendants were armed with deadly weapon when they perpetrated robbery, so as to be guilty of robbery of first degree, the "perpetration" of crime of robbery is not completed the moment stolen property is in possession of robbers, but escape of robbers with their ill-gotten gains by means of arms is as important to execution of robbery as gaining possession of property. Pen.Code, §§ 211, 211a.

3. Robbery ⚷10

"Robbery" being a combination of crime of assault with that of larceny, includes, as does larceny, the element of asportation, and the appropriation of another's property at scene of hold-up is a transaction which continues after the perpetrators depart from place where property was seized. Pen.Code, § 211.

4. Statutes ⚷184

Statutes should be construed whenever reasonably possible with view to carrying out the intent and purpose which actuated their adoption, and to secure the objective sought to be achieved.

5. Robbery ⚷11

A person participating in a robbery who becomes armed, either during the "taking" incidental to the robbery or while the offense is being "perpetrated," is guilty of robbery of first degree. Pen.Code, §§ 211, 211a.

6. Robbery ⚷15

Where defendants entered filling station for purpose of robbing attendant, and during commission of offense one of defendants took loaded revolver from attendant, all of defendants were equally liable for added penalty inflicted for commission of offense while armed with deadly weapon. Pen.Code, §§ 211, 211a.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

William C. Wallace, Louis F. Bechdolt and Joseph E. Glover were convicted of robbery, and they appeal.

Affirmed.

Hearing denied; CARTER, J., dissenting.

Morris Lavine, of Los Angeles, for appellants William C. Wallace and Joseph E. Glover.

Paul E. Tapley, of Los Angeles, for appellant Louis F. Bechdolt.

Earl Warren, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for respondent.

WHITE, Justice.

This is an appeal by defendants from orders denying their motions for new trial and from judgments pronounced against them after their pleas of guilty to the crime of robbery. The only point here involved is as to the degree of the robbery, and we are asked, pursuant to section 1181 of the Penal Code and upon the authority of People v. Kelley, 208 Cal. 387, 281 P. 609, and People v. Covington, 1 Cal.2d 316, 34 P.2d 1019, to reduce the robbery conviction to that of second degree.

Appellants pleaded guilty to the crime of robbery, and by appropriate waivers of jury submitted to the court for determination the question of the degree of the admitted offense. Thereupon the court took evidence, from which it appears that appellants robbed one Hugh Weir while he was acting as a service station attendant in the city of San Gabriel in Los Angeles county. The robbery was committed about 2 o'clock on the morning of March 4, 1939, when appellants came into the service station in an automobile and one of them asked the attendant, Weir, for five gallons of gasoline. The latter put the gasoline in the tank of appellants' automobile, and after some conversation between one of the appellants and Weir as to how to get to San Diego and what road to take, Weir received a dollar bill from one of the appellants in payment for the gasoline and went into the station to make change. The three appellants followed him into the station. When they were inside the station one of the appellants had his hand in his right hand coat pocket and said, "All right, doc, let's have it." Convinced that the three men were robbers, the complaining witness put up his hands and went to the back of the station which was about three feet from the cash register, while two of the appellants went over to the cash register. While the appellants were at the cash register one of them made the suggestion that the victim be searched, pursuant to which suggestion appellant Glover proceeded to and did search Weir, finding upon the latter's person a 38-caliber revolver. Appellant Glover then asked the complaining witness what he was doing with the gun, and pulling the hammer back, said, "You see, it is cocked," whereupon he pointed it at the head of the complaining witness for a fraction of a minute. About that time the other two appellants were through looting the cash drawer and were on their way out of the station. One of the appellants told the complaining witness to sit on the floor for twenty minutes. The sum of $13.08 constituted the fruits of the robbery.

[1] Appellants' sole ground of appeal is that from the foregoing facts the taking of personal property from Mr. Weir in his immediate presence was accomplished without the use of a deadly weapon, and that when the only dangerous or deadly weapon figuring in the commission of the offense was the weapon obtained as part of the loot of the robbery, such possession of a dangerous or deadly weapon does not measure up to the requirements of section 211a of the Penal Code, which denounces as robbery of the first degree any robbery which is perpetrated by a person while armed with a dangerous or deadly weapon. This claim of appellants is without merit. Section 211 of the Penal Code defines robbery as the felonious *"taking"* of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear. This section is followed by section 211a, which provides that any robbery which is *"perpetrated"* by a person being armed with a dangerous or deadly weapon is robbery of the first degree. From a reading of the facts of this case it is at once apparent that appellants were engaged in the "taking" of the personal property of the victim Weir at the time they became armed with the 38-caliber revolver. Appellants being thus armed while they "perpetrated" the robbery, it matters not from what source they obtained the dangerous or deadly weapon in question.

[2] It is the law that the "perpetration" of the crime of robbery is not completed the moment the stolen property is in the possession of the robbers. The escape of the robbers with their ill-gotten gains by means of arms is as important to the execution of the robbery as gaining possession of the property. In the case before us not only was a gun used and pointed at the

complaining witness, but his own gun was taken from him, and it obviously constituted a means of preventing the complaining witness, by the use of his revolver, from making any attempt to frustrate or thwart the perpetrators of the crime. As was said in People v. Boss, 210 Cal. 245, 251, 290 P. 881, 883, "The *escape* of the robbers with the loot, by means of arms, necessarily is as important to the execution of the plan as gaining possession of the property. Without revolvers to terrify, or, if occasion requires, to kill any person who attempts to apprehend them at the time of or immediately upon gaining possession of said property, their plan would be childlike." (Italics added.) In People v. Dowell, 204 Cal. 109, 266 P. 807, 811 where the robber was fleeing from the scene of the robbery carrying what he thought was the bag and money of the victim and fired upon and killed a pursuing officer of the law in order to effect his escape while retaining the stolen property, the Supreme Court said, "We are satisfied that the crime of robbery had not been completed in any sense at the time of the unlawful shooting, but on the contrary the murder was committed in the perpetration of such crime."

[3] Robbery, being a combination of the crime of assault with that of larceny, includes, as does larceny, the element of asportation; and the appropriation of another's property at the scene of the hold-up is a transaction which continues after the perpetrators depart from the place where the property was seized. People v. Raucho, 47 P.2d 1108, 8 Cal.App.2d 655, 664; People v. Green, 93 Cal.App. 435, 436, 269 P. 687; People v. Melendrez, 25 Cal.App.2d 490, 494, 77 P.2d 870.

What we have here held does no violence to the views expressed in People v. Black, 73 Cal.App. 13, 29, 238 P. 374, 381, cited by appellants. That case construes section 460 of the Penal Code, which provides, among other things, that burglary is of the first degree when the burglar "while in the commission of such burglary arms himself with a deadly weapon." In that case the weapons stolen in the burglary were unloaded, and no assault was made upon any person. The conclusion therein reached by the court was based upon its reluctance to hold that a burglar who arms himself with a deadly weapon when in his burglarizing he steals an unloaded firearm and carries it away as part of his loot, is guilty of burglary of the first degree. To hold otherwise, says the court in the cited case, would be no more correct than to say that "one commits an assault with a deadly weapon when he points an unloaded firearm at another." There is no analogy or similarity between the case cited by appellants and the one now under consideration by us.

[4, 5] Neither the definition of robbery nor the specification of the degrees thereof contemplate that any fine distinctions shall be drawn for the benefit of highwaymen. No reason can be found in the law that requires a robber to be armed at all times during a robbery. If at any time during the progress of the "taking" or while the robbery is being "perpetrated", the robber arms himself or becomes armed with a deadly weapon, he brings himself within the pale of section 211a of the Penal Code. As was said by this court in People v. Stevens, 32 Cal.App.2d 666, 670, 90 P.2d 595, 597 (hearing denied by the Supreme Court), "Statutes should be construed, whenever reasonably possible, with a view to carrying out the intent and purpose which actuated their adoption and to secure the objective sought to be achieved by the legislation in question. The laws here in question were designed for the protection of the community and its residents, and not the lawbreaker." To achieve the manifest purpose of the legislation it must be held, and we do so hold, that any defendant participating in a robbery who becomes armed, either during the "taking" incidental to the robbery or while the offense is being "perpetrated", is guilty of robbery of the first degree.

[6] Appellants' claim that "under no circumstances could the defendants Wallace and Bechdolt be guilty of first degree robbery. The three men entered the station unarmed, and it was not the intent of any of them to be armed at the time of the commission of the felony", must be rejected. Acting in concert as were the three appellants herein, when one of their number armed himself the consequences thereof were visited equally upon his associates who were aiding and abetting him in the commission of the crime.

The judgments and the orders denying the motions for new trial are, and each of them is, affirmed.

We concur: YORK, P. J.; DORAN, J.

JUCHERT v. CALIFORNIA WATER SERVICE CO.*

Civ. 10910.

District Court of Appeal, First District, Division 2, California.

Dec. 15, 1939.

Hearing Granted Feb. 10, 1940.

1. Waters and water courses 🔑195

In suit by motorcyclist to recover from water company for injuries sustained when motorcycle struck hole in road, on theory that road was caused to sink by water escaping from company's broken pipe into filled ground, evidence which failed to show improper installation of pipe, patent defects of any kind or failure to inspect pipe was insufficient to support implied finding of negligence.

2. Waters and water courses 🔑195

A water company was not liable for injuries sustained by motorcyclist whose motorcycle struck hole in road, in absence of negligence on part of company in installation or maintenance of water pipe under roadway alleged to have sunk because of water escaping from pipe.

3. Waters and water courses 🔑195

In suit by motorcyclist against water company for injuries sustained when motorcycle struck hole in road, motorcyclist had burden of proving his contention that road was caused to sink by water escaping from company's broken pipe or by drainage water increased by escaping water. Code Civ.Proc. § 1960.

4. Evidence 🔑98

Where contentions of party rest on inferences to be drawn from proved facts, and existence of an essential fact is left in doubt, the party upon whom burden rests to establish that fact should suffer and not his adversary. Code Civ.Proc. § 1960.

5. Evidence 🔑597

A judgment cannot be based on guesses or conjectures.

6. Evidence 🔑595

A finding of fact based on an inference must be on an inference drawn from evidence rather than from a mere speculation as to probability without evidence.

7. Evidence 🔑98

Where different inferences may be drawn from proved facts, some supporting party on whom rests burden of proof and some supporting his adversary, proof of party having burden is insufficient.

8. Trial 🔑191(7)

Waters and water courses 🔑195

In action by motorcyclist against water company for injuries sustained when motorcycle struck hole in road, where motorcyclist contended that road was caused to sink by water escaping from company's pipe, court erroneously gave instruction which applied doctrine of res ipsa loquitur and assumed that water escaping from pipe injured motorcyclist, in absence of any claim that water company controlled road or evidence that escaping water injured motorcyclist.

◆

Appeal from Superior Court, San Mateo County; Arthur Coats, Judge.

Action by Walter A. Juchert against the California Water Service Company and another to recover for injuries sustained in a fall occurring when plaintiff's motorcycle struck a hole in a road. The named defendant's motion for a new trial was denied and it appeals from the judgment.

Judgment reversed.

J. E. McCurdy, of San Mateo, for appellant.

Hugh F. Mullin, Jr., and Francis N. Foley, both of San Mateo, for respondent.

STURTEVANT, Justice.

The motorcycle on which the plaintiff was riding struck a hole in the road and the plaintiff was thrown to the ground. For injuries sustained in the fall he brought this action to recover damages. He named the city of San Mateo and California Water Service Company as defendants. Both defendants answered and the action was tried before the court sitting with a jury. When the taking of the evidence had been concluded the trial court granted a motion made by the city of San Mateo for a directed verdict. This defendant made a similar motion but it was denied. The jury returned a verdict in favor of the plaintiff in the sum of $8,000. The defendant made a motion for a new trial. That motion was denied and the defendant appealed from the judgment.

In presenting its appeal the defendant contends that the evidence was insufficient to support the verdict and that the trial court committed prejudicial error in giving an instruction applying the doctrine of res ipsa loquitur. Before proceeding to discuss either point it becomes necessary to summarize the facts.

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*For subsequent opinion see 106 P.2d 886.

El Camino Real, one of the main highways in the state, runs through San Mateo from north to south. It is crossed by Second avenue which runs from east to west. At a point about 100 feet north from the intersection of those streets, San Mateo creek crosses El Camino Real at right angles. The stream is bridged by a sunken culvert which is buried by a deep fill. On the morning of March 9, 1936, the time of the accident, a hole had sunk in the surface of the highway at a point immediately adjacent to the curb on the east side of the highway and 186 feet north of the intersection of Second avenue with the highway. The hole was about five inches deep near the curb on the eastern boundary of the highway, it was from fourteen to eighteen inches wide and extended southwesterly eight or ten feet out into the roadway gradually diminishing in depth.

The plaintiff was a mail carrier engaged in traversing the streets of San Mateo daily but was not aware of the existence of said hole. In making his rounds on the morning of March 9, he was traveling at a speed of about twenty or twenty-two miles an hour in a northerly direction and did not see the hole in time to avoid hitting it. When his motorcycle hit the hole the plaintiff was thrown and suffered the injuries complained of.

Formerly in El Camino Real, immediately south of the place of the accident, there was a steep grade over a small hill. At that time the highway was only thirty-five feet wide. In 1935 material changes were made. A concrete culvert in the form of an arch was constructed over San Mateo creek. Retaining walls were constructed from the corners of the culvert parallel with the roadway which was increased to a width of one hundred two feet from side to side. The hill was cut down and a fill was placed over the culvert. The fill was from twenty-two to twenty-seven feet deep in places. The old road was not taken out but the fill was put on top of it and the sides were filled to bring the whole to a uniform grade and width. Although the work was properly done, the road where filled has at times sunk in places and substantial fills have been required from time to time since the above-mentioned alterations were made. In the hole we are discussing a yard and one-half was used in repairing it in March of 1936 and during the following one hundred days other fills in the total sum of eleven yards were made. In March, 1938, other fills were made. The holes so filled were not adjacent. Some were on the east side, some were on the west side of the highway, some were over one hundred feet apart.

After the work was completed the roadway was one hundred two feet wide. A width of seventy-two feet was surfaced with asphaltic concrete. On the side on the east a gutter and curb were installed. East of the curb a concrete sidewalk was placed. Then to the east of the sidewalk and between it and the retaining wall along the boundary of the Mills Hospital grounds there was left a strip seven feet wide which was covered with gravel. In the side of the arched culvert there were inserted a full number of "weep-holes". They were openings to allow a discharge into San Mateo creek of any accumulation of water in the basins formed by the culvert and the retaining walls attached at each end. The drainage of surplus waters was both north and south toward the arched culvert.

When the culvert was being placed in position the public utilities were assigned positions in which they could install their pipes and conduits. On the east end of the culvert on a strip covered with gravel, on a plane four feet below the surface, was assigned a place for the laying of the thirty-six inch water pipes of the San Francisco Water Company. Slightly above and to the east a space was assigned to the defendant to lay its twelve-inch iron water pipe. The defendant furnished new cast-iron pipe. It was twelve inches in diameter and twelve feet long. One end was bell-shaped, the small end was inserted in the bell, and the joint was caulked. After the pipe was laid the water was turned on and the pipe was left exposed for observation for three or four weeks. All of the work was done by the defendant under the supervision and direction of the officers of the state highway. There was no evidence that the defendant did not employ competent assistants, that it did not inspect at all due proper times, but on the other hand that it did inspect and examine its pipes three days before the accident complained of. A pipe of the Pacific Gas and Electric Company was already in place. The concrete retaining wall between the highway and Mills Hospital was poured over and around it. That pipe of the latter company extended through the eastern wall and will later be mentioned again. No claim is made that any one of said sets of pipes was not of good material nor that the installation was done improperly. Prior to the date of the accident the rainfall was heavy in San Mateo county. In the sixty days prior to the accident over fifteen inches of rain fell.

On Friday, March 6, 1936, water was seen percolating through the hole in which the pipe of the Pacific Gas and Electric Company pierced the eastern wall. That water ran down into San Mateo creek. Immediately thereafter examinations were made to ascertain if the water pipe was broken. Defendant's agents at once made an examination of its pipes and reached the conclusion that its pipes were not leaking. The water issuing through the hole occupied by the pipe of the Pacific Gas and Electric Company was of such quantity as might run through a one-half inch pipe. Said hole is located in said wall in a place that is forty-five feet from the leak in the pipes maintained by the defendant and several feet above the "weep-holes" hereinabove mentioned.

After the accident the defendant made a further examination. It then located a leak in the bottom of one joint of its cast-iron pipe. That leak was in the form of a split seam and is spoken of as a "hair crack" two and one-half inches long. Through it flowed water to the amount of one-half cupful per minute. The soil was wet not more than three feet around the leak. The joint was taken out and a new joint was installed. The evidence does not show whether thereafter the discharge of water ceased to flow through the hole in the wall occupied by the pipe of the Pacific Gas and Electric Company. Except the excavation made by the defendant the evidence shows no other. Later the city of San Mateo filled the hole in the roadway.

[1, 2] As recited above the defendant contends there was no evidence to sustain the verdict of the jury. That point must be sustained. There was not a particle of evidence that the defendant's pipe was not properly installed, that there were any patent defects of any kind that defendant did not duly inspect, or of any other act of negligence. Therefore the implied finding of the jury that the defendant was negligent is wholly unsupported. In the absence of negligence it was not liable. 26 Cal.Jur. 152.

[3-7] That the road sank and thereby created the hole on the surface is clearly shown. What caused it to sink was the real issue on trial. There was no direct evidence. The plaintiff contends there was an inference the road was caused to sink by water which escaped from the defendant's broken pipe into the filled ground, or by drainage water increased by the water that so escaped from defendant's pipe. The defendant contends the road was caused to sink because it was built on filled ground or because the filled ground was saturated with drainage water. These two opposing contentions rest, if on anything, on the inferences to be drawn from proved facts contained in the evidence. Code Civ.Proc., sec. 1960. The burden of proof rested on the plaintiff. When such is the fact, and the existence of an essential fact upon which a party relies is left in doubt or uncertainty, the party upon whom the burden rests to establish that fact should suffer and not his adversary. A judgment cannot be based on guesses or conjectures. A finding of fact based on an inference must be on an inference drawn from evidence rather than from a mere speculation as to probability without evidence. Reese v. Smith, 9 Cal.2d 324, 328, 70 P.2d 933. When, as here, different inferences may be drawn from the proved facts, some of said inferences supporting the party on whom rests the burden of proof and some supporting his adversary, the proof of the party on whom rests the burden is insufficient. Puckhaber v. Southern Pacific Co., 132 Cal. 363, 365, 366, 64 P. 480, and cases there cited.

[8] The point just discussed is closely allied to the next point made by the defendant. It contends the trial court, acting upon the request of the plaintiff, erroneously gave an instruction applying the doctrine of res ipsa loquitur. That instruction is as follows: "I instruct you that when a thing which causes injury is under the control and management of a defendant and the accident is such as in the ordinary course of things does not happen if those who have the management use ordinary care, it affords reasonable evidence in the absence of explanation by the defendant, that the accident arose from want of ordinary care. Therefore, if you find that defendant water

company had exclusive control and management of its water pipe, and that water was permitted to escape therefrom, then I instruct you that the escaping of said water from said pipe affords evidence, in the absence of explanation, that it arose from a want of ordinary care on the part of said water company in the control and management of said pipe." It was not applicable to the facts. The thing that caused the accident in the instant case was a hole in the road. Bearing that in mind, the first sentence of the instruction was clearly inapplicable because there was not even a claim that the road or any part of it was "under the control and management of the defendant * * *." The second sentence assumes that the water escaping from defendant's pipe injured the plaintiff. As shown above there was no evidence to that effect.

The judgment is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

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36 Cal.App.2d 131

PEOPLE v. ZIMMERMAN.

Cr. 3244.

District Court of Appeal, Second District, Division 2, California.

Dec. 15, 1939.

Criminal law 🔑1182

Where time for filing opening brief had expired and defendant had failed to make an appearance after having been cited to show cause why appeal should not be dismissed for failure to appear, judgment of conviction was affirmed. Pen.Code, § 1253.

◆

Appeal from Superior Court, Los Angeles County; Walter Desmond, Judge.

Mamie I. Zimmerman was convicted of assault with a deadly weapon with intent to commit murder, and she appeals.

Affirmed.

Joseph A. Ball and Charles C. Stratton, both of Long Beach, for appellant.

Earl Warren, Atty. Gen., for respondent.

PER CURIAM.

Appeal having been taken by defendant after judgment convicting her of assault with a deadly weapon with intent to commit murder, and the appellant's time for filing her opening brief having expired on September 1, 1939, and having failed to make her appearance after having been cited to show cause why the appeal should not be dismissed by reason of her failure to make an appearance,

Now, therefore, in pursuance to the provisions of section 1253 of the Penal Code, the judgment and the order appealed from are affirmed.

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36 Cal.App.2d 144

WILSON v. DUNBAR.

Civ. 2457.

District Court of Appeal, Fourth District, California.

Dec. 16, 1939.

1. Execution 🔑188

A hearing to determine title to property claimed by third party is somewhat in the nature of a supplementary proceeding, and is intended to be of a more or less summary nature. Code Civ.Proc. § 689, as amended by St.1935, p. 1958.

2. Execution 🔑200

After judgment determining rights of third party claiming property levied on, trial court could not grant new trial, in view of fact that statute relating to third-party claims outlined procedure to be followed, and gave right of appeal from judgment, and made no mention of power to grant new trial. Code Civ.Proc. § 689, as amended by St.1935, p. 1958.

◆

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action on a note by Henry Wilson, as executor of the last will and testament of William J. Miles, deceased, substituted for Alice Jean Miles, an incompetent person, by Henry Wilson, guardian of her estate, against Owen L. Dunbar. An attachment was issued and levied upon an automobile which was registered in the name of the defendant. The defendant defaulted, and judgment was entered against him. Guy Dunbar filed a third-party claim, claiming to be the owner of the automobile. A judgment was entered in favor of the plaintiff and against the third-party claimant. An order was entered granting the third-party claimant a new trial. From a judgment striking from the record the order granting the new trial, the third-party claimant appeals.

Affirmed.

Clarence P. Wallick and Robert E. Krause, both of Long Beach, for appellant.

Burton E. Hales, of Redlands, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order vacating and striking from the records a previous order granting a new trial on the issue raised by the filing of a third party claim.

On March 31, 1936, the plaintiff brought an action upon a promissory note against the defendant, Owen L. Dunbar. An attachment was issued and levied upon an automobile which was registered in the name of the defendant. The defendant defaulted and judgment was entered against him on May 21, 1936. On April 15, 1936, Guy Dunbar filed a third party claim, claiming to be the owner of this automobile. After a hearing, properly noticed, judgment was entered on July 24, 1936, in favor of the plaintiff and against the third party claimant. A motion for a new trial was made by the third party claimant and on September 21, 1936, an order was entered granting him a new trial. A notice of motion to strike this order from the records was filed by the plaintiff on August 8, 1938. Such a motion was made and argued and, on August 26, 1938, the same was granted and an order entered striking from the record the previous order granting a new trial. From the order thus entered the third party claimant has appealed.

The controlling question presented is whether or not a trial court is authorized by statute, or otherwise, to grant a new trial after judgment determining the rights of a third party claimant in the proceeding authorized and provided for in section 689 of the Code of Civil Procedure. In Nelson v. Superior Court, 14 Cal.App.2d 44, 57 P.2d 1351, the power of a court to grant a new trial after such a judgment was in effect approved, it being held that a motion for a new trial extended the time within which an appeal might be taken. That case, however, involved a state of facts which arose at a time when section 689 contained little as to the procedure in connection with hearing a third party claim, and did not expressly provide for a right of appeal. It was pointed out therein that a different situation prevails in those instances where a complete scheme of procedure for a particular proceeding is provided by a statute which expressly provides for an appeal but omits any provision for the granting of a new trial.

[1] In 1935, St.1935, p. 1958, section 689 was amended by adding a number of provisions outlining the procedure to be followed at, and following, a hearing in the proceeding authorized by that section, including one giving a right of appeal from the judgment. Not only is the procedure thus outlined definite and complete, but it varies in a number of respects from that provided for ordinary actions at law or in equity, including the absence of any provision for the seeking or granting of a new trial. There are substantial reasons for such differences since such a hearing to determine title to property claimed by a third party is somewhat in the nature of a supplementary proceeding, and since it is intended to be of a more or less summary nature.

In passing upon an exactly similar question, after the amendment of section 689 in 1935, the appellate department of the superior court of Los Angeles county, in the case of Spiegelman v. Bowlus, 15 Cal.App.2d Supp. 765, 59 P.2d 225, 226, after outlining the procedure then provided by section 689 for a proceeding of this nature, said: "It is apparent that the Legislature has thus made rather complete and specific provision for the procedure to be followed on a hearing to determine title in case of a third-party claim. After judgment, an appeal is expressly authorized. No mention is made of the power to grant a new trial. It is our conclusion that the general power to grant new trials contained in section 657, Code of Civil Procedure, does not control these special third-party claim proceedings. Consequently, there being no inherent power to grant new trials, see Lancel v. Postlethwaite (1916) 172 Cal. 326, 329, 156 P. 486, the trial court had no authority whatever to make such an order."

[2] We are in accord with the holding in the decision last referred to and with the reasoning therein set forth. In the instant case, the authority of the trial court was limited by the complete scheme of procedure provided by section 689, and it had no power to add to that procedure by considering and acting upon an application for a new trial. Its order, in that regard, was unauthorized and void. The order vacating that unauthorized order was, therefore, proper and may not be disturbed.

In view of our conclusion upon the main problem presented it is unnecessary to pass upon the other points raised.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

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36 Cal.App.2d 152

GARCIA v. STATE DEPARTMENT OF INSTITUTIONS et al.

Civ. 12533.

District Court of Appeal, Second District, Division 1, California.

Dec. 18, 1939.

Prohibition 🔑20

A petition for writ of prohibition against the State Department of Institutions and others involving a law relating to sterilization of certain inmates of state hospitals was denied on ground that it did not state facts justifying issuance of writ. St.1937, p. 1155, § 6624.

WHITE, J., dissenting.

Petition by Sara Rosas Garcia against the State Department of Institutions and others for a writ of prohibition.

Petition denied.

David C. Marcus, of Los Angeles, for petitioner.

YORK, Presiding Justice.

The petition for a writ of prohibition is denied upon the ground that it does not state facts sufficient to justify this court in issuing its writ as prayed.

I concur: DORAN, J.

WHITE, Justice (dissenting).

I dissent. Section 6624 of the Welfare and Institutions Code, St.1937, p. 1155, provides that when a person has been lawfully committed to any state hospital who is afflicted with or suffers from certain mental and physical ailments, "before any such person is released or discharged from a State hospital, the State Department of Institutions may, in its discretion, cause such person to be sterilized".

It seems to me that the legislature is without authority to authorize a purely administrative board to deprive a person of the right of procreation without the opportunity of having the finality of such action passed upon by a court of law, and that in so doing there is probable violation of the due process clause of the federal Constitution. U.S.C.A.Const. Amend. 14. It is to be noted that without notice to the inmate upon whom the operation is to be performed and without notice to his next of kin the State Department of Institutions is clothed with absolute unrestricted power to sterilize. In my opinion, the grant of such power should be accompanied by requirements of notice and of hearing at which the inmate might be afforded an opportunity to defend against the proposed operation. To clothe legislative agencies with this plenary power, withholding as it does any opportunity for a hearing or any opportunity for recourse to the courts, to my mind partakes of the essence of slavery and outrages constitutional guaranties. As was said by our Supreme Court in Drummey v. State Board of Funeral Directors and Embalmers, 13 Cal.2d 75, 87 P.2d 848, 853: "Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. * * *"

If the foregoing be true, with reference to the protection of property rights, how much more so should it be applied to the protection of personal rights.

And further in the same case, 13 Cal.2d 75, 87 P.2d at page 854, it is said: "Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority."

To my mind, the question presented by this application is a serious one and involves the constitutionality of the aforesaid provision of the Welfare and Institutions Code. I feel that an alternative writ should issue, thereby affording a hearing on the question.

WEST KEY NUMBER SYSTEM

35 Cal.App.2d 604

WOOD v. SILVERS et al.

Civ. 6283.

District Court of Appeal, Third District, California.

Dec. 22, 1939.

Hearing Denied Jan. 22, 1940.

1. Venue 🔑69

The affidavits of witnesses for plaintiff, filed in support of motion to retain cause for trial in county wherein action was brought, were not fatally defective because failing to aver affirmatively that affiants would actually be called as witnesses at the trial.

2. Venue 🔑69

The affidavit of plaintiff averring that affiants, whose affidavits in support of motion to retain cause for trial in county wherein action was brought, were challenged because failing to aver affirmatively that affiants would actually be called as witnesses, were necessary witnesses and that plaintiff could not safely go to trial without their evidence was sufficient to meet requirements.

3. Venue 🔑69

Where affidavits of witnesses for plaintiff in support of motion for retention of cause for trial in county wherein action was brought stated that witnesses were employed by plaintiff until specified dates, District Court of Appeal was required to assume, in absence of evidence to the contrary, that employment ceased at the dates specified, so that it would be entitled to consider the affidavits.

4. Venue 🔑70

Where affidavits of witnesses for plaintiff in support of motion to retain cause for trial in county wherein action was brought stated that witnesses were employed by plaintiff until specified dates, the statute providing that a thing once proved to exist presumptively continues as long as is usual with things of that nature, would not create presumption that employment of such witnesses continued to time of filing of complaint, or hearing of motion so as to preclude consideration of those affidavits. Code Civ.Proc. § 1963, subd. 32.

◆

Appeal from Superior Court, Sonoma County; Donald Geary, Judge.

On petition for rehearing.

Petition denied.

For former opinion, see 96 P.2d 366.

H. G. Crawford, of Lakeport, for appellants.

L. R. Lambert, of Santa Rosa, for respondent.

PER CURIAM.

[1,2] On petition for a rehearing the appellants contend the affidavits of witnesses of the respondent, filed in support of the motion to retain the cause for trial in Sonoma county, are fatally defective for failure to affirmatively aver that they would actually be called as witnesses at the trial. It is true that those affidavits merely recite that "*If I am called* as a witness * * * I will testify as follows." It is apparent none but the parties to a suit can know what witnesses may be called. The witnesses cannot state with assurance they will actually be called. The law does not require impossibilities. The affidavit of a witness, therefore, need not necessarily contain such an affirmative declaration. In this case the affidavit of the plaintiff supplies that necessary statement. He avers

that these affiants, whose affidavits are challenged, are necessary witnesses at the trial and that he cannot safely go to trial without their evidence. That statement meets the requirements of the law.

[3, 4] The affidavits further state certain witnesses were employed by the plaintiff *until specified dates.* In the absence of evidence to the contrary we must assume the employment ceased at the dates specified. There is no presumption created by section 1963, subdivision 32, of the Code of Civil Procedure, under such circumstances, that the employment of such witnesses continued to the time of the filing of the complaint or the hearing of the motion.

The petition for rehearing is denied.

◆

36 Cal.App.2d 147

MATHEWS v. CITY OF ALBANY et al.

Civ. 10904.

District Court of Appeal, First District,

Division 2, California.

Dec. 18, 1939.

Rehearing Denied Jan. 17, 1940.

Hearing Denied Feb. 15, 1940.

See 98 P.2d 1025

1. Explosives 🔑11

In action by 12-year-old boy against city and another for injuries resulting from ignition of powder obtained by boy from unexploded bomb found on playground after fireworks display, boy's testimony that he had played with fireworks for a number of years, knew properties of powder in the bombs, and had been warned against the bombs, *held* to establish boy's contributory negligence as a matter of law, authorizing nonsuit.

2. Negligence 🔑85(2)

A minor is bound to exercise the intelligence with which he is endowed, and, upon his discovery of perils, must exercise such care to avoid injury as may fairly and reasonably be expected from persons of his age and physical and mental capacity.

3. Negligence 🔑136(8)

Where the capacity and intelligence of a child are not controverted, the court may determine as matter of law whether a particular act is such as would be performed by child of his age, capacity, and intelligence.

◆

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Ralph Mathews, an infant, by William Mathews, his guardian ad litem, against the City of Albany and another, for injuries resulting from explosion of fireworks. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

Hearing denied; CARTER, J., dissents.

Leo A. Sullivan, A. K. Whitton, and C. H. Frost, Jr., all of Oakland, for appellant.

Crosby & Crosby and Joseph J. Yovino-Young, City Atty., all of Oakland, for respondent City of Albany.

J. T. Blalock, of San Francisco, for respondent Arthur Kirkpatrick, Superintendent of Recreation, City of Albany.

NOURSE, Presiding Justice.

A judgment of nonsuit was entered in favor of defendants in an action by plaintiff, an infant of about 12 years of age, for personal injuries.

On July 4, 1936, a fireworks display was conducted upon property leased by the City of Albany for playground purposes. The city purchased the fireworks from a local hardware company which furnished a man who discharged them at a public celebration on the night of the Fourth. The following day, a Sunday, several children found unexploded fireworks on the premises, which they carried away. The plaintiff found an unexploded bomb. He opened it and poured the powder in an empty container. He found an empty "shell" which had been shot off the night before. He poured his powder into that. Then he found another unexploded bomb which he opened. He poured this powder into his "shell", took it home, and placing it in his back yard, set a match to the open powder. Injuries to his eyes resulted from the ignition of this powder.

[1] The appellant has raised a number of objections to the order granting a nonsuit, but they all fall before the unimpeached testimony of his own witnesses which discloses his contributory negligence as a matter of law. His own testimony shows that he had played with fireworks for a number of years; knew that when he lit

loose powder it would either burn or explode; knew that there were two kinds of powder used in fireworks—one which would merely burn when ignited, the other which would explode; had been specially warned that the "bombs" used at the park on the previous night were dangerous and knew that they were of the kind that would explode; and thus knew that when he ignited the powder which he had placed in the container it would cause an explosion. The evidence is that he was a boy of normal mental and physical capacity, but one having more than normal knowledge and experience of and with explosives.

[2, 3] The case is controlled by Bolar v. Maxwell Hardware Co., 205 Cal. 396, 401, 271 P. 97, 60 A.L.R. 429, where a number of cases to the same purport are cited. The accepted rule is that a minor is bound to exercise the intelligence with which he is endowed, that upon his discovery of perils he must exercise such care to avoid injury as may fairly and reasonably be expected from persons of his age and physical and mental capacity. (20 R.C.L., p. 125.) And, where the capacity and intelligence of the child are not controverted, the court may determine, as matter of law, whether the particular act is such as would be performed by one of his age, capacity, and intelligence. Studer v. Southern Pacific Co., 121 Cal. 400, 404, 53 P. 942, 66 Am.St.Rep. 39.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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36 Cal.App.2d 158

BENGUET CONSOL. MIN. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 11171.

District Court of Appeal, First District, Division 1, California.

Dec. 19, 1939.

Hearing Denied Feb. 15, 1940.

1. Workmen's compensation 🔑82

The word "resident," as used in statute giving Industrial Accident Commission jurisdiction over all controversies arising from injuries suffered outside state, where injured employee is resident of state at time of injury and contract of hire was made in state, must be construed as synonymous with "domicile." St.1937, p. 292, § 5305.

[Ed. Note.—For other definitions of "Domicile" and "Resident," see Words & Phrases.]

2. Workmen's compensation 🔑20

The provision of Labor Code, limiting Industrial Accident Commission's jurisdiction over controversies arising from injuries suffered outside state by employees hired in state to cases wherein injured employee was resident of state at time of injury, is unconstitutional discrimination, so that benefits of such act are extended to nonresidents. St.1937, p. 292, § 5305.

3. Workmen's compensation 🔑82

An employee, initiating proceedings in state to recover compensation under Labor Code for injuries sustained by him outside state while employed under contract made in state, is entitled to benefits of such act, though not resident of state when injured. St.1937, p. 292, § 5305.

4. Workmen's compensation 🔑81

A contract of hire, signed by employee and employer's duly authorized agent in state, wherein employer's major products, shipped thereto, were sold for many years, large portion of its purchases were made through such agent, and employer maintained banking connections, was made in state within Labor Code provision, giving Industrial Accident Commission jurisdiction over all controversies arising from injuries suffered outside state by employees under contracts of hire made in state, though such contract provided that term of employment did not commence until employee's arrival in Philippine Islands, wherein he was injured. St.1937, p. 292, § 5305.

5. Workmen's compensation 🔑248

Mere changes in employee's salary or duties during term of his contract of hire do not abrogate such contract.

6. Workmen's compensation 🔑1342

Where employment of one contracting to perform certain services for definite period at fixed rate continued beyond such period, it will be presumed, in absence of new contract, that employment continued under same contract and on terms originally fixed. Civ.Code, § 2012.

7. Workmen's compensation ⚷1424

Evidence *held* to support Industrial Accident Commission's implied finding that employer and employee, awarded compensation for injuries sustained outside state after expiration of term of employment contract made in state, agreed before such expiration to extend contract and continue employment thereunder. St.1937, p. 292, § 5305.

8. Workmen's compensation ⚷20

The state has definite vital interest in employment contract made in state, at least where employer is doing business therein, and may constitutionally assume jurisdiction over awards of compensation for injuries sustained outside state by persons so employed, as by statute giving Industrial Accident Commission jurisdiction over all controversies arising from injuries suffered outside state by employees hired in state. St. 1937, p. 292, § 5305.

◆

Proceeding by the Benguet Consolidated Mining Company for a writ of review to review an award of compensation under the Workmen's Compensation Act by the Industrial Accident Commission for injuries to Frederick L. Knouse, petitioner's employee.

Award affirmed.

W. H. Lawrence and Burbank & Laumeister, all of San Francisco, for petitioner.

Everett A. Corten and Keith & Creede, all of San Francisco, for respondents.

PETERS, Presiding Justice.

This is a proceeding to review an award of compensation made by the Industrial Accident Commission in favor of Frederick L. Knouse against the Benguet Consolidated Mining Company, his employer.

The respondent commission, after a lengthy hearing, found that Knouse, while employed as a mine superintendent by petitioner in the Philippine Islands, was injured in the course and scope of his employment, on January 25, 1937. The evidence shows that Knouse was shot in the face and hands by a subordinate employee. There is no dispute that the injuries received were serious, disfiguring, and have resulted in permanent disability. Although the injury occurred in the Philippine Islands, the commission found that it had jurisdiction because the "contract of employment was made and entered into in the State of California".

Based on his disability rating as shown by the evidence, the commission awarded Knouse $25 a week for 207 weeks, amounting in all to $5,175; found that the employer was entitled to a credit for $532.14 already paid to Knouse; and awarded Knouse further medical care for the injuries received, for the balance of his life.

On this petition no challenge is made of the amount of the award or of the findings that the injury occurred in the scope and arose out of the employment. Petitioner contends that the commission had no jurisdiction under the California law to make an award against it; and, further, that if the California statutes purport to confer such jurisdiction, they are unconstitutional. The points raised by petitioner are neither new or novel. As will later appear, both points have been determined adversely to the contentions of petitioner by the Supreme Court of this state and of the United States.

The evidence shows that Knouse was born in North Carolina in 1901. After reaching maturity he engaged in the mining business or attended mining schools in various states of the United States, and, on occasion, in foreign countries. In 1931 he moved to California where he remained until 1933, in which year he went to the Philippines under contract with petitioner. During his two-year residence in California he spent the major portion of his time at Nevada City. He testified that, upon arriving in California in 1931, he approached a Mr. Eye, who was then the San Francisco representative of petitioner, to see if he could secure employment with that firm. He was not at first successful. He also testified that Nevada City was his residence in 1933 when the contract was finally signed; that while he lived there between 1931 and 1933 he registered there as a voter and voted in various elections; that he has never registered or voted elsewhere; that although he has moved about the world in the mining business, he prefers Nevada City as a place to live; that after being injured in the Philippines in 1937 he returned to the United States; that his port of entry was New York City; that he went from there to North Carolina to visit his family; that from there he went to Baltimore for medical treatment; that then he returned to North Carolina to continue certain treatments recommended by his doctors; that he then started West, stopping off for short periods in Denver and Salt Lake City; that he finally returned to Nevada City where he arrived in April, 1938; that he has resided there ever since.

The record shows that in October, 1933, Knouse signed a written contract of employment with the mining company in San Francisco, a Mr. M. H. Gerry, Jr., signing as the representative of the employer. This contract provided that Knouse was employed by the mining company for a period of two years, commencing upon his arrival in the Philippines, in the position of mine shift boss at a salary of $250 per month. The contract, although it provided that the employment was not to commence until the employee arrived in the Philippines, also provided that the employee was to receive one-half month's salary to cover the time he was en route to the Islands, and the employer agreed to pay all traveling expenses. It was also provided that if the contract were extended for an additional year, making three years in all, upon completion of the contract the employer agreed to furnish the employee with transportation to San Francisco or Seattle. This contract was signed in San Francisco on October 28, 1933. The exact status of Gerry, who signed on behalf of the company, and of Mr. Eye, his predecessor, is a matter of some dispute. The record shows that these men had offices in the Hobart building in San Francisco, the office rent being paid by Benguet Mining Company, and an affiliated mining company; that Gerry received a substantial salary from the company; that the name of the company was on the door of the office until removed apparently in 1937. It also appears that Gerry, and, before him, Eye, represented the mining company in many transactions. They signed various employment contracts as the representative of the company on instructions from the head office at Manila. The very contract signed by Knouse is headed: "Benguet Consolidated Mining Co. Head Office, Manila, P. I." Immediately below this appears: "San Francisco Office: 1106 Hobart Building, Telephone Garfield 2538." On instructions from the head office, these representatives purchased various materials and machinery for the company and caused them to be shipped to the Islands. These articles were paid for by Gerry by his personal check, and he reimbursed himself by drawing on the company's bank account maintained in the Wells Fargo Bank, San Francisco. The representative also at one time had (and the officers were not sure but that he still had) a power of attorney to represent the company in connection with its gold shipments to California. It also appears that the company is mainly engaged in the gold mining business, and has been engaged in that business since 1903; that it now produces about $450,000 bullion a month; that during that entire period its entire gold product has been shipped to San Francisco except for two trial shipments to New Zealand and Vancouver; that since the passage of the Gold Act by Congress, 31 U.S.C.A. § 440 et seq., it must ship all of its gold to the states, and in fact it ships it all to the San Francisco mint; that the money paid by the mint for the gold is deposited in the Wells Fargo Bank; that shareholders of the company living in the United States are paid dividends by checks drawn on the Wells Fargo Bank. It also appears that Gerry possesses the power to draw on the Wells Fargo Bank account.

After signing the contract in October of 1933, Knouse went to the Islands, and took up his duties as mine shift boss. During the first two-year period of the contract he received various increases in salary, and various promotions. The contract was then extended for the third year contemplated by its terms, and during this period Knouse was also promoted with consequent increase in salary and change of duties. At the end of the third year, Knouse continued to work for petitioner under circumstances hereafter related in detail. He was injured on January 25, 1937. He received certain medical, surgical and hospital care in the Islands, and then it was determined that he should return to the states for further medical treatment. In April of 1937, before leaving, Knouse and the company signed what purported to be a release, by the terms of which in consideration of a recited sum of a little over $6,000, Knouse purported to release the company from all liability growing out of the injury. However, this entire sum was not received by Knouse. The larger portion of the money was for doctor and hospital bills paid by the company, for some salary paid Knouse while ill, and for further medical expense in the states. The commission found that the employer was entitled to a credit against the award in the sum of $532.14. The amount of that credit is not challenged in this petition. Apparently the commission believed that the balance of the $6,000 was paid out for expenses properly chargeable against the employer under the California Workmen's Compensation Act. St.1917, p. 831. If the California law is applicable, this purported release was, of course, invalid.

The basic problem presented is whether, under this statement of facts, the California Industrial Accident Commission had jurisdiction to award compensation for the injury of which complaint is here made.

[1] Section 5305 of the Labor Code, St. 1937, p. 292 (formerly sec. 58 of the Workmen's Compensation Act, St.1917, p. 870), provides: "The commission has jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this State in those cases where the injured employee is a resident of this State at the time of the injury and the contract of hire was made in this State." It will be noted that the section purports to require that, to confer upon the commission, jurisdiction for injuries received outside the state, the employee must be a resident of California at the time of injury, and the contract of hire must be made in this state. Little need be said as to the first requirement—residence in the state at the time of injury. In the first place, the word "resident" as there used cannot possibly mean that the injured employee must be physically living in the state at the time of injury, because the statute presupposes that the employee is out of the state when injured. The word "resident" as there used must be construed to be synonymous with domicile. Quong Ham Wah Co. v. Industrial Acc. Comm., 184 Cal. 26, 34, 192 P. 1021, 12 A.L.R. 1190. The facts already recited in this opinion tend to indicate that respondent Knouse was in fact a resident of California at the time of his injury. He testified that from 1931–1933 he resided in Nevada City; that he registered and voted there; that he preferred to live there. After his injury, and after securing medical attention in the east and visiting his family in North Carolina, he returned to Nevada City, the place he preferred to live.

[2] However, even if this evidence does not support the inference that Knouse was in fact a resident of California at the time of his injury, that would not be a bar to the jurisdiction of the commission. By various decisions it has been established that the provision purporting to limit this provision of the act to residents of California is an unconstitutional discrimination, and that the effect of such unconstitutionality is to extend the benefits of the act to nonresidents, if the contract of hire was entered into in this state. This point was first directly presented in Quong Ham Wah Co. v. Industrial Acc. Comm., 184 Cal. 26, 192 P. 1021, 12 A.L.R. 1190, writ of error dismissed 255 U.S. 445, 41 S.Ct. 373, 65 L.Ed. 723. In that case the majority of the court expressly held that the effect of the unconstitutionality of the clause in question was to extend its benefits to nonresident citizens of other states. Justice Wilbur, in a concurring opinion, interpreted the majority opinion as follows (184 Cal. page 49, 192 P. page 1031, 12 A.L.R. 1190): "I agree with the majority of the court in holding that, notwithstanding the language of the statute with reference to residents, by virtue of the federal Constitution a *nonresident of California, if a citizen of the United States,* is entitled to the same remedies as a resident, and for that reason the Industrial Accident Commission had jurisdiction of the complaint of a resident of California, and would also have jurisdiction of a similar complaint by a nonresident, and that there is therefore no such discrimination as is prohibited by the federal Constitution." (Italics ours.)

[3] Whatever doubt may exist as to this phase of the problem was set at rest, by the case of Alaska Packers' Ass'n v. Indus. Acc. Comm., 1 Cal.2d 250, 34 P.2d 716; Id., 294 U.S. 532, 55 S.Ct. 518, 79 L.Ed. 1044. In that case, as both opinions state, the employee was a *nonresident alien.* Both courts held that, because the contract of hire was entered into in this state, the benefits of the California act were extended to such nonresident alien. In the decision of the Supreme Court of California it was held that the requirement that the employee must be a resident of California "has been nullified by the decision in Quong Ham Wah Co. v. Industrial Acc. Com., 184 Cal. 26, 192 P. 1021, 1025, 12 A.L.R. 1190 * * * which held that the Federal Constitution extended the benefits of the act to nonresidents also". 1 Cal.2d 255, 34 P.2d 719. The United States Supreme Court, in its opinion (294 U.S., at page 538, 55 S.Ct. at page 520, 79 L.Ed. 1044) pointed out that, under the California decisions, it had been held that the "privileges and immunities clause of the Federal Constitution prevented giving any effect to the requirement that the employee be a resident", and that the benefits of the act were available to a nonresident alien.

From these cases it follows that, under section 5305 of the Labor Code, if the contract of employment in existence at the time of the injuries was in fact entered into in California, Knouse, having initiated proceedings in this state, is entitled to the benefits of the California act.

[4] It is conceded that the original contract was signed by Knouse for himself and by Gerry as the representative of the mining company in San Francisco in 1933. The first contention of petitioner on this phase of the case is, that the contract of 1933, summarized above, was not a contract of employment entered into in California, but was a mere agreement to hire upon arrival in the Philippines; that no relation of employer-employee between Knouse and the petitioner ever existed in California; that the negotiations between Knouse and Gerry were similar to those between an independent employment agency and an employer in another state; that under proper principles, under such a state of facts, California has no jurisdiction. To sustain its contention petitioner relies almost entirely on "Comment: a" to section 398 of the Restatement of the Conflict of Laws.

Section 398 of the Restatement provides: "A workman who enters into a contract of employment in a state in which a Workmen's Compensation Act is in force can recover compensation under the act in that state for bodily harm arising out of and in the course of the employment, although the harm was suffered in another state, unless the act provides in specific words or is so interpreted as to apply only to bodily harm occurring within the state." This section is, of course, a statement of the general principle enunciated in section 5305 of the California Labor Code, supra. Following this section in the Restatement, appears "Comment: a", relied upon by petitioner, which reads as follows: *"Employment through agency.* The case of employment through an employment agency in one state, *where the entire business is carried on in another state,* and the applicant is merely sent to the principal office to report, is specially treated. In such a case, the relation is regarded as established not by the action of the agency, but by the workman reporting for work at the principal office of the business, the transaction at the employment office not being regarded as *definitive hiring.* In that case, the Compensation Act of the state where the workman reports for duty governs compensation." (Italics ours.) In the Alaska Packers' case, supra, the Supreme Court of California commented on this very section and pointed out (1 Cal. 2d page 261, 34 P.2d page 721) that the comment "does not reflect the general rule, but rather an exception to or modification of the general rule announced" in section 398, supra. After quoting section 398 the court pointed out that "the general rule as suggested, and not a comment noting an exception or modification of the general rule, would be the more persuasive".

However, whether the rule stated in "Comment: a" is or is not to be followed, as an exception to the general rule stated in section 398, we are of the opinion that the exception has no application to the instant case. Here the record discloses that a "definitive hiring" took place in California, not through an independent employment agency, but through Gerry, a duly authorized agent of the employer in this state. The "entire business" of petitioner was not carried on in the Philippines. For many years the major product of the petitioner has been shipped to, and sold in, California. A large portion of its purchases have been made through Gerry. Petitioner maintains banking connections in this state, and pays some of its shareholders by checks drawn on the local state bank. Gerry's powers and duties have been discussed earlier in this opinion. He was clearly acting as the agent of petitioner, and petitioner was clearly doing a material portion of its business in this state.

Although the contract of hire provided that the term of employment did not commence until the employee's arrival in the Philippines, this provision does not determine whether a "definitive" contract of employment was entered into in this state. It is of some significance that the contract provided not only for transportation to the Philippines, but also that the employee should collect a portion of his salary while traveling to the islands.

Under all these circumstances it must be held that the "contract of hire" of October, 1933, "was made in this state" within the meaning of section 5305 of the Labor Code. See, also, Globe Cotton Oil Mills v. Industrial Acc. Comm., 64 Cal.App. 307, 221 P. 658.

The petitioner next contends that even if the October, 1933, contract of employment was made in this state, that it expired within two years, or at most three years, and that at the time of the injury the employee was working under a contract made in the islands. The commission found that the contract under which the employee was working at the time of injury—January 25, 1937—was entered into in the state of California.

As already held, the original contract of hire was made in California in October, 1933. This contract, by its terms, was to run for a period of two years, but contemplated its extension for another year. There is no serious dispute that the contract was extended for the third year. Knouse was injured after working a little over three years. The real dispute centers around the question as to whether, at the end of three years, the parties entered into a new contract of employment in the Philippines, or whether, prior to the expiration of the three-year contract, the parties mutually agreed to an extension of the term of the original contract made in California.

[5] The record shows that during the three-year period Knouse received various increases in salary and promotions. The law is well settled that mere changes in salaries or duties made during the term of the contract, does not abrogate the original contract, and that the original contract remains in force in spite of such changes. Thus, it has been held, that where a contract of employment for a definite term is entered into in one state, and the actual work is performed in another state, and the employee is injured in the latter state, the state where the contract was entered into has jurisdiction, even though changes in salary and duties were agreed upon in the state where the injury occurred. The basis of these decisions is that the original contract is still in force and effect in spite of the changes agreed upon in the state where the injury occurred. Selser v. Bragmans Bluff Lumber Co., La.App., 146 So. 690; Pettiti v. T. J. Pardy Const. Co., 103 Conn. 101, 130 A. 70; see, also, Magnolia Compress & Warehouse Co. v. Davidson, Tex.Civ.App., 38 S.W.2d 634; Texas Employers' Ins. Ass'n v. Volek, Tex.Com.App., 69 S.W.2d 33; Sims v. Truscon Steel Co., 343 Mo. 1216, 126 S.W.2d 204.

From these cases it is quite clear that the original contract of two years, extended to three years, was still in effect in spite of the changes in duties and salary agreed upon in the Philippines. It is undisputed that Knouse arrived at Antamok, Philippine Islands, on November 27, 1933. The contract would normally have expired November 27, 1936. Knouse was injured after the expiration of the three-year contract, on January 25, 1937.

Respondent commission takes the position that both by operation of law, and by act and intention of the parties, the original contract was extended, so that in January, 1937, Knouse was in fact still working under the contract made in California in 1933.

[6] The contention that the original contract of 1933 was still in force and effect in 1937 by operation of law, is based on the provisions of section 2012 of the Civil Code as that section read until 1937, when it was substantially transferred to the Labor Code, section 3003, St.1937, p. 262. Section 2012, as it read prior to 1937, provided:

"Where, after the expiration of an agreement respecting the wages and the term of service, the parties continue the relation of master and servant, they are presumed to have renewed the agreement for the same wages and term of service." This section apparently embodies the well-settled rule expressed in 18 Ruling Case Law, page 533, section 47, as follows:

"If persons have contracted for the performance of certain services for a definite period at a fixed rate, and the employment continues beyond the period agreed upon, in the absence of any new contract it will be presumed that the employment continued under the same contract and upon the terms originally fixed." See Conner v. Garrett, 65 Cal.App. 661, 224 P. 786, where the rule stated in Ruling Case Law, supra, was quoted and approved; see, also, Henkel v. J. J. Henkel Company, 212 Cal. 288, 298 P. 28; Magnolia Compress & Warehouse Company v. Davidson, Tex.Civ.App., 38 S.W.2d 634; J. I. Kislak, Inc., v. Muller, 100 N.J.Eq. 110, 135 A. 673.

[7] In the instant case it is not necessary to rely on the doctrine that the contract was extended by operation of law. The evidence shows that prior to the expiration of the three-year term the parties by mutual consent agreed to continue in effect the contract entered into in San Francisco in 1933.

Respondent Knouse testified that, in October, 1936, before the expiration of the three-year term, he had a talk in Manila with Mr. Duggleby, vice-president of petitioner, concerning his contract; that he told Duggleby that his contract was about to expire; that "Mr. Duggleby said continue on with your contract, working under the same contract"; further, that Duggleby told him to "continue on with this contract"; to continue on "under the terms of that contract * * * to continue under this original contract". Knouse further explained that the reason for continuing the old contract in effect was to assure him his vacation. The 1933 contract had provided that at the end of three years the employee was entitled to a trip to the states. Knouse explained that at the end of the three years it would have been difficult to put a new man in charge of the property, but that it was contemplated the construction would be completed shortly thereafter and then it would be easy for him to take his vacation. This evidence clearly supports the implied finding of the commission that prior to the expiration of the California contract, the parties, by mutual consent, agreed to extend that contract, and to continue the employment under that contract. The evidence also shows that petitioner itself apparently believed the California contract was still in effect at the time of the injury to Knouse. When the employer and employee entered into the purported release agreement after the injury, the president of the company, John W. Haussermann, furnished the employee with an itemized list of expenditures and a letter explaining them. In the letter it was mentioned "that under the contract with Mr. Knouse" he was entitled to transportation to San Francisco, but that, since the employee desired to go to New York, the company "agreed to waive" that provision, and to pay the cost of transportation to New York. Obviously, this part of the letter had reference to the clause in the California contract, above mentioned, entitling the employee to transportation to the states at the end of the 1933 contract. It is at least a reasonable inference that in March, 1937, two months after the injury, Mr. Haussermann believed the California contract of 1933 was still in effect.

[8] Petitioner's last contention is that if section 5305 of the Labor Code, supra, be interpreted to confer jurisdiction over petitioner by reason of the facts herein recounted it is unconstitutional. This contention requires but little comment. The Alaska Packers' case, supra, has definitely established that over contracts of employment entered into in this state, at least where the employer is doing business in this state, California has a definite and vital interest, and that, in such cases, the state may constitutionally assume jurisdiction over awards for injuries occurring outside this state. The latest case interpreting the California law is Pacific Employers Ins. Co. v. Industrial Accident Comm., 306 U. S. 493, 59 S.Ct. 629, 83 L.Ed. 940, affirming 10 Cal.2d 567, 75 P.2d 1058, decided by the United States Supreme Court in March of this year. In that case the contract of employment had been entered into in Massachusetts, and the injury occurred in California, so that the case is not factually similar to the instant case. In discussing the general problem, however, the court stated (page 632 of 59 S.Ct.): "Similarly the constitutionality of the provisions of the California statute awarding compensation for injuries to an employee occurring within its borders, and for injuries as well occurring elsewhere, when the contract of employment was entered into within the state, is not open to question. Alaska Packers Association v. Industrial Accident Comm., 294 U.S. 532, 55 S.Ct. 518, 79 L.Ed. 1044; New York Central R. Co. v. White, 243 U.S. 188, 37 S.Ct. 247, 61 L.Ed. 667, L.R.A.1917D, 1, Ann.Cas.1917D, 629; Mountain Timber Co. v. Washington, 243 U.S. 219, 37 S.Ct. 260, 61 L.Ed. 685, Ann. Cas.1917D, 642."

In the Alaska Packers' case, supra, the United States Supreme Court passed directly on the constitutionality of section 5305 of the Labor Code, and held the statute applicable in favor of a nonresident alien. The court stated (294 U.S. at page 547, 55 S.Ct. at page 524, 79 L.Ed. 1044): "The enactment of the present statute of California was within state power and infringes no constitutional provision. Prima facie every state is entitled to enforce in its own courts its own statutes, lawfully enacted. One who challenges that right, because of the force given to a conflicting statute of another state by the full faith and credit clause, assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum."

In the instant case the petitioner has not sustained the burden—in fact, the petitioner has not even pleaded a conflicting foreign statute or based any argument thereon. Its chief argument in this regard is that the record does not show any interest of California in this contract because the employer was not doing business in this state. The record in this regard has already been fully summarized in this opinion. That summary shows that the company was doing a substantial portion of its business in this state, sufficient, at least to give this state a vital and definite interest in contracts of employment entered into in this state regardless of where the injuries might occur.

For the foregoing reasons the award should be, and hereby is, affirmed.

We concur: WARD, J.; GOODELL, Justice pro tem.

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36 Cal.App.2d 116

CITY OF ELSINORE v. TEMESCAL WATER CO.

Civ. 2449.

District Court of Appeal, Fourth District, California.

Dec. 14, 1939.

1. Evidence 🔑**508, 574**

The court had duty of considering opinions given by expert witnesses concerning source of water in controversy, but was not required to accept as conclusive opinion of any one of them.

2. Waters and water courses 🔑**158½(1)**

In action by city to enforce its water rights under contract with water company authorizing company to construct dam cutting off flow of river and settling claims of parties to water, company had burden of proving its contention that waters released into river by construction of tunnel by a water district were in fact not the waters of the river.

3. Waters and water courses 🔑**158½(1)**

In action by city to enforce its water rights under contract with water company settling claims of parties to water of river, evidence relating to source of waters released into river as result of construction of tunnel by a water district sustained findings that those waters constituted a portion of waters making up natural flow of river so as to be subject to contract.

4. Waters and water courses 🔑**158(2)**

An agreement between city and water company settling claims to water of river and to all waters impounded and stored in water company's reservoir was required to be given a reasonable construction to give effect to parties' intention and to be interpreted in light of circumstances under which it was made and object sought to be attained.

5. Waters and water courses 🔑**158(2)**

Waters which were released into river as result of construction of tunnel by a water district, and which were impounded in water company's reservoir, were subject to contract between city and water company providing that all waters impounded in reservoir, with exception of prescriptive water otherwise provided for, should be allocated as provided by contract.

6. Waters and water courses 🔑**158½(2)**

The constitutional provision relating to conservation of water did not apply to use of water for maintenance of level of lake used for recreational purposes so as to preclude city lying on shore of lake, on ground that water would be wasted, from enforcing by injunction its right to water in controversy under contract with water company. Const. art. 14, § 3, adopted 1928.

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Appeal from Superior Court, Riverside County; Pat R. Parker, Judge.

Action by the City of Elsinore against the Temescal Water Company for the construction and enforcement of a contract settling a controversy as to water rights. From the judgment rendered, the defendant appeals.

Judgment affirmed.

Walter S. Clayson, of Corona, and Crump & Rogers, of Los Angeles (Guy Richards Crump, of Los Angeles, of counsel), for appellant.

Eugene Best, City Atty., and C. L. McFarland, both of Riverside, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment construing a contract with reference to the sharing of certain waters flowing in the channel of the San Jacinto river, and enjoining the defendant from diverting, impounding or storing such waters except as provided for in said contract.

The San Jacinto river rises in the San Jacinto mountains and on reaching the valley flows along the base of those mountains in a northwesterly direction for 18 or 20 miles and then makes a "U" turn, flowing in a southwesterly direction through Lakeview and Perris valleys for about 16 miles when it enters and passes through a narrow canyon about four or five miles long and known as Railroad canyon, and then enters Elsinore valley and runs into Lake Elsinore. During its course through Railroad canyon it is joined by the waters of Salt creek. Between the mouth of Railroad canyon and Lake Elsinore is a fan-shaped water-bearing detritus or debris cone, which is recharged by the waters of the river on their way to the lake. Water is and has been pumped from wells in this water-bearing cone by various interests and used for irrigation purposes in the Perris valley. The San Jacinto river is perennial until it reaches the floor of the valley, after which it flows only in the winter season except in wet years when it flows throughout the year. During that part of its course which lies along the westerly base of the mountains it is fed by many creeks and small streams, and by springs and general runoff from the slope of these mountains.

Lake Elsinore is a natural lake with an area of about seven square miles, a maximum depth of 40 feet, a capacity of 75,000 acre feet and, when full, stands at an elevation of 1,261 feet above sea level. Its main source of supply is the flow of the San Jacinto river and it rarely overflows, the last time being in 1916. The City of Elsinore lies on the shore of this lake and depends largely for its prosperity upon housing, feeding and catering to the wants of those who use the lake for various recreational purposes, including, boating, bathing and fishing.

The defendant is a mutual water company which supplies water to the city of Corona, and for irrigation purposes near that city. It had a prescriptive right to certain water, and had also pumped water from the lower part of Perris valley which had been taken in a conduit through Railroad canyon and on to the vicinity of Corona. In August, 1927, the defendant commenced the construction of a dam near the mouth of Railroad canyon which would have the effect of cutting off the flow of the San Jacinto river above Lake Elsinore and above the water-bearing cone, the plans including a pipe line and ditch for the purpose of conveying the water past Lake Elsinore. Several suits were brought by the City of Elsinore and other interested parties in the Elsinore valley, seeking to enjoin the building of this dam. After issue had been joined in these suits a compromise was agreed upon which was expressed in a contract executed on October 29, 1937, between the plaintiffs in the various suits as first parties and this defendant as second party.

This contract, after stating that the first parties are severally the owners of certain parcels of land lying below the mouth of Railroad canyon, within the watershed of the San Jacinto river, and all or part of which are riparian to either the San Jacinto river or Lake Elsinore or both of them, and that the first parties or some of them are and for many years have been withdrawing water from wells sunk in the debris cone at the mouth of the canyon, recites that it is the desire of the parties to settle and adjust, by this agreement, all differences between them respecting the issues in the injunction suits which had been filed, the construction of a dam in Railroad canyon, the maintenance and operation thereof and of the reservoir which would be created thereby, the amount of water which the water company may divert, impound and/or store in the reservoir in addition to the water to which it has a prescriptive right, the amount and extent of such prescriptive right, and the existence at various stages of lake level of waters available for appropriation by the second party and the time and manner of such diversion.

The contract then contains numbered paragraphs setting forth the definite agreements of the parties. The parts thereof which are material here may be summarized or quoted as follows: 1. The water company may construct and operate a dam and reservoir in Railroad canyon, the dam to be of any height desired but not less than 70 feet above stream bed level. 4. The water company may divert from the river and impound and store in this reservoir "the first waters flowing in Railroad canyon at or above the dam (exclusive of Salt creek waters) up to a maximum in any one year of 2000 acre feet". This 2,000 acre feet is agreed upon and fixed as the amount of water to which the second party is entitled by prescriptive right, which water is therein-after to be referred to as "prescriptive water". 5. In addition to its prescriptive water the water company may store in the reservoir all or any part of its Perris valley waters "subject to allocation thereof" as provided in paragraph 6. 6. "All waters, diverted from San Jacinto River and/or Salt Creek, and all other waters impounded and stored in the reservoir, less the amount of the prescriptive water impounded therein and less losses of water stored in the reservoir, shall be allocated in the following ratio: One-sixth to first parties and five-sixth to second party." 8. "Second party may, and it shall have the right (so far as first parties are concerned) to divert into and store in its Railroad Canyon reservoir, from the waters of the San Jacinto River, and Salt Creek, the respective quantities of water hereinafter in this paragraph set forth in addition to its prescriptive water; that is to say": (here follow provisions that an unlimited quantity may be diverted and stored whenever the lake level is above 1,255 feet, that certain maximums may be diverted and stored when the lake level is between 1,250 and 1,255 feet and when it is between 1,245 and 1,250 feet, and that the second party "shall not make any diversions from the flow of the San Jacinto River, or Salt Creek, or store any water of the San Jacinto River, or Salt Creek, other than its prescriptive water" whenever the lake level is at or below 1,245 feet.) "The water company may also impound and store such waters, in addition to the said waters of the San Jacinto River, and Salt Creek as it may desire." The agreement then provides for an immediate dismissal of the injunction suits then pending.

After the dam was built, and in 1933, the Metropolitan Water District commenced construction of a 13-mile tunnel into and through the San Jacinto mountains, which had not been completed at the time this action was tried. In the course of such construction large quantities of water were encountered in the mountains and were released in such a manner that they entered the channel of the river, as it flowed along the base of the mountains, and followed the course of the river into Railroad canyon where they were intercepted by the defendant's dam and held in its reservoir. The amount of this water thus reaching the reservoir was, up to the time of the trial, in excess of 90,000 acre feet. During that period the defendant was storing behind its dam in Railroad canyon and diverting down its pipe lines past Lake Elsinore large quantities of this water, and it is admitted that no part of such water was allowed to flow past the dam.

In the meantime, by 1936, the last of a series of dry years, Lake Elsinore had receded until it had a maximum depth of only six feet, an area of less than 1,700 acres and a volume of about 5,000 acre feet. The low and stagnant condition of the lake caused the accumulation of a green slime on the surface of the lake along the shore, caused the death of fish therein, and gave rise to noxious odors which pervaded the entire City of Elsinore. The lake became unsuitable for any recreational purpose, which resulted in a decline of property values in the city, a decrease in its population and a loss of business to its inhabitants.

This action was then brought for the purpose of determining whether or not the waters reaching this reservoir as the result of these tunnel operations come within the provisions of the contract referred to, and for the purpose of enforcing the plaintiff's rights thereunder. The court found in all respects in favor of the plaintiff finding, among other things, that the water intercepted in drilling this tunnel forms a part of the source of supply of the San Jacinto river and except for such interception would form a part of the flow of that river; that the water issuing from said tunnel was not developed and foreign water in respect to the San Jacinto river; that the defendant had for more than two years stored and impounded in its reservoir back of said dam, and diverted therefrom down it pipe line past Lake Elsinore, large quantities of such water in excess of the amounts permitted by the abovementioned contract; that the defendant threatens to continue the diversion and storage of large quantities of water in excess of the amounts permitted by the contract, which water would otherwise reach Lake Elsinore and raise its level; and that the lowering of the lake level has caused certain described conditions which have injured the City of Elsinore and its inhabitants, for which pecuniary compensation cannot afford adequate relief. As a conclusion of law, the court found that all of the water in question and any other water stored in or diverted from this reservoir is and shall be subject to the terms of the agreement between the parties, including the provision therein that any water diverted, impounded or stored by means of this dam, with the exception of the prescriptive water above referred to, shall be allocated between the parties in accordance with the terms of the contract. Judgment was entered accordingly, it being decreed, in effect, that all of the water in controversy is and shall be subject to the terms of the agreement and that an injunction issue restraining the defendant from diverting into or storing in its reservoir or removing therefrom any such water in excess of the amounts permitted by the contract. From this judgment the defendant has appealed.

The only controversy here is as to whether or not the water thus encountered in the tunnel operations and released into the river was and is subject to the terms of the contract between the parties. The appellant contends that this is foreign water which in the course of nature would never have reached its reservoir or Lake Elsinore, nor have furnished support for other water enabling such other water to reach the lake. In other words, it is contended that it conclusively appears from the evidence that this water, had it not been artificially turned into the stream bed, would and could have had no material effect upon the flow of water in the San Jacinto river. It is argued that the application of the contract is, by its terms, expressly limited to "water of the San Jacinto river" and that it has no application to waters which in the course of nature would not be a part of the flow of that river but which, because of some external means, happen to be flowing in a part of the bed of that stream. Particular reliance is placed upon paragraph 8 of the agreement, giving the appellant the right to divert and store in its reservoir "from the waters of the San Jacinto River" certain quantities of water varying at respective levels of the lake, and the last sentence of which reads: "The Water Company may also impound and store such waters, in addition to the said waters of the San Jacinto River, and Salt Creek as it may desire." The appellant, claiming that this is water which otherwise would not have reached its reservoir and that the respondent was entitled only to a portion of such flow of the river as would naturally reach Railroad canyon, relies upon the principle expressed in Pomona Land & Water Co. v. San Antonio etc. Co., 152 Cal. 618, 93 P. 881, that where one is entitled to the use of a given amount of water at a given point he may not lay claim to any excess water reaching that point however it may be produced. This principle has been applied where one party is entitled to a fixed amount, and the other has developed or saved additional water which may be taken without interfering with the right of the first party. Not only was none of the water here in question developed or saved through any efforts of the appellant, but the question remains as to whether the amount to which the respondent was entitled was so fixed by the contract as to exclude it from sharing in these waters.

The appellant contends that the findings, to the effect that the water encountered and intercepted in the construction of this tunnel forms a part of the source of supply of the San Jacinto river, and that without such interception such waters would form a part of the flow or tend to support the natural flow of the San Jacinto river, are not supported by the evidence. It relies upon the testimony of two of its witnesses one of whom stated that he was a "civil engineer and geologist" and the other that he was a "consulting engineer and geologist". It is argued that the testimony of these witnesses stand without contradiction in the record because no other witness who testified qualified himself as a "geologist".

These witnesses testified that there are a number of major and minor "faults" running near and through the San Jacinto mountains. The principal one is the San Jacinto fault, which runs along the westerly base of these mountains. One of these witnesses testified that he had traced this fault from some miles north of the tunnel to a point near the west portal thereof. The other testified that he believed this fault was buried under an alluvial deposit from that point on southerly. The testimony is that the San Jacinto fault, and a number of lesser faults parallel to it, run in the general direction of northwest to southeast; that there are also a number of minor cross-faults running in a northeasterly and southwesterly direction; and that the effect of the forces of nature was to create a wall of "gouge" along the several fault zones, caused by heavy pressure and the intense rubbing of one side against the other which ground the rocks into a fine powder and formed a gouge which was impervious to water. In brief, the theory of these witnesses was that the gouges thus formed along these fault zones acted as dams which would prevent water from passing through them except for trifling leaks in some places. After describing the various faults, so far as known from surface indications and as disclosed by operations in this tunnel, each of these witnesses expressed the opinion that the natural dams created by these fault zones would prevent the waters which were encountered in the drilling of this tunnel from ever reaching the San Jacinto river or from in any way contributing to or affecting the flow of water in that river. One of the main reasons given for this opinion was that the water level in a certain "graben" was not lowered by the operations in the tunnel. This graben is an artesian basin lying at the foot of the mountains and through which the San Jacinto river flows during a part of its course. A map in evidence indicates that this graben is a mile or two wide and extends from a point some three miles southerly from the west portal of the tunnel to a point some ten miles northerly from the tunnel opening.

It does not seem surprising that the water level in this graben remained the same after the tunnel operations with this extra water flowing through the same, in addition to any other source of supply. Both of these witnesses admitted that there might be fissures in the gouges along the fault zones which would permit some water to escape, although they thought the amounts would be small. One of them testified that no springs along one creek which flows into the San Jacinto river showed any signs of being affected by the tunnel operations, but that some springs along another such creek, located six or seven miles from the tunnel, were dry. This witness further admitted that the tunnel operations had affected the water level or flow of certain springs, water courses and lakes on a large ranch located at the foot of the mountains and near the San Jacinto river causing them to go dry, although others on the same ranch were not affected. This witness testified that there was no way of telling how high these various faults were, how deep they went into the ground, or how far they extended laterally, which he said might be ten feet or ten miles.

A "Civil engineer, in the hydraulic line", with twenty-five years' experience and considerable experience in studying water in connection with the San Jacinto river, testified for the respondent. He testified that in years of normal, or above, rainfall the waters of the San Jacinto river reached Lake Elsinore as surface flow; that of the waterfall in the mountains of the watershed affecting the San Jacinto river a portion flows down immediately, a portion is absorbed in the ground whence it comes out in temporary springs and seepage, and a portion percolates on down and goes into storage in cracks and fissures, escaping at some later time and at some place either in the form of surface springs or underground escape from the mountains; that, in his opinion, the main San Jacinto fault is buried all along the foot of the San Jacinto mountains; that the top of this main fault is below the tunnel in question at its west portal; and that the top of this fault is below the ground surface of the graben to which we have referred. He stated that although these faults do act as dams there is both leakage through fissures in the faults and overflow over the faults as they are buried, through a modern alluvium of sand and gravel which carries water across the faults. He testified that the buried waters in these mountains reach the graben by passing through the faults and by going over the top of them; that the underground waters in the San Jacinto mountain area northeast of the main San Jacinto fault support the stream flow of the San Jacinto river both by being in contact therewith and by furnishing a reservoir supply of water which escapes as springs and also escapes underground; that these waters both have contact with the water in the graben area and also support that water; that if these mountain waters are reduced in quantity it directly affects the water which will reach and become a part of the flow of the San Jacinto river; and that these mountain waters not only affect the water level in the graben but the water in the graben affects the water in the San Jacinto river by supporting and helping any stream flow that reaches that area. The general effect of his testimony is that the underground storage water in question affected and contributed to the flow of the San Jacinto river both directly, and indirectly by supporting other waters which without such support would not reach and become a part of the flow of that river. His testimony supported the inference that these tunnel operations affected the flow of water in the San Jacinto river by causing a larger present flow at the expense of a later flow.

[1] While expert evidence is both valuable and necessary in such a case as this, it by no means follows that the opinion of any one expert witness must be accepted by the court as conclusive. A knowledge of surface indications of possible or probable geological formations may be valuable to an engineer engaged in the study of water conditions and water development. Some knowledge along this line may be acquired by a civil engineer who studies water conditions and the physical facts which affect those conditions over a long period of time, and in a particular area. While the qualifications of these witnesses had an important bearing, as did the reasons they gave for their opinions, both affected the weight that should be given to their testimony by the trial court. Each of these expert witnesses testified at length as to various physical facts in relation to the area above and around the reaches of the San Jacinto river. It was the duty of the court to consider the respective opinions given by these witnesses, and the reasons therefor, and it cannot be said that the testimony of one of them was entitled to no consideration since that witness had not claimed to be a full-fledged "geologist", whatever that may be. A clear conflict appears in the testimony of the expert witnesses.

[2, 3] After considering all of the evidence the court concluded, as stated in a memorandum opinion, "that the waters from the Aqueduct tunnels do in fact constitute a portion of the waters going to make up the natural flow of the San Jacinto river. That the underground reservoirs constitute a support to the surface flow and do feed the springs and streams tributary to said San Jacinto river and that any asportation of said tunnel waters from the stream or watershed would seriously and injuriously affect the flow of said stream throughout its entire course." The question of whether these underground waters, released through the tunnel operations, were waters which would naturally feed this river or furnish support for other waters which would in the course of nature add to the flow of that river, was one of fact. The burden was upon the appellant to prove that these waters, shown to have been flowing in the stream bed and to have been intercepted by the dam in question, were in fact not the waters of the river. Larsen v. Apollonio, 5 Cal.2d 440, 55 P.2d 196. The court found to the contrary and the evidence, although conflicting, is sufficient to sustain those findings.

[4] Assuming that the water in question would not, in the course of nature be a part of "the waters of" this river, a further consideration is as to the effect of the existing contract upon the rights of the parties thereto, with respect to sharing in the use of said water. This water was not produced by the appellant and, whatever its original source, it was water which did flow down the river and was intercepted by the dam and stored in the reservoir which was created pursuant to the terms of the agreement. That agreement should be given a reasonable construction in order to give effect to the intention of the parties as expressed therein, and should be interpreted in the light of the circumstances under which it was made and the object then sought to be attained. The primary purposes of the contract were to permit the appellant to erect the dam and maintain the reservoir; to protect the respondent, and the other parties, by limiting the amount which the appellant might divert or impound from the water flowing in that part of the river and which would, except for the dam, proceed on toward Lake Elsinore; and to allocate the water thus diverted or stored as between the respective parties. While the parties did not then contemplate an artificially accelerated flow of the river at that point the language used indicates an intention to contract, as between themselves, with respect to the storage and disposition of any and all water which would be intercepted by the proposed dam.

[5] The provisions of the contract giving to this appellant a right to divert, impound or store water are contained in paragraphs 4, 5 and 8 thereof. Paragraph 4 gives it the right to divert from the river and store in the reservoir a yearly maximum of 2,000 acre feet of "the first waters flowing in Railroad Canyon at or above the dam (exclusive of Salt Creek waters)". This means the first waters flowing in the river which reached Railroad canyon. That amount is agreed upon as water to which the appellant has a prescriptive right and which it may exclusively use. Paragraph 5 gives the appellant the right to store in the reservoir all or

any part of its Perris valley waters. This is water which the appellant had previously pumped in Perris valley and brought through Railroad canyon in a conduit. It is significant that irrespective of the origin of this water or whether or not it would, in the course of nature, have reached this dam, the contract provides that this water when thus stored is "subject to allocation thereof" as provided for in paragraph 6. Paragraph 8 then gives the appellant the right to divert and store in the reservoir from the waters of the San Jacinto river and Salt creek certain quantities of water at various levels of the lake, with the final provision that it may impound and store such additional waters as it may desire. This last clause is particularly relied upon by the appellant as giving it the right to intercept by its dam, and keep for itself, all of the waters here in question on the ground that they constitute no part of the natural flow of the river. While that provision permits the appellant to store in the reservoir any foreign water or water which would not naturally flow through Railroad canyon, it not only refers to water which actually reaches the reservoir but the appellant is not entitled under the terms of the contract to the exclusive use of such water. Paragraph 6 relates to all water that may be impounded by the proposed dam and provides that all waters diverted from the river and/or Salt creek "and all other waters impounded and stored in the reservoir", with the exception of the prescriptive water provided for in paragraph 4, shall be allocated "one sixth to first parties and five-sixths to second party".

It thus clearly appears from the terms thereof that the existing contract between the parties covered the waters here in question and that the court correctly concluded and decreed that all of the water involved in this controversy "is and shall be subject to the terms of said agreement".

[6] The appellant makes the further contention that, in the exercise of the police power for the promotion of the general welfare, section 3 of article XIV of the state Constitution, adopted on November 6, 1928, limits rights to water to the reasonable use thereof and that the respondent was not entitled to injunctive relief because the contract of October 29, 1927, was against public policy in that it permitted the waste of water. It is argued that the effect of the injunction is to permit the respondent "to waste water in a stagnant pond" while depriving the appellant of water it is supplying others for irrigation and domestic purposes. Aside from other considerations, including the fact that water which passes the appellant's dam recharges the cone area from which water is pumped to irrigate lands near the respondent city, the argument that the use of water for the purpose of maintaining the level in Lake Elsinore constitutes waste and unreasonable use thereof is without merit. Neither the maintenance of health-giving recreational opportunities, nor the existence and continuance of large business interests devoted to and built up for the purpose of making those opportunities available to large numbers of its citizens, can be held to be against the public policy of this state.

While the case came up in a different form the principle contended for by this appellant was decided adversely to it in City of Los Angeles v. Aitken, 10 Cal.App. 2d 460, 52 P.2d 585, 592, which case involved Mono lake, a lake very similar to Lake Elsinore in its conditions and available uses. In that case it was held that the use of stream water to maintain the level of the lake, and the uses and benefits resulting therefrom, were neither unreasonable nor in conflict with the provisions of article XIV, section 3, of the Constitution. In that case, the court said: "But this limitation of riparian rights of owners of land to a necessary use for beneficial purposes does not mean that the water must be actually used in irrigating the land or consumed for domestic purposes. It does not authorize the appropriation of littoral rights to land bordering on the margin of a lake without the payment of just compensation therefor, when the very value of the land depends on the maintenance of the lake in its natural condition. Irrigation and household uses of water are not the only reasonable or beneficial purposes for which it may be employed, even though the presence of mineral salts or alkali in the water rends it unfit for human consumption or domestic use."

It may be further observed that this issue was not raised by the pleadings or gone into at the trial, and there is no evidence that other sources of supply were not sufficient for the needs of the appellant and the people to whom it supplies water. Under the circumstances here appearing, and as between the parties hereto, this constitutional provision has no application, and no reason appears why injunctive relief was not properly granted.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

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36 Cal.App.2d 171

BROWN v. MURPHY.

Civ. 2400.

District Court of Appeal, Fourth District, California.

Dec. 19, 1939.

Hearing Denied Feb. 15, 1940.

1. Mines and minerals 🔑19(1)

Notices of location by miners are to be liberally construed.

2. Mines and minerals 🔑38(15)

In action to quiet title to mining claims, evidence supported finding that plaintiff had knowledge of boundaries of defendant's claims, and that in relocating same claims, plaintiff did not act in "good faith." Civ. Code, § 1426p.

[Ed. Note.—For other definitions of "Good Faith," see Words & Phrases.]

3. Mines and minerals 🔑26

A person who knows that mining claim is in actual possession of another cannot honestly believe that it is vacant and subject to entry and relocation, and entry under such circumstances cannot be made in "good faith" unless it is made upon some right or color of right, or claim of legal right to make entry existing before the entry. Civ.Code, § 1426p.

4. Property 🔑7, 9

Actual possession in another is prima facie evidence of title in possessor, and is protected against lawless invasion without right or color of right, but one who has title and present right of possession may always take peaceable possession of what he claims to be his own.

5. Mines and minerals 🔑38(2)

Where defendant in action to quiet title to mining claims was in actual possession and occupancy of property after discovery of mineral, intrusion by plaintiff in bad faith, with full knowledge of such facts and without any right or color of title, constituted him a "naked trespasser" who was in no position to question defendant's title. Civ.Code, § 1426p.

[Ed. Note.—For other definitions of "Naked Trespasser," see Words & Phrases.]

6. Mines and minerals 🔑14(1)

Although, generally, any competent locator may enter upon mineral land of the United States which is not covered by valid subsisting location, even though it be in actual possession of another, such entry must be peaceable and in good faith.

7. Mines and minerals 🔑27(3)

Good faith confronts any subsequent locator who enters on actual possession of senior locator's land for purpose of initiating claim to the same ground, although senior location be invalid, and when such entry is in bad faith, such intrusion constitutes a "naked trespass."

8. Mines and minerals 🔑38(14)

Since plaintiff in action to quiet title to mining claims must rely on strength of his own title, it was incumbent on him to prove that he located in good faith, especially when property was in actual possession of another.

9. Mines and minerals 🔑38(20)

In action to quiet title to mining claims, copies of recorded affidavits of proof of annual labor sustained finding that annual assessment work was done in time and manner and to extent required by law.

10. Mines and minerals 🔑38(20)

In action to quiet title to mining claims, finding that annual labor was done could have been rested on oral testimony, though conflicting, without considering recorded affidavits of proof of annual labor.

11. Mines and minerals 🔑38(14)

The burden was upon plaintiff in action to quiet title to mining claims to prove failure of defendant to do required annual work.

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Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by J. Lex Brown against T. J. Murphy to quiet title to mining claims.

From a judgment for defendant, plaintiff appeals.

Affirmed.

L. M. Cox, E. John Eriksson, and Homer M. Bail, all of San Bernardino, for appellant.

Duckworth, Harrison & Mussell, of San Bernardino, for respondent.

GRIFFIN, Justice.

This is an action to quiet title to certain mining claims in San Bernardino county, described by appellant as the Ledge Group of claims. Defendant and respondent answered and denied plaintiff's title and right of possession; admitted an adverse interest in the property and alleged ownership and right of possession to certain mining claims known as the Gold Chief Group; and prayed for judgment quieting title to the latter group of claims.

Trial was had before the court which resulted in a judgment for defendant and respondent, quieting his title to the Gold Chief Group, and against appellant's claim of title to the Ledge Group of claims. Plaintiff appeals from the judgment.

T. J. Murphy and his predecessors in interest have been the owners and in possession of the Gold Chief Group of mining claims for more than forty years. These claims are situated in the Goffs Mining District and are named as follows: Gold Chief, Gold Chief Number Two, Marie, Ethel, and Gold Chief Number One, the location notices of which were recorded August 30, 1893; August 30, 1893; October 25, 1894; April 2, 1896, and January 9, 1897, in the order named. In the original location notices the Gold Chief was described as the Gold Chief Claim; the Gold Chief Number Two as Gold Chief South Extension Mine; the Marie as Miriam Gold Mine; the Gold Chief Number One as Gold Chief North Extension Placer Mining Claim; and the Ethel as the Ethel Gold Mine. The record title shows various transfers extending over many years, by which T. J. Murphy claims title in addition to adverse possession for the period prescribed by law.

These mining claims are contiguous. Most of the development work for the group was performed on the principal claim, which is the Gold Chief. The main shaft on the Gold Chief is 200 feet in depth and considerable work was done on the 80, 100 and 200-foot levels. On the 200-foot level there is a cross cut about 75 feet in length, and approximately 220 feet of drifting. On the 100-foot level there is a cross cut of 36 feet and approximately 85 feet of drifting. On the 80-foot level, the drift is approximately 119 feet. There is a shaft known as the Du Pont Shaft, 100 feet deep, on the Gold Chief Number Two, and a tent house and tool shop is located on the Gold Chief.

Proofs of labor containing some variance in descriptions were admitted in evidence showing annual labor from 1896 to 1937 in excess of $15,800. A Mr. Seburn was employed by respondent to act as watchman and do the assessment work on these claims since 1910. He lived on the property continuously for two and a half years prior to the trial. For several years past, respondent paid Seburn between $500 and $600 per year for his services in acting as caretaker and doing assessment work. It appears that there was no interference with respondent's long-continued possession of the Gold Chief mines until appellant appeared on the premises. Appellant visited the property in 1921, and again in September, 1936. He had a conversation with respondent's agent, Bagley, in which appellant expressed a desire to lease the Gold Chief property and obtained permission from him to sample the mine. On December 17, 1936, appellant wrote to respondent's agent asking for a lease and notified the agent that he was going to take out several tons of ore to find out the most profitable way to work the mine. Appellant agreed to pay a royalty on ore shipped. He extracted and shipped the ore between December, 1936, and March, 1937, and paid the royalty as agreed. In April, 1937, he removed his tools from the property. Soon thereafter, in a letter to the agent, he asked to continue with his sampling of the mine and again referred to a lease. On May 12, 1937, he wrote to Mr. Seburn asking for a lease. Appellant admitted, both on direct and cross-examination, that he never intended to lease the mines. His testimony was as follows:

"(By Mr. Mussell): Q. Then, at the date of that letter, in 1936, you were hoping to be able to get a lease on these premises from the Murphy interests? A. No, sir; I never did expect to lease it.

"Q. Isn't that what you said in this letter? A. I know I did, but I knew the property was open for location, and I just wanted permission to go in and sample it; that is why I did that.

"Q. Well, didn't you do that for the purpose of leading Mr. Murphy and Mr. Bagley to believe that you were trying to negotiate a lease on these premises? A. I was still asking permission, to save any trouble, so that I could sample the mine, because I didn't want any hard feelings with Mr. Seburn."

In August, 1937, appellant returned to the mines and at about 6 o'clock in the evening, attempted to locate four claims, which he calls the Ledge Group, over and on the Gold Chief property, while Mr. Seburn was actually residing on the property. Appellant admits that he located these Ledge claims on discoveries made by him while on the property sampling and extracting ore under the previous agreements with the agent of respondent. After doing some work on the property, which he called development and location work, in September, 1937, appellant left the claims and soon thereafter commenced this action to quiet title.

On the trial of the issues as presented by the pleadings respondent did not dispute that monuments were erected on the claims as testified by appellant. He admitted that there was no question of fact that the land covered by said mining claims was mineral bearing, and it was stipulated that the common source of title was from the United States Government. Appellant offered proof of his citizenship, of a discovery of a vein or lode bearing mineral of sufficient value to justify its extraction, the setting up of monuments and tracing of boundaries, of performance of necessary and required location work, of the proper posting of notices of location, and the recorded notices as to his said four mining claims. Documentary evidence was admitted, over appellant's objection thereto, in support of respondent's chain of title through mesne conveyances to the claims pleaded in his answer. There exists discrepancies or variations in names of the claims and mining districts in the documents. Respondent presented, over appellant's objection thereto, documents of proof of annual labor in which similar discrepancies exist. These variations and discrepancies were explained in part by the instruments themselves and by the testimony of witnesses. Other than the existence of the Gold Chief shaft, there is no evidence other than the recorded location notices, that artificial monuments marking respondent's claims existed at the time of appellant's attempted location.

The evidence disclosed that the properties had not been actively operated as a mine for several years prior to the commencement of this action; that there was no great amount of machinery or mining equipment left upon the property since it had been operated as a mine; that Seburn had constructed and reconstructed a frame tent house upon the property and acted as watchman and also was employed to do the assessment work upon the claims; that there was a good road leading to the property used by him for ingress and egress and he repaired this road after each rain; that he cut stumps upon the property for fuel and to clear it; that he dug about the shafts and sampled for good ore; and that practically all of the work was done upon the Gold Chief claim. Seburn testified:

"(By Mr. Mussell): Q. How many days did you work in the department of the Gold Chief Group of mines during the period beginning June 30, 1936, and ending July 1, 1937? A. About 90 days.

"Q. During the period beginning June 30, 1935, and ending July 1, 1936, how many days? A. 90. * * *

"Q. During those two years was the value of the work that you did on those claims, as improvements to the mine, more than $500? A. Yes, it would amount to more than $500.

"Q. For each year? A. Yes, sir, for each year."

The court, inter alia, made findings that appellant's locations were within the boundaries of the Gold Chief Group; that appellant at the time of his locations well knew the boundaries of respondent's claims; that appellant's locations were not in good faith and were made while appellant was a permittee and licensee of respondent and while appellant was on respondent's claims under agreement with him for the removal of ore from the claims, and that the required assessment work had been done.

Appellant contends now that the following findings of fact and conclusions of law and judgment are unsupported by the evidence: (1) That there is no evidence in the record of the location of any of the mining claims described by the respondent or his predecessors; (2) That the premises located by appellant were within the boundaries of respondent's claims; (3) That appellant was a licensee and permittee of respondent when he located his claims; (4) That appellant did not locate his claims in good faith; (5) That appellant knew the boundaries of respondent's claims; (6) That respondent was the owner of his mining claims by adverse possession, and that he had been in continuous possession thereof for more than ten years; and (7) That respondent's alleged group of claims were marked and staked so that the boundaries could be readily traced.

It is also claimed that the trial court erred in admitting into evidence certain notices of location, deeds and proofs of labor, together with notices of intention to hold claims. It is further argued that proofs of labor cannot be considered prima facie evidence of work done on claims to which there is no record title; that the premises located by appellant were open and unappropriated government land; that respondent not owning the premises could not give a lawful permit to sample same; that respondent did not plead lack of good faith, and therefore this defense was not open to him; and that respondent did not perform his annual assessment work.

[1, 2] Appellant first argues that on the dates on which each claim was originally located, there was no law, either state or federal, which provided for the posting or recording of location notices; that there was no evidence in the record to the effect that the Goffs Mining District rules required such posting and recording; that therefore there was nothing to give any definite legal effect to the posting and recording of the notices of location of any of the five claims; that therefore the trial court erred in admitting them into evidence over the objection of the appellant (citing Daggett v. Yreka Mining Co., 149 Cal. 357, 86 P. 968); and that they did not constitute in themselves a location or any part of a legal location of the claims and are of no value except as acts in pais, and had no law behind them to give them any legal effect and should have been excluded from the evidence; that there were no monuments, stakes, or any means by which the mining property claimed to be owned by respondent in and about the Ledge Group of claims located by appellant, could be identified either as to location or territory embraced. It is argued that when the validity of a mining claim is questioned, the erection of the boundary monuments cannot be presumed to have been done, and there must be positive proof of their erection; that the only competent evidence of the marking of boundaries must be that of witnesses who saw the monuments placed, or who saw them standing after being placed, citing Guerin v. American Smelting & Refining Co., 1925, 28 Ariz. 160, 236 P. 684; McInerny v. Allebrand, 107 Cal.App. 457, 290 P. 530; Sarnow v. Wood, 130 Cal.App. 568, 20 P.2d 364; Madeira v. Sonoma Magnesite Co., 20 Cal. App. 719, 130 P. 175.

We have examined the cited cases. The facts and circumstances therein related are dissimilar and do not involve the good faith of the locator. In the instant case that question became directly involved and the court made a finding that appellant did not make his location in good faith. Appellant went upon the premises to sample the mine under a false pretense that he intended to enter into a lease with respondent. He well knew that any rights he had upon the premises were through respondent's right and claim of possession and ownership. In March, 1937, while appellant was on the property and shipping ore, he wrote to respondent's agent referring to "delay in the proceedings of the lease". From the testimony it is unquestionably shown that appellant gained entry to the Gold Chief property by leading respondent and his agents to believe that he, Brown, would lease the claims. Admitting the foregoing statements and letters, Brown stated that he never intended to lease the Gold Chief property. In respect to appellant's explanation of these false statements he said: "Well, I went down there to save trouble. * * *" It is admitted that the only discovery made by appellant was during the period he was in possession of the claims under the agreement. The attempted subsequent location by appellant was made about 5 or 6 o'clock in the evening when he well knew the keeper was on the property. The keeper objected and appellant told him he was going to locate them anyway, over his objection. The appellant had previously gained knowledge of the boundaries of the Gold Chief claims. His testimony was in part as follows:

"Q. (By Mr. Mussell): Do you know whether the claims which you located, or allege that you have located, are they up on the Gold Chief claims? A. Well, I know what they said; that is where Mr. Seburn told me that the Gold Chief Group of claims lay; * * *

"Q. You say you are familiar with this Gold Chief property—these Gold Chief claims? A. No; I know where Mr. Seburn said they were; he told me in brief,—this is where they lay—the neighborhood they lay in."

A drawing on a blackboard by the many witnesses testifying in relation to the claims, the boundaries, and other identifications, was made use of in the trial court. This drawing apparently has been erased. At any rate, a copy thereof is not before us for consideration. The record in relation thereto is confusing and difficult to follow, especially as to the conflict of boundaries. It is apparent from the testimony, however, that appellant attempted to relocate over the Gold Chief and Du Pont shafts, the main workings of the Gold Chief Group.

The appellant had personal knowledge, as well as knowledge, through recordation of the original location notices, of the area and description of the claims therein set out. Yreka Min. & Mill. Co. v. Knight, 133 Cal. 544, 547, 65 P. 1091; sec. 1426p, Civ.Code; Cheesman v. Hart, C.C., 42 F. 98; Vogel v. Warsing, 9 Cir., 146 F. 949; McLean v. Ladewig, 2 Cal.App.2d 21, 37 P.2d 502. The original recorded location notice dated August 23, 1893, provided in part as follows:

"Notice is *hearby* given that the undersigned in Compliance with the requirements of the Mining Act of Congress approved May 10th, 1872 we have this day located and claim 1500 linear feet along the *coarse* of this Lead, Lode or Vein of mineral bearing quart*s* and 300 feet in width on each side of the *midle* of said Lead, Lode or Vein situated in Goffs Mining District, County of San *bernanena,* State of California and more particularly described as follows, to-wit:

"Commencing at this monument of stone being the center of the Northerly end of claim and upon which this notice is posted thence easterly 300 feet to monument of stone, thence southerly 1500 feet to monument of stone, thence Westerly 300 feet to monument of stone being the center of the southerly end of claim thence westerly 300 feet to monument of stone, thence Easterly 300 feet to place of beginning.

"This claim is situated at the *bace* of the New York Mountain in the Lowe hills on the Southerly side of the *mountan* and about 7 miles northerly from Rock Springs and about 8 or 10 miles westerly from the town of Purdy on *on* the *Rail Road* and 3 or 4 miles southerly from the New York Mines and about 2 miles from the water in Rushon Canyon and shall be known as the Gold Chief Mine."

The other location notices received in evidence contain a similar detailed description. Notices of location by miners are to be liberally construed. Carter v. Bacigalupi, 83 Cal. 187, 23 P. 361.

The evidence is sufficient to support the finding that appellant had knowledge of the boundaries of the claims and to support the further finding that appellant, in relocating the same claims, did not act in good faith. It was stated in Harper v. Hill, 159 Cal. 250, 113 P. 162, 165:

"The object of the law in requiring the location to be marked on the ground is to fix the claim, to prevent floating or swinging, so that those who *in good faith* are looking for unoccupied ground in the vicinity of previous locations may be enabled to ascertain exactly what has been appropriated in order to make their locations upon the residue." (Italics ours.)

In Miller v. Chrisman, 140 Cal. 440, 73 P. 1083, 1084, 74 P. 444, 98 Am.St.Rep. 63, the rule is stated thus:

"One who thus in good faith makes his location, remains in possession, and with due diligence prosecutes his work toward a discovery, is fully protected against all forms of forcible, fraudulent, surreptitious, or clandestine entries and intrusions upon his possession. Such entry must always be peaceable, open, and above board, and made *in good faith* [italics ours], or no right can be founded upon it."

See, also, Tweedy v. Parsons, 217 Cal. 447, 450, 19 P.2d 497; Lind v. Baker, 31 Cal.App.2d 631, 88 P.2d 777.

[3–5] A person who knows that a mining claim is in the actual possession of another cannot honestly believe that it is vacant and subject to entry and relocation; and the entry under such circumstances cannot be made in good faith unless it is made upon some right or color of right, or claim of legal right to make the entry. Such a claim of right must exist before the entry, to constitute good faith in making the entry. If it does not exist, the entry is made without color of right or color of title, and is an entry in bad faith; for actual possession in another is prima facie evidence of title in the possessor, and is protected in the law against lawless invasion without right or color of right, but one who has a title and present right of possession may always take peaceable possession of what he claims to be his own. The undisputed findings of the court in the instant case are that the respondent was in the actual possession and occupancy of the property after the discovery of mineral thereon. When the appellant, in bad faith, with full knowledge of these facts, and without any right or color of title, ousted the respondent, and although if it may be conceded, which we do not, that the location under which respondent was in possession was invalid or defective, still he was in the actual possession after discovery, which is essential to perfect any mineral location, and which was the only discovery made under any location. The land was not open and unoccupied mineral land which warranted the appellant in the face of such knowledge of respondent's actual possession to invade such possession, oust respondent therefrom, and under such entry attempt to negotiate a location of the property. On the contrary, an intrusion under such circumstances by appellant, not in good faith, constituted him a naked trespasser who is in no position to raise any issue whatever on the question of title under which respondent held his possession of the property.

[6, 7] It is true, generally speaking, that any competent locator, for the purpose of negotiating a location for himself, may enter upon mineral land of the United States which is not covered by a valid subsisting location, even though it be in the actual possession of another, but still such entry must be peaceable and in good faith. Good faith confronts any subsequent locator who enters upon the actual possession of a senior locator's land for the purpose of initiating a claim to the same ground, although the senior location be invalid, and when such entry is in bad faith, such intrusion constitutes a naked trespass. Little Sespe Consolidated Oil Co. v. Bacigalupi, 167 Cal. 381, 139 P. 802; Talmadge v. St. John, 129 Cal. 430, 436, 62 P. 79; Butte & Superior Copper Co. v. Clark-Montana Realty Co., 249 U. S. 12, 39 S.Ct. 231, 63 L.Ed. 447, 458.

[8] In view of this finding and conclusion it is unnecessary to determine the many other points presented. Inasmuch as appellant must rely on the strength of his own title, under the circumstances here related it was incumbent upon him to prove that he located in good faith, especially when the property was in the actual possession of another. Schroder v. Aden Gold Mining Co., 144 Cal. 628, 78 P. 20; Chowchilla Farms v. Martin, 219 Cal. 1, 22, 25 P.2d 435; Del Giorgio v. Powers, 27 Cal.App.2d 668, 81 P.2d 1006; Hess v. Moodey, Cal.App., 95 P.2d 699.

[9–11] There appears to be little or no conflict in the evidence as to the assessment work done on the claims prior to 1936. The evidence as to such work subsequent to July 1, 1936, is conflicting. Copies of the recorded affidavits of proof of annual labor on the claims were received in evidence which is sufficient to sustain the finding of the trial court that the annual assessment work was done in the time and manner and to the extent required by law. Pidgeon v. Lamb, 133 Cal.App. 342, 346, 24 P.2d 206. The court could have rested its finding that the annual labor for the years in question was done on the oral testimony in the record, though conflicting without considering the affidavits. The burden was upon the appellant to prove failure of the respondent to do the required annual work. Musser v. Fitting, 26 Cal.App. 746, 148 P. 536. For the reasons expressed, the judgment of the court denying appellant's claim of title was quite proper. The decree quieting title of respondent as against appellant must be sustained.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.

PEOPLE v. KYNETTE et al. *

Cr. 3136.

District Court of Appeal, Second District, Division 2, California.

Dec. 18, 1939.

Hearing Granted Jan. 16, 1940.

1. Homicide ⚷230

An element necessary to be proved to sustain conviction of attempted murder is proof of specific intent to kill.

2. Homicide ⚷230

An element necessary to be proved to sustain conviction of assault with intent to murder is proof of specific intent to kill.

3. Explosives ⚷5

An element necessary to be proved to sustain conviction of malicious use of explosives with intent to injure another is proof of a specific intent to injure a human being. Pen.Code, § 601.

4. Criminal law ⚷878(4)

Where defendant is charged with offense of attempt to murder and offense of malicious use of explosives with intent to injure, and evidence is introduced concerning a single act, defendant may not be convicted of both offenses and verdicts finding him guilty of both are void for repugnancy. Pen. Code, § 601.

5. Criminal law ⚷878(4), 1175

Where evidence indicated single act of bombing of automobile, verdicts finding accused guilty of attempted murder, assault with intent to murder, and malicious use of explosives with intent to injure, as authorized by instruction, were inconsistent and required reversal of conviction. Pen.Code, § 601.

6. Criminal law ⚷878(4)

Where District Court of Appeal determined that verdict finding accused guilty of attempted murder, assault with intent to murder, and malicious use of explosives with intent to injure, were inconsistent, conviction of accused, who denied participation in the act on which prosecution was based, could not as contended by prosecution be affirmed on the count charging malicious use of explosives with intent to injure.

7. Witnesses ⚷300

A person cannot be compelled to be a witness against himself. Const. art. 1 § 13.

8. Witnesses ⚷309

Constitutional privilege against self-incrimination prevents the prosecution from introducing, over objection, evidence that accused has refused to testify before grand jury, claiming the constitutional privilege. Const. art. 1 § 13.

9. Criminal law ⚷1170½(1)
Witnesses ⚷309

In prosecution for malicious use of explosives with intent to injure, admission, over objection of accused, of evidence that accused, when summoned before grand jury which was investigating bombing upon which the prosecution was based, declined to answer questions, relying on their constitutional privilege against self-incrimination was violation of constitutional privilege of accused and constituted prejudicial error.

◆

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Earle E. Kynette was convicted of attempting to murder, assault with intent to commit murder, and malicious use of explosives, and Roy J. Allen was convicted of malicious use of explosives, and they appeal.

Reversed and new trials ordered.

John Oliver, of Los Angeles, Max E. Gilmore, of Hollywood, and George W. Rochester, of Los Angeles, for appellant Earle E. Kynette.

Richard H. Cantillon and John E. Glover, both of Los Angeles, and Max E. Gilmore, of Hollywood, for appellant Roy J. Allen.

Earl Warren, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and A. H. Van Cott, Jere J. Sullivan, and Eugene D. Williams, Deputies Dist. Atty., all of Los Angeles, for respondent.

McCOMB, Justice.

These appeals are:

(A) By defendant Kynette from judgments finding him guilty of the crimes of, (1) attempting to murder Harry J. Raymond, (2) assault with intent to commit murder, and (3) malicious use of explosives;

(B) By defendant Allen from a judgment finding him guilty of the crime of malicious use of explosives.

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*For subsequent opinion see 104 P.2d 794.

There are also appeals from the orders denying their motions for a new trial.

Although the briefs in this case total 1908 pages and the record consists of 4569 pages, we have had the opportunity of perusing appellants' opening briefs since October 27, 1938, respondent's brief since March 10, 1939, and appellants' supplemental briefs since January 13, 1939. Thus, though the oral argument took place on October 25, 1939, we are now prepared to render our opinion.

As stated by respondent in its brief, "the controlling facts in the case are simple and capable of statement in comparatively limited space". We therefore adopt substantially respondent's statement of the facts as follows:

January 14, 1938, there was in existence in the police department of the city of Los Angeles an organization known as the Special Intelligence Unit, which at the time of the commission of the crime of which defendants were convicted and for more than two years prior thereto had been under the command of defendant Kynette. Defendant Allen for some time had been a member of the unit. This unit had its headquarters in a building on West First street in Los Angeles separate from the rest of the police department. Its activities consisted principally in setting dictaphones, spying upon, following, and in general conducting an extensive espionage upon persons engaged in political activities against the interest of the city administration under Mayor Shaw.

June 17, 1937, a bankruptcy hearing was scheduled for the purpose of questioning one Harry Munson, who had been a member of the Los Angeles city police commission and against whom Ralph Gray had secured a judgment for several thousand dollars. Harry Raymond, a friend of Mr. Gray's appeared at the hearing as did also defendant Kynette. The hearing was postponed and finally set for January 25, 1938. After defendant Kynette and Mr. Raymond left the place where the hearing had been scheduled to occur, Mr. Raymond testified that the following occurred:

"A. In substance, Kynette said to me, 'You know this is an election debt.' I said, 'Do you understand what this money is for?' 'I think I know,' he said, and I said 'Which office are you from now?' He said, 'You know where I am from.' I said, 'I guess you are from the Chief's Office, you have been working over there.' He said, 'Yes, I am from the Chief's office, but I get my orders from Joe Shaw. Now,' he said, 'You know why I am here in regard to this campaign bill.' I said, 'What have you got to do with it?' He said, 'This thing has got to stop. You can't turn any heat on the administration.' I said, 'I am not interested in any heat or no heat going on the administration.' Gray has got $2,990 coming from Harry Munson. Gray filed a suit and Munson took the stand and confessed judgment and he has got it coming and Munson told me he would pay him and I would like to see Gray get the money and I am going to stay with Gray until he does get it or I find out that Munson hasn't got it. A man can't ride around in a' ——this is the substance of this whole conversation—— 'a man can't ride around in a DeSoto sedan and have $150 suits and have a room in a downtown hotel and have his meals brought upstairs and private barbers shave him unless he has got money.' He said, 'I am going to tell you something.' He said, 'Right now Munson is Joe Shaw's friend.' He said, 'You know I was off the job a while and I got back on the job. I am a lieutenant now.' I said, 'I know you are and I practically know how you got it.' And he said, 'There is nothing going to happen to Munson.' He said, 'Now, if there is any further trouble or any further bothering of Munson, you know I am the head of the Intelligence Squad.' I said, 'What has that got to do with me?' He said, 'Maybe you will find out a little later.' I said, 'Well, I will tell you something, Kynette. I have known you quite a while and if you are threatening somebody you are in the right place because we don't care about any threats. The part we are interested in is in helping Gray get his money.' I said, 'You have been bamboozling and bulldozing and running people around here for a long time, you and that Intelligence Squad. So far as Gray is concerned he can speak for himself. So far as I am concerned, I am not going to stand for it for one minute.' I said, 'If that is your attitude I will bid you goodbye right now,' and I started down the street. The reason I started down the street Ralph Gray had been waiting for Rose and Rose had just come down, and coming out the door of the Hall of Records and they started and as they started I started. I said, 'Well, I will be going.' He said, 'Just a minute Raymond.' I turned around and took a step and said, 'What is it?' He said, 'I hope you don't try to get too tough, because you remember what happened to that little boy Red Foster?' I said, 'I know what happened to Red Foster, but from what you say I guess you know more about it than I do,' and I went on down the street with Mr. Rose and Mr. Gray.

"Q. And do you know what happened to Red Foster? A. Yes, he was bombed out in his room."

Subsequent to June 17, 1937, and prior to January 25, 1938, the Special Intelligence Unit above referred to, under the direction of defendant Kynette set up an espionage upon Mr. Raymond. This was accomplished by setting members of the intelligence unit to spy upon Mr. Raymond during the daytime. A house (hereinafter called the spy house) was also rented near Mr. Raymond's home. This house was rented by one of the members of the intelligence unit under an assumed name and pursuant to the orders of defendant Kynette, who stated that he wanted a house in the immediate neighborhood of Mr. Raymond's house to install a dictaphone and to observe his activities. This occurred September 21, 1937. From this date until the time of the crime hereafter related, all of Mr. Raymond's activities were observed either by members of the intelligence unit stationed at the house above mentioned or by members of the unit following Mr. Raymond as he moved about the city.

Defendant Allen was assigned to duty at the spy house above referred to about October 25, 1937. About January 8, 1938, defendant Kynette stated to Mrs. Towns that he was tracing Harry Raymond's car, trying to find the reason why Mr. Raymond was giving information to certain individuals who were interested in the political life of Los Angeles. Shortly prior to this time defendant Kynette had been seen examining Mr. Raymond's parked automobile. In January 1938, as Mr. Raymond was walking on a public street in Los Angeles and passed defendant Kynette standing with five other men, defendant Kynette stated to the men with whom he was talking, "There goes the son-of-a-bitch now; it won't be long until I take care of him."

In December, 1937, defendant Kynette in the middle of the night was observed by Mrs. Raymond examining the door of Mr. Raymond's garage with a flashlight.

Mr. Fisher, a foundryman in Los Angeles, testified that at about the same time he had a conversation at his place of business with defendant Kynette as follows:

"Q. Yes, now, when you saw this man whom you have identified as the defendant Kynette, did he have this mustache on? A. No, sir.

"Q. Was there anybody with him? A. Yes, there was.

"Q. And describe the man that was with him. A. The man that was with him was a tall man, wore a felt hat, grey felt, soft hat, and a dark overcoat.

"Q. Did they come in together? A. Yes, sir.

"Q. Did the two of them have any conversation with you? A. The tall man.

"Q. The tall man did the talking? A. Yes, sir.

"Q. And was Kynette there? A. He was.

"Q. State what the conversation was. A. They came in there and I was back in the foundry working and I was called into the machine shop, and the tall man asked me if I had any pipe or any tubing of any sort around there, and I says, 'The only thing we have is a brass tubing or brass bushing stock,' and I showed him what we had; he said it was too thick and I says, 'What are you going to do with it?' 'Well,' he says, 'I want something thin that will break easy in small pieces,' and I says, 'Well, Mister, you came to the wrong place for anything like that. We don't make anything here that breaks easy,' so I told the man to go to the Kinney Iron Works. With that they went out of the side door, and that is all."

On the night of January 13 and the early morning of January 14, 1938, there was a great deal of activity by some persons in the spy house. A neighbor who lived across the alley from the spy house was awakened by three men who were talking in the alley and who immediately went into the spy house when he called to them. Later his wife heard footsteps going down the alley from the direction of the spy house toward the Raymond house and a half hour later heard footsteps returning from the Raymond house. Defendant Allen was on duty in the spy house on this night. The morning of January 14, 1938, Mr. Raymond left his house, went into his garage, got into his automobile, placed his foot upon the starter button, and immediately a terrific explosion occurred, which resulted in the demolition of his automobile, together with the garage, and serious injury to Mr. Raymond.

At the scene of the explosion were found many fragments of iron pipe, which experts testified were part of a bomb, which consisted of "a three inch malleable wrought iron pipe with a cast iron cap at each end".

A few days after the bombing, the neighbor who had seen the men near the spy house the night before the bombing was beaten by a man whom he identified as defendant Allen, who was accompanied by defendant Kynette, and told to keep his mouth shut as to what he knew concerning the Raymond bombing. The same day defendant Allen took a vacation and went to the mountains, where he stayed for several days.

January 15, 1938, Mr. Gray was at the hospital visiting Mr. Raymond, when he was called to the telephone, and had a conversation with a person whose voice he identified as that of defendant Kynette as follows: "The voice said, 'Mr. Gray? Mr. Ralph Gray? Yes. How is Mr. Raymond this evening? Mr. Raymond is resting better, thank you. Who is this?' There was no response to my query. He continued 'That's too bad. Next time we will do a better job. You're next, Mr. Gray, maybe tomorrow, next day or next week, but we will get around to you and we will do a better job on you than we did on Mr. Raymond.' I inquired, 'Why am I selected for this honor?' 'You stick your nose into other people's business. That is too bad.' I inquired if he had anything further to say to me and there was no response and I hung up the receiver."

Subsequent to the bombing, the garage of defendant Kynette's home was searched and there was found a small roll of California Cap Company detonator leg wire consisting of two strands, one white covered and the other black covered, which is produced only by the California Cap Company. Numerous pieces of wire of the same kind were found at the scene of the Raymond bombing. The several bits of black-colored leg wire found at the scene of the bombing, when added together, amounted in length to more than the several pieces of white-colored leg wire found at the same place. On the other hand, of the black-covered leg wire found at defendant Kynette's garage just the opposite was true. The sum total of the black-covered leg wire found at the scene of the bombing added to that found at Kynette's garage just about equaled in length the sum of the white leg wire found at both places.

Each defendant makes thirty-two separate and distinct assignments of error.

A.

Defendant Kynette urges that the judgments should be reversed for the reason, among numerous others, *that the trial judge committed prejudicial error in instructing the jury as follows:*

"Verdict Separate Offenses

"The defendants are charged in the Indictment with Four Counts, each of which are separate and distinct offenses, and each defendant may be convicted or acquitted upon any number or all of the offenses charged and each offense of which such defendant is convicted or acquitted must be stated in your verdict.

"Instruction requested by the Plaintiff and Given

"Ambrose
"Judge."

This proposition is tenable and is governed by the following pertinent rules of law in California:

[1] (1) An element necessary to be proved to sustain a conviction of the crime of attempted murder is proof of a specific intent to kill. People v. Miller, 2 Cal.2d 527, 530, 42 P.2d 308, 98 A.L.R. 913.

[2] (2) An element necessary to be proved to sustain a conviction of assault with intent to murder is proof of a specific intent to kill. People v. Wilson, 117 Cal. 688, 693, 49 P. 1054.

[3] (3) An element necessary to be proved to sustain a conviction of malicious use of explosives with intent to injure another is proof of a specific intent to injure (not kill) a human being. Pen.Code, § 601; People v. Koehn, 207 Cal. 605, 612, 279 P. 646.

[4] (4) Proof of existence of the specific intent necessary to constitute the crime of attempt to murder and proof of the existence of a specific intent necessary to constitute the crime of malicious use of explosives with intent to injure are inconsistent one with the other and may not be reconciled; and, where a defendant is charged with both offenses and evidence is introduced of a single act, defendant may not legally be convicted of both offenses,

and verdicts finding him guilty of each offense based on such evidence are inconsistent and void for repugnancy. People v. Koehn, 207 Cal. 605, 611, 279 P. 646.

In People v. Koehn, supra, defendant was charged and found guilty on two counts, (1) attempt to murder, and (2) malicious use of explosives with intent to injure a human being. In holding that the specific intents required to sustain a verdict of guilty of the foregoing offenses were inconsistent with each other and could not be reconciled upon any theory, our Supreme Court says at page 611 of 207 Cal., at page 649 of 279 P.: "Returning to the question whether a conviction on both counts of the information may be sustained, we are of the view that the two conclusions are inconsistent with each other and cannot be reconciled by the application of any rule by which the purposes of a rational mind may be determined."

[5] Applying the foregoing rules to the facts in the instant case, defendant Kynette was charged and found guilty of (a) attempting to murder Harry Raymond, (b) assault with intent to murder Harry Raymond, and (c) malicious use of explosives with intent to injure Harry Raymond. The trial judge, as hereinbefore pointed out, instructed the jury that they might find defendant guilty "upon any number or all of the offenses charged". Thus it is impossible to determine how the jury viewed the evidence and what criminal intent, if any, the jury found actuated defendant Kynette, that is, did he intend to kill Harry Raymond or did he merely intend to injure him? Since the defendant under the authorities above cited could not have had the specific intents to commit all of the offenses of which he was found guilty, the verdicts were void for repugnancy.

In People v. Werner, 29 Cal.App.2d 126, 84 P.2d 168, a case involving analogous principles of law, defendants were charged with (a) offering a bribe, and (b) grand theft allegedly committed in an effort to obtain money by false pretenses. The defendants were tried by the same trial judge who presided over the instant case, and an instruction identical with that set forth above was read to the jury. In reversing the judgments on the ground that the verdicts were inconsistent and repugnant and applying the rules of law as set forth in People v. Koehn, the District Court of Appeal says at page 132 of 29 Cal.App.2d, at page 171 of 84 P.2d: "* * * The law could neither imply one intent when a different intent was established by the evidence nor imply two different and conflicting intents from the same act. * * * If a criminal intent is to be implied it cannot be implied both ways, and it is impossible to tell how the jury viewed the evidence."

Thereafter our Supreme Court denied a hearing in People v. Werner, again affirming the principle of law announced in People v. Koehn, supra.

[6] There is no merit in respondent's contention that, should this court find the verdicts inconsistent, nevertheless the judgment should be affirmed on the count finding defendant Kynette guilty of maliciously using explosives with intent to injure Harry Raymond, as was done in People v. Koehn, supra, for the reason that, as expressly pointed out in People v. Koehn, defendant Koehn took the witness stand and testified that he placed a bomb at the residence of Judge Beaumont with the expressed intention of intimidating and terrifying Judge Beaumont. This the Supreme Court held in effect amounted to a plea of guilty by defendant of maliciously using explosives with intent to terrify, saying in People v. Koehn, supra, 207 Cal. at page 612, 279 P. at page 649:

> "* * * That he was properly convicted of the malicious use of explosives with the intention of terrifying and intimidating the judge of the court was the defendant's repeated admission at the trial of the case, both as a witness and in the conduct of said cause. * * *
>
> "* * * His admissions in court in effect amounted to a plea of guilty. The submission of the question of his guilt upon the count charging an attempt to murder could not have, under the state of the record, prejudiced the jury in its consideration of the crime which, by his own admissions, he committed."

In the instant case, there were no such admissions. Defendants took the witness stand and specifically denied having had any participation or connection with the dastardly plot or the cowardly and villainous act of placing the bomb, the explosion of which resulted in serious personal injury to Harry Raymond.

B.

Among his assignments of error defendant Allen relies for reversal of the judgment against him on this proposition:

It was prejudicial error for the trial judge over the objection of defendant Allen to permit the prosecution to show that defendants Kynette and Allen when summoned before the Los Angeles County Grand Jury, which was investigating the bombing of Harry Raymond, had declined to answer questions, relying on their constitutional privilege against self-incrimination.

This proposition is tenable. During the course of the trial the prosecution offered to prove that defendants when summoned before the Los Angeles county grand jury, which was investigating the Harry Raymond bombing, declined to testify and asserted their constitutional privilege against self-incrimination. To this evidence appellant Allen objected and his objection was overruled and the proffered evidence received. Among instructions given to the jury was the following:

"You have been instructed that a witness may be impeached, among other things, by evidence that he has at other times made statements inconsistent with his present testimony. In this case where a witness, whether he be a defendant or not, has answered a certain question with an answer devoid of any admission of guilt and it is shown that at some other time and place to substantially the same question he made answer, 'I decline to answer on the ground that the answer might tend to incriminate me,' or words to that effect, the two answers are inconsistent. The effect of this may be to discredit the testimony of the witness but it does not prove the truth of the former statement.

"Given by the Court as modified.

"Ambrose, J."

[7, 8] It is the established law that a person may not be compelled in a criminal case to be a witness against himself, art. I, sec. 13, Constitution of the State of California, and this constitutional privilege prevents the prosecution from introducing over objection evidence that defendant has refused to testify before a grand jury, claiming his constitutional privilege against self-incrimination.

In People v. Luckman, 254 App.Div. 694, 3 N.Y.S.2d 864, at page 865, the supreme court appellate division of New York in reversing a conviction of defendant for the crime of perjury thus states the rule: "It is our unanimous opinion that it was error (1) to permit the prosecutor in cross-examining the witness Betty Kleinman to show that she had claimed her constitutional privilege against self-incrimination in testifying before the grand jury. Const. art. 1, § 6. This view is in accord with the weight of authority. [Citing numerous cases.]"

In State v. Bailey, 54 Iowa 414, 6 N.W. 589, at page 590, the supreme court of Iowa says: "3. The defendant in this case became a witness in his own behalf. Upon cross-examination, the district attorney, against the objection of the defendant, was permitted to ask the following question: 'Why was it that you testified on the other trial that you did not desire to answer, as it might criminate yourself?' This question was improperly allowed, for the reasons already suggested. It is further objectionable because not pertinent to anything elicited on the examination in chief."

[9] Applying the above-stated rule to the present case, it is evident that the testimony to which objection was made was improperly received in evidence and was a violation of defendant Allen's constitutional privilege against self-incrimination. From the evidence thus received, taken together with the instruction above quoted, the jury may have inferred that, since defendant Allen had relied upon his constitutional right and refused to testify before the grand jury, such conduct amounted to an admission of guilt by defendant Allen.

Further, there was no inconsistency between the defendant's refusal to testify before the grand jury on the ground that his testimony might tend to incriminate him and his testimony at the trial denying guilt of the offenses for which he was being tried. He might have been innocent of the offenses which were subsequently charged against him, and yet his testimony, if given before the grand jury, might have tended to prove him guilty of other offenses, such as, for example, wire tapping.

In view of our conclusions on the foregoing propositions, it is unnecessary for us to consider the numerous other errors urged by defendants. Suffice it to say that many of them appear to have merit, and upon a retrial of this case constitutional guarantees and the rules of evidence should be strictly adhered to and irrelevant and immaterial evidence should be excluded.

For the foregoing reasons the judgments and orders appealed from are and each is reversed and new trials are ordered.

WOOD, Justice (concurring).

I concur:

In the case of People v. Koehn, 207 Cal. 605, 279 P. 646, the defendant was charged in separate counts with attempted murder and the malicious use of explosives. The defendants in the present case were tried on the same charges. In the Koehn case the Supreme Court ruled, "* * * from the nature of the two offenses charged, that he could not be guilty of both".

In view of the ruling in the Koehn case, a ruling which it is our duty to follow, no course is open to this court other than to reverse the convictions. The attorney-general contends with persuasive argument that the judgments of conviction on the count charging the malicious use of explosives should be allowed to stand. We are prevented by the decision in the Koehn case from sustaining this contention.

Mr. Presiding Justice MOORE, deeming himself disqualified, takes no part in the consideration or determination of this case.

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36 Cal.App.2d 14

NIDER v. CITY COMMISSION OF CITY OF FRESNO et al.

Civ. 2358.

District Court of Appeal, Fourth District, California.

Dec. 8, 1939.

1. Municipal corporations 🔑104

In proceeding for writ of review, city commission's order, made in quasi-judicial capacity, can be vacated only if commission exceeded its jurisdiction in making order or lacked jurisdiction to make it, and court is not concerned with mere errors in exercise of commission's jurisdiction.

2. Municipal corporations 🔑159(6)

The Fresno city commission can be said to have exceeded its jurisdiction under city charter in making order sustaining mayor's removal of city physician from office after hearing on charges against him only if there was entire lack of any evidence sustaining its conclusions. St.1921, p. 1832, § 22.

3. Municipal corporations 🔑159(6)

At Fresno city commission's hearing on charges against one removed from office of city physician by mayor, traffic officer's testimony concerning reduction of fracture of his wrist by new city physician with accused's assistance in emergency after such removal should have been excluded. St.1921, p. 1832, § 22.

4. Municipal corporations 🔑159(6)

At Fresno city commission's hearing on charges against one removed from office of city physician by mayor, evidence that accused did not discover malingerers and lost confidence of many city employees to such extent that they objected to being treated by him was sufficient to support commission's order sustaining removal as against contention that he could be removed only for incompetence or neglect of duties and not because of opinions or prejudices of such patients, in view of charter provisions that commission shall not be bound by technical rules of evidence. St.1921, p. 1832, § 22.

5. Municipal corporations 🔑104

To accomplish ends intended by framers of Fresno city charter, vesting city's legislative power and general administrative control of city government in city commission, members of such commission should be vested with broad discretionary powers, which should not be curtailed by courts except in cases of fraud, oppression, or manifest abuse of discretion. St.1921, p. 1826, § 6.

6. Municipal corporations 🔑159(6)

At hearing before Fresno city commission on charges against one removed from office of city physician by mayor, weight and sufficiency of evidence of loss of confidence in accused by many city employees, whom it was his duty to treat when they became sick or injured in performance of their duties, were questions for commissioners to decide. St.1921, p. 1832, § 22.

7. Municipal corporations 🔑159(6)

At hearing before Fresno city commission on charges against one removed from office of city physician by mayor, evidence of loss of confidence in accused by many city employees, whom it was his duty to treat when they became sick or injured in performance of their duties, his lack of diligence in discovering malingerers, and his inefficiency, *held* sufficient to support commission's order sustaining removal, though commission found that his competency and ability as physician and surgeon were not impeached. St.1921, p. 1832, § 22.

8. Municipal corporations 🔑159(6)

The Fresno city commission had jurisdiction to pass on weight and sufficiency of, and make finding on, evidence before it on question of inefficiency of former city physician at hearing on charges against him after his removal by mayor, and hence had jurisdiction to enter order sustaining removal at conclusion of such hearing. St.1921, p. 1832, § 22.

9. Municipal corporations 🔑159(6)

The appellate court cannot vacate Fresno city commission's order sustaining mayor's removal of city physician because court might have reached different conclusion than commissioners on weight of evidence at hearing on charges against him, as such fact does not affect question of commission's "jurisdiction," which includes power to decide case wrongly as well as rightly. St.1921, p. 1832, § 22.

[Ed. Note.—For other definitions of "Jurisdiction," see Words & Phrases.]

10. Municipal corporations 🔑159(6)

The Fresno city commission's finding, that competency and ability of one removed from office of city physician by mayor as physician and surgeon was not impeached, did not destroy effect of commission's general finding, supporting its order sustaining removal, that he failed to maintain professional confidence of many city employees to such extent that they would not submit to treatment by him for injuries or other disabilities. St.1921, p. 1832, § 22.

11. Municipal corporations 🔑159(6)

The Fresno city commission did not lose jurisdiction to make order sustaining city physician's removal from office by mayor because of its failure to try charges against him within 30 days, as required by civil service board's rules applicable to employees in classified service, as such physician was in exempted service. St.1921, p. 1832, § 22.

12. Municipal corporations 🔑159(6)

The Fresno civil service board's rules as to time for trial of charges against removed city employees by city commission are directory only in their applicability to city physician in exempted, instead of classified, service. St.1921, p. 1832, § 22.

13. Municipal corporations 🔑159(6)

One given prompt trial by Fresno city commission on charges preferred against him by mayor, who removed him from office of city physician, after judgment in cases involving other phases of matter became final, should not be permitted to urge undue delay in bringing cause to trial in proceeding for review of commission's order sustaining removal. St.1921, p. 1832, § 22.

14. Municipal corporations 🔑159(6)

The Fresno city commission's resolution, sustaining charge against one removed from office of city physician by mayor, was not invalid as passed by affirmative vote of all commissioners, including mayor who did not sit during trial and was shown not to have voted on resolution by city clerk's attached certificate, as recital in resolution that it was found by unanimous vote meant unanimous vote of those participating in hearing and resolution could have been passed by affirmative vote of three of four members of commission other than mayor.

15. Mandamus 🔑3(2)

"Mandamus" is extraordinary remedy to be used where law furnishes no other remedy and one should be afforded to promote ends of justice.

[Ed. Note.—For other definitions of "Mandamus," see Words & Phrases.]

16. Mandamus 🔑12, 77(1)

Mandamus may be used to compel performance of duty especially enjoined by law or admission of person into use and enjoyment of office from which he is unlawfully excluded, where law furnishes no other remedy and one should be afforded to promote ends of justice. Code Civ.Proc. § 1085.

17. Certiorari 🔑28(2)
Mandamus 🔑26

Generally, "mandamus" may be invoked to compel inferior tribunal to act within its jurisdiction, while "writ of review" lies to annul order made by court in excess of its jurisdiction.

[Ed. Note.—For other definitions of "Writ of Review," see Words & Phrases.]

18. Mandamus 🔑53

A writ of mandate is not usually used to set aside judicial tribunal's order and ordinarily is not proper remedy if challenged order is in excess of jurisdiction or merely erroneous.

19. Mandamus 🔑12, 72

Mandamus will issue only to enforce performance of clear legal duty and not to control action involving discretion of a board.

20. Mandamus 🔑77(1), 107

Mandamus is not proper remedy whereby a person claiming right to office filled by another under claim of right may compel payment of salary to himself or try title to office.

21. Mandamus 🔑3(12), 77(4)

Mandamus to compel Fresno city commission to reinstate petitioner as city physician after entry of its order sustaining his removal from such office by mayor is not proper remedy, as law furnishes remedy by writ of review and action sought to be controlled did not spring from duty imposed by law, but involved exercise of discretion by commissioners in deciding case on evidence introduced. St.1921, p. 1832, § 22.

22. Certiorari 🔑1

A writ of review may be issued by court of general jurisdiction to review order, made by inferior tribunal, board, or officer exercising judicial function in excess of jurisdiction thereof when acting in judicial or quasi-judicial capacity, where neither appeal from such order nor other plain, speedy and adequate remedy is provided by law. Code Civ.Proc. § 1068.

23. Constitutional law 🔑80(2)

The Legislature may vest judicial powers in boards or commissions, having territorial jurisdiction limited to city or town, township, county, or city and county, by either general law or charter provisions. Const. art. 6, § 1.

24. Constitutional law 🔑318

The taking of evidence and rendition of decision thereon by Fresno city commission, before which hearing on written charges against one removed by mayor from office of city commission was had on his request after notice to him, satisfied requirement of due process. St.1921, p. 1832, § 22; Const. Cal. art. 1, § 13; U.S.C.A.Const. Amend. 14.

25. Constitutional law 🔑277(2)

The right to office or employment with government or any of its agencies is not vested property right, and removal therefrom will not support question of due process. Const.Cal. art. 1, § 13; U.S.C.A.Const. Amend. 14.

26. Mandamus 🔑72

An action involving discretion of officer, board, or commission cannot be controlled by writ of mandate, which can only require performance of duty imposed by law.

27. Mandamus 🔑76

The appellate court cannot compel Fresno city commission to vacate its order, sustaining mayor's removal of city physician after hearing before it on charges against him in accordance with legal requirements and obedience to court's order, where commission's order was supported by evidence and within its jurisdiction. St.1921, p. 1832, § 22.

Original proceeding by Dr. Gerald K. Nider for a writ of review and writ of mandate to review and vacate an order of the City Commission of the City of Fresno, sustaining petitioner's removal from the office of city physician by the mayor.

Peremptory writ of mandate denied, alternative writ discharged, and order affirmed.

Rae B. Carter, of Fresno, for petitioner.

C. M. Ozias, City Atty., of Fresno, for respondents.

MARKS, Justice.

Petition for writ of review and writ of mandate concerning an order made by the City Commission of the City of Fresno.

This is an original proceeding for writ of review and writ of mandate involving an order made after trial of petitioner by the City Commission of the City of Fresno (which we will hereafter refer to as the Commission) on charges preferred against him by the mayor of that city. Other phases of this matter have been before this court. Nider v. Homan, 32 Cal.App.2d 11, 89 P.2d 136; Nider v. Homan, 32 Cal.App. 2d 21, 89 P.2d 135. The facts set forth in those opinions will not be repeated here.

After the judgments in those cases became final the Commission promptly set for trial the charges against petitioner. The trial resulted in the sustaining of one of the several charges of misconduct and the overruling of all the others, which, in the opinion of the commissioners were not sustained by the evidence. It will be necessary for us to consider only the charge which was sustained and which resulted in petitioner's being removed from his office. That charge is as follows: "You, as City Physician of Fresno, have failed to maintain the professional confidence, as a physician and surgeon, of a considerable number of the employees and officers of the City of Fresno to such an extent that many of them have declared that they will not submit to your treatment as a physician and surgeon in the event of injury or other disability."

The finding of the Commission on this charge is as follows: "The Commission finds, by a unanimous vote that the first reason for dismissal has been sustained. However, we further find, in connection with said reason for dismissal, that the competency and ability of Dr. Nider as a physician and surgeon, has not been impeached."

We will first consider the cause from the point of view of a writ of review reserving the question of the writ of mandate for separate consideration in the later part of this opinion.

The several grounds of attack on the jurisdiction of the Commission to make its order sustaining the removal of petitioner may be consolidated and restated as follows: (1) That there is no evidence in the record supporting the charge and the order sustaining the removal of petitioner by the mayor of Fresno; (2) That the finding "that the competency and ability of Dr. Nider as a physician and surgeon, has not been impeached" is a definite and particular finding of the one material and important fact of the case and destroys the effect of the very general finding supporting his removal as it is inconsistent with it; (3) That the Commission lost jurisdiction of the matter by reason of lapse of time and that petitioner was automatically reinstated in his office because of lapse of time; (4) That the resolution of the Commission shows on its face that the mayor voted for its passage which this court held he had no right to do. Nider v. Homan, 32 Cal.App.2d 11, 89 P.2d 136.

[1] It is well settled that in a proceeding of this kind, reviewing the order of a city commission made in a quasijudicial capacity, that the order under attack can only be vacated if it be in excess of the jurisdiction of the Commission or if the Commission lacked jurisdiction to make it. We are only concerned with the question of jurisdiction. We are not concerned with mere errors in the exercise of that jurisdiction.

[2] It is admitted, and correctly so, that the charter of the city of Fresno vests in the Commission jurisdiction to conduct the hearing, to take evidence on the charges filed and on the issues presented by the answer of petitioner and to reach its conclusion after the hearing is completed. It is well settled that under such circumstances it can be said that the Commission exceeded its jurisdiction in making its order only if there be an entire lack of any evidence presented which sustained its conclusions. Garvin v. Chambers, 195 Cal. 212, 232 P. 696.

Under section 22 of article 3 of the charter (Stats. 1921, p. 1832) charges against employees within the civil service must be tried by the civil service board. That section contains the following: "The Civil Service Board may regulate the conduct of said hearing so that the same will not be unnecessarily prolonged, and may confine witnesses in their testimony to the material matters under consideration, and shall not be bound by the technical rules of evidence and pleading, * * *."

The same section contains the following: "No officer or employee of the city may be removed except for reasons that will promote the efficiency of the public service. * * * It is not the intention of the provisions of this section to warrant the retention in the city service of any inefficient, incapacitated, disgruntled, or insubordinate officer or employee, and the Civil Service Board and City Commission in their decisions, while protecting officers and employees from improper removals, shall have due regard for the interests of the good administration of the city's business."

If charges be filed against a person in the exempted service of the city, which classification included petitioner, they must be tried by the Commission under similar rules and procedure as those governing trials by the civil service board. Sec. 22, art. 3, Charter.

The record discloses that a large number of employees of the city of Fresno appeared and testified. Practically all of those called by the city testified that they had lost all confidence in petitioner's professional ability and did not want to be treated by him for any injury or disease suffered or contracted in line of duty; that numerous other employees entertained like opinions. There is other evidence to the effect that petitioner was not diligent in detecting malingerers who desired to lay a foundation for retirement on pensions by making unfounded claims of being sick; that he reported employees sick and unfit for duty and that some of them, when supposedly sick, went hunting or fishing or to picture shows or other places of amusement. Another group of employees who were called as witnesses by petitioner were equally positive in expressing their views to the effect that petitioner was a very competent physician and surgeon and had rendered excellent service in performing his duties as city physician and was entirely satisfactory to them.

Petitioner complains bitterly of rulings of the Commission on objections to offered evidence. He urges that practically all of the evidence introduced against him was hearsay or consisted of laymen's opinions on medical or surgical matters upon which the witnesses had no right to speak and which was utterly incompetent for any purpose; that it cannot be considered as evidence supporting the questioned order.

[3] It must be admitted that respondents went too far afield in the evidence which they permitted to be introduced. To illustrate, a traffic officer was permitted to testify concerning the reduction of a fractured wrist early in 1939. Petitioner was not then city physician, having been removed from his office several months earlier. He happened to be at the hospital when the witness was treated and was requested by the acting city physician to assist in reducing the rather difficult fracture. Petitioner only assisted in an emergency and did not have charge of the case. Such evidence should have been excluded.

[4] However, there is other evidence in the record, some of it admitted without objection, that shows that petitioner had not discovered malingerers; that he had lost the confidence of a very considerable number of the employees of the city of Fresno to such an extent that they objected to his treating them; that some of that number objected to petitioner to the further extent that they would not permit him to administer to them at all.

Petitioner's argument on this phase of the case may be reduced to this: That this evidence is not sufficient to support the removal order, there being no evidence of any incompetency or neglect of any duty on his part. In other words, petitioner argues that he can only be removed for incompetence or for neglect of his duties and not because of opinions or prejudices on the part of some of those who must become his patients because of his office and their employment by the city. Petitioner's argument on this phase of the case overlooks the provisions of the charter that on these hearings the Commission "shall not be bound by the technical rules of evidence and pleading".

The duties of the city physician are thus defined in an ordinance of the city of Fresno:

"It shall be the duty of such city physician to give medical and surgical attention to sick or injured persons brought to the city emergency and to all sick or injured members of the police, fire or other departments of said city who shall become sick or injured as a result of the discharge of their official duties."

The city physician is appointed by the commissioner of public safety and welfare who is ex-officio mayor and who is, generally speaking, responsible for the efficient performance of their duties by those coming under his jurisdiction.

[5] The charter vests "the legislative power of the city and general administrative control of the city government" in the city commission. Charter, art. II, sec. 6. It was clearly the intention of the framers of the charter to make the commissioners responsible for the proper administration of the municipality's affairs. To accomplish those ends they should be vested with broad discretionary powers which should not be curtailed by the courts except in cases of fraud, oppression or manifest abuse of discretion.

[6, 7] It must be admitted that a study of the record before us leaves the distinct impression that the commissioners at least went to the limit of a sound discretion in sustaining the removal of petitioner on the ground which they chose to support the order of the mayor. That they went beyond that limit is a conclusion we cannot reach.

As we have seen, one of the duties of the city physician was to care for city employees who became sick or were injured in the performance of their duties. It is well known that one important element in the successful treatment of the sick or injured is the confidence of the patient in the physician administering to him. A lack of that confidence may well interfere with the success of the treatment and render the physician inefficient in a particular case regardless of his general professional qualifications, training and skill in his profession. To retain such a city physician in office might impair instead of "promote the efficiency of the public service". If a large number of the city employees had lost confidence in petitioner, it might reasonably be concluded that such lack of confidence would render him inefficient in treating them. The charter particularly provides that it is not intended to compel the retention in the city service of an inefficient officer or employee. There is evidence of loss of confidence in petitioner by a considerable number of employees. The weight and sufficiency of that evidence was a matter to be decided by the commissioners. With this evidence before them we cannot say that there was an entire lack of any evidence to support the challenged order which in effect finds petitioner to be an "inefficient" but not an "incompetent" officer. Further, there is evidence that petitioner was not diligent in discovering malingerers who claimed to be sick and at the same time were able to go hunting and fishing and engage in other recreations. This is also evidence bearing on the efficiency of petitioner and gives further support to the order of the Commission.

[8, 9] As there was evidence before the Commission bearing upon the question of the inefficiency of petitioner to perform the duties of his office the Commission had jurisdiction to pass on the weight and sufficiency of that evidence and make a finding upon it. We can be concerned only with the jurisdiction of the Commission. We are not concerned with errors in its rulings. As there was evidence to support the order there was jurisdiction to make it. Therefore, we must conclude that the Commission had jurisdiction to enter an order at the conclusion of the hearing. Because we might have reached a conclusion on the weight of the evidence contrary to that reached by the commissioners does not affect the question of jurisdiction. As has been frequently remarked, jurisdiction includes the power to decide a case wrongly as well as rightly.

[10] What we have already said disposes of the second contention of petitioner. We believe it should be clear that a man may be, as is established by a preponderance of the evidence concerning petitioner, a competent, able, skilful and successful physician and surgeon in his general practice and still may be inefficient and as a result of such inefficiency, incompetent to fill a particular position where he is required to treat a certain group many of whom have lost confidence in his ability.

[11-13] Petitioner urges that because the charges against him were not tried within thirty days the Commission lost jurisdiction over the case and could only reinstate him. This argument is based on rules adopted by the civil service board under powers given that body by the charter. By their terms those rules are made to apply to employees in the classified service. Petitioner was not in the classified but in the exempted service. Further, if it be assumed that those rules might be applicable here, we believe they are directory only in their applicability to this case and to petitioner in the exempted service. There has been much litigation in this matter. Nider v. Homan, 32 Cal.App.2d 11, 89 P.2d 136; Nider v. Homan, 32 Cal.App.2d 21, 89 P.2d 135. When the judgments in those cases became final petitioner was given a prompt trial. In view of all the facts he should not be permitted to urge an undue delay in bringing his cause to trial.

[14] Lastly it is urged that the resolution sustaining the charge against petitioner was passed by the affirmative vote of all the commissioners, including Mayor Homan. This argument is based on the language used in the resolution that it was found "by a unanimous vote * * *". This clearly means by the unanimous vote of those participating in the hearing. It is admitted that Homan did not sit during the trial and the certificate of the city clerk attached to the resolution shows that he did not vote on the resolution. Further, the resolution could have been passed by the affirmative vote of three members of the Commission, and four members, not including Homan, voted for its passage. If Homan had voted for the resolution it would have constituted error but could not have affected the jurisdiction of the Commission as his vote was not necessary for the passage of the resolution. Nider v. Homan, 32 Cal.App.2d 21, 89 P.2d 135; Nider v. Homan, 32 Cal.App.2d 11, 89 P.2d 136.

We will now consider the cause from the point of view of its being a proceeding to obtain a peremptory writ of mandate to require the Commission to vacate its order sustaining the charge against petitioner. We have already sufficiently detailed the facts of the case together with the grounds of attack on the order and the applicable provisions of the charter and ordinance so that there need be no repetition of those phases of the case which are identical under both the petition for a writ of review and for a writ of mandate.

[15-18] Mandamus is an extraordinary remedy to be used where the law furnishes no other remedy and where to promote the ends of justice one should be afforded. It may be used under those circumstances to compel the performance of a duty which the law especially enjoins or to compel the admission of a person into the use and enjoyment of an office to which he is entitled and from which he is unlawfully excluded. Sec. 1085, Code Civ.Proc. Very generally speaking, mandamus may be invoked to compel an inferior tribunal to act within its jurisdiction while a writ of review lies to annul an order of a court made in excess of its jurisdiction. Golden Gate Tile Co. v. Superior Court, 159 Cal. 474, 114 P. 978. A writ of mandate is not usually used to set aside an order of a judicial tribunal. Ordinarily it is not the proper remedy if the challenged order is in excess of jurisdiction and is equally inappropriate if the order is merely erroneous. O'Neill v. Reynolds, 116 Cal. 264, 48 P. 57.

[19] It is established that mandamus will only issue to enforce the performance of a clear legal duty but not to control an action involving discretion on the part of a board. Valley Motor Lines v. Riley, 22 Cal. App.2d 233, 70 P.2d 672; Lambert v. Fenelon, 25 Cal.App.2d 142, 77 P.2d 268; Nider v. Homan, 32 Cal.App.2d 11, 89 P.2d 136.

[20] It has been held that mandamus is not a proper remedy by which a person out of office, but claiming the right to an office filled by another under claim of right, may compel the payment of the salary to himself or try the title to the office; that the incumbent is a necessary party. Black v. Board of Police Commissioners, 17 Cal. App. 310, 119 P. 674; Humburg v. Board of Police & Fire Commissioners, 27 Cal.App. 6, 148 P. 802; People v. Bailey, 30 Cal.App. 581, 158 P. 1036.

[21] When we apply the foregoing rules to the facts before us we are forced to the conclusion that mandamus is not the proper remedy to be invoked in this case, for two reasons: (1) Because the law furnishes petitioner with another remedy (writ of review), and (2) because the action sought to be controlled did not spring from a duty imposed by law but rather because it involved the exercise of a discretion on the part of the commissioners in deciding a case on the evidence introduced.

[22] The writ of review is the proper remedy to be employed to review the order of the Commission. Such a writ may be issued by a court of general jurisdiction to review the order of an inferior tribunal, board or officer exercising judicial functions made in excess of the jurisdiction of such tribunal, board or officer when acting in a judicial or quasijudicial capacity and when there is neither an appeal from such order nor other plain, speedy and adequate remedy provided by law. Sec. 1068, Code Civ.Proc.; 4 Cal.Jur. 1065, sec. 35 et seq., and cases cited.

In Nider v. Homan, 32 Cal.App.2d 11, 89 P.2d 136, 139, this court said:

"It is settled in California that local boards (not boards of statewide authority) may act in a judicial capacity as a quasi-judicial body. Wulzen v. Board of Supervisors, 101 Cal. 15, 35 P. 353, 40 Am.St.Rep. 17; Croly v. Board of Trustees of City of Sacramento, 119 Cal. 229, 51 P. 323; Imperial Water Co. v. Board of Supervisors, 162 Cal. 14, 120 P. 780; Rigdon v. Common Council, 30 Cal.App. 107, 157 P. 513; Norman v. Cogswell, 82 Cal.App. 159, 255 P. 251; Bayside Land Co. v. Dolley, 103 Cal.App. 253, 284 P. 479. In the Croly case it was held that when a board of trustees sits at the hearing of charges against a city officer the board is acting in a quasi-judicial capacity. Garvin v. Chambers, 195 Cal. 212, 232 P. 696, is to the same effect.

"In Quinchard v. Board of Trustees, 113 Cal. 664, 45 P. 856, 857, it is said:

"'The distinction between a judicial and a legislative act was pointed out by Field, J., in the Sinking Fund Cases, 99 U.S. (727) 761 (25 L.Ed. 504), as follows: "The one determines what the law is, and what the rights of the parties are with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it."'

"In Imperial Water Co. v. Board of Supervisors [supra] it was said:

"'It does not follow, however, that where the Legislature delegates such power to a local board, and provides that it can be exercised only upon certain conditions and upon the ascertainment of certain facts by such board after a notice and hearing to parties interested, that the proceeding thus authorized is not of a judicial character. Although such boards do not have the character of an ordinary court of law or equity, they frequently are required to exercise judicial functions in the course of the duties enjoined upon them. In Robinson v. Board (of Supervisors), 16 Cal. 208, the court says: "It is sufficient if they are invested by the Legislature with power to decide on the property or rights of the citizen. In making their decision they act judicially whatever may be their public character." There are many decisions to the same effect. People v. El Dorado County Supervisors, 8 Cal. 58, 61; People ex rel. De Fries v. Martin County Supervisors, 10 Cal. 344; Eldorado County v. Elstner 18 Cal. 144, 149; Murray v. Board (of Supervisors), 23 Cal. (492), 494; Miller v. Board (of Supervisors), 25 Cal. (93), 97; Keys v. (Board of Sup'rs of) Marin (County), 42 Cal. (252), 254; Smith v. Strother, 68 Cal. (194), 196, 8 P. 852; Wulzen v. Board of Supervisors, 101 Cal. (15), 24, 35 P. 353, 40 Am.St.Rep. 17. Where in a proceeding before such a board a public notice is required to be given, and a hearing of objections or protests to the contemplated action is provided for, and the order to be made thereon is one which affects the property or rights of the citizen, the proceeding is usually held to be judicial and subject to be reviewed on certiorari.'"

In referring to the trial of the charges against Nider it was further said in the same case:

"Under the decisions already cited it would seem clear that the City Commission will act in a judicial capacity in conducting the hearing, in making its findings on the evidence produced and in pronouncing its judgment."

As the proceeding before us was judicial in its nature and as the commissioners acted in a judicial capacity in making the challenged order, it follows that the writ of review and not the writ of mandate is the proper remedy afforded to petitioner.

[23] This conclusion does not conflict with the holding in the case of Standard Oil Co. v. State Board of Equalization, 6 Cal.2d 557, 59 P.2d 119, and the numerous cases following that decision. Those cases involved actions by state boards exercising state wide jurisdiction. They are grounded on the provisions of section 1 of article VI of the Constitution which vests in the state senate and named courts general state wide judicial powers. From those provisions its follows that the legislature has no power to vest in other bodies general state wide judicial powers.

We have no such situation here. The same section of the Constitution gives to the legislature the power to establish inferior courts "in any incorporated city or town, township, county or city and county". Under this provision we have no difficulty in concluding that the legislature may, either by general law or through the provisions of a charter, vest judicial powers in boards or commissions having the limited territorial jurisdiction named in the Constitution. This makes it unnecessary for us to conclude that Standard Oil Co. v. State Board of Equalization, supra, and the other cases following it, overrule by implication the long line of cases, a few of which have been cited, which hold that boards of supervisors, city commissions, city councils and other such bodies may exercise judicial functions and that their orders may be reviewed in certiorari proceedings.

[24] Nor do those conclusions conflict with those arrived at in Drummey v. State Board, 13 Cal.2d 75, 87 P.2d 848, and Davis v. State Board, Cal.App., 95 P.2d 959, where it was held that it was necessary for the courts to pass on the weight and sufficiency of the evidence introduced in support of orders of administrative boards having no judicial powers, which orders deprived persons of the right in the one case of engaging in the business of undertaking and embalming and in the other of the right to engage in the practice of optometry.

These decisions are based on the due process clauses of the federal and state Constitutions. 14th Amendment U.S. Const., U.S.C.A.; sec. 13, art. I, Const. of Calif. The holdings were made necessary by the conclusion that as licenses to engage in those occupations were property rights they could only be taken away after notice to the licensees and proper hearings; that as the state boards possessed no judicial powers the courts must provide for the notices and places of hearings and must pass on the weight and sufficiency of the evidence before the licenses could be revoked. Thus, as no other forum was available and as no other remedy was provided by law it was necessary to employ the writ of mandate to satisfy the due process clauses of the Constitutions.

The situation here is far different from those confronting the courts in the last-cited cases because here a forum was provided by law to try the charges against petitioner. Written charges had to be filed and notice given petitioner. On his request a hearing was required before a body possessing judicial powers. Evidence was taken and a decision rendered on that evidence. This satisfied the requirements of due process. In Estate of Stobie, 30 Cal.App.2d 525, 86 P.2d 883, 885, it was said:

"In considering this question in Sherer v. City of Laguna Beach, 13 Cal.App.2d 396, 57 P.2d 157, it was said * * *:

"'Due process of law does not entitle a person to have a hearing before any particular board, tribunal, or court. It is satisfied if he be given a fair hearing upon reasonable notice before a board, tribunal, or court having jurisdiction of the proceedings and the parties. As was said in Ex parte Wall, 107 U.S. 265, 2 S.Ct. 569, 589, 27 L.Ed. 552: "* * * 'Perhaps no definition,' says Judge Cooley, 'is more often quoted than that given by Mr. Webster in the Dartmouth College Case [Dartmouth College v. Woodward, 4 Wheat. 518, 4 L.Ed. 629]: "By the law of the land is most clearly intended the general law—a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society."' Cooley, Const.Lim. 353. The question, what constitutes due process of law within the meaning of the constitution, was much considered in this court in the case of Davidson v. New Orleans, 96 U.S. 97 (24 L.Ed. 616); and Mr. Justice Miller, speaking for the court said: 'It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it he has by the laws of the state a fair trial in a court of justice, according to the modes of proceeding applicable to such a case.'" See, also, City of Seattle v. Kelleher, 195 U.S. 351, 25 S.Ct. 44, 49 L.Ed. 232.'"

[25] Further, as was said in Ludolph v. Board of Police Commissioners, 30 Cal.App.2d 211, 86 P.2d 118, 121:

"The right to an office or of employment with the government or any of its agencies is not a vested property right, and removal therefrom will not support the question of due process. Matter of Carter, 141 Cal. 316, 319, 74 P. 997; Boyd v. Pendegast, 57 Cal.App. 504, 506, 507, 207 P. 713; Garvin v. Chambers, 195 Cal. 212, 225, 232 P. 696."

[26, 27] As we have already seen, an action involving discretion on the part of an officer, board or commission cannot be controlled by a writ of mandate. Such writ can only require the performance of a duty required by law. The duty owed petitioner was a hearing held in accordance with the requirements of law. A hearing was had in obedience to the order of this court. At the conclusion of that hearing the commissioners weighed the evidence and rendered judgment. Those functions involved the exercise of a discretion on the part of the commissioners that cannot be controlled by a writ of mandate. As there was evidence before the commission which supported its order, and as it had jurisdiction to make that order, we cannot by writ of mandate, compel it to vacate that order.

The peremptory writ is denied and the alternative writ of mandate is discharged. The order of the commission is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

In re GUMP'S ESTATE. *

COHEN v. GUMP et al.

Civ. 10940.

District Court of Appeal, First District,
Division 1, California.

Dec. 19, 1939.

Rehearing Denied Jan. 18, 1940.

Hearing Granted Feb. 15, 1940.

1. Mortgages ⚷32(3)

An absolute deed given for purpose of securing debt may be treated as mortgage, and rule applies to deeds of trust with power to convey notwithstanding conveyance is made to creditor instead of third party.

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*For subsequent opinion see 107 P.2d 717.

2. Perpetuities 🔑6(2)

If some of essential features of trust deed are incorporated in instrument designed to create inter vivos trust, such trust repugnant to constitutional and statutory provisions need not be upheld for sole reason that trust deeds have been declared not to be restraints on alienation. Civ.Code, § 715; Const. art. 20, § 9.

3. Courts 🔑200½

The probate court has jurisdiction to determine controversy as to title between estate and its executors in their individual capacities.

4. Courts 🔑200½

The question of jurisdiction of probate court respecting controversy as to title is generally determined by status of claimant.

5. Appeal and error 🔑151(2)
Executors and administrators 🔑314(3)

A legatee had right to resist in probate proceedings application for final distribution on ground that executor should be charged with certain realty conveyed in trust by testatrix, and being an aggrieved party had right to appeal from order, as against contention that probate court was without jurisdiction to determine question of ownership of property as between representatives of estate and strangers. Probate Code, §§ 1020, 1240.

6. Executors and administrators 🔑314(11)

In proceeding wherein legatee resisted application for final distribution on ground that executor should be charged with property conveyed in trust by testatrix, no relief could be afforded to estate against interest of person not specially represented, who was legatee and beneficiary under trust. Probate Code, § 1020.

7. Perpetuities 🔑3

The state may limit and even prohibit disposition of property to prevent any delay beyond allotted time in vesting of future interests, and in estates already vested, to prohibit restraints upon alienation. Civ.Code, § 715; Const. art. 20, § 9.

8. Perpetuities 🔑4(1), 6(1)

The constitutional rule against perpetuities has same general purpose as statutory provision against restraints on alienation, but perpetuity rule relates to vesting beyond permitted period, whereas rule relating to restraints on alienation refers to prevention of transfer of property already vested. Civ. Code, § 715; Const. art. 20, § 9.

9. Perpetuities 🔑4(1)

If vesting of future interest is to be postponed beyond allotted time, and such fact appears from fair and reasonable construction of governing instrument, it is obnoxious to constitutional provision against perpetuities, and rule of remoteness is controlling. Const. art. 20, § 9.

10. Perpetuities 🔑4(3), 6(2)

If equitable interest is to vest remotely or actually vested at time of creation of attempted trust or at time of death of maker of instrument, in determining validity of provision of such document under rules relating to remoteness or to restraints on alienation, test is not what has happened, but what may occur under terms of instrument. Civ.Code, §§ 715, 716, 749, 771; Const. art. 20, § 9.

11. Perpetuities 🔑4(15)

Trust agreement conveying realty to bank as security, whereby bank was to hold and manage properties for indefinite and possibly distant date before conveying them to children, or to children of children of trustor, offended against rule of remoteness. Civ. Code, § 715; Const. art. 20, § 9.

12. Perpetuities 🔑4(15)

If trust was invalid for remoteness of vesting, such invalidity dated from its creation. Const. art. 20, § 9.

13. Perpetuities 🔑4(2)

If at time of execution and delivery of agreement there was even bare possibility that in carrying out purposes of trust, absolute power of alienation would be suspended beyond permissible period, it violated statutory rules and must be declared void. Civ. Code, §§ 715, 716, 749, 771.

14. Perpetuities 🔑4(15)

Where, under agreement conveying realty in trust to bank as security, vesting of title in trustor's children could not occur at time of execution and delivery of document nor immediately on trustor's death because of contingency that children must give note and trust deed, invalidity of document appeared from its inception, since deed from bank to children could be indefinitely postponed. Const. art. 20, § 9.

15. Perpetuities 🔑3

As respects operation of constitutional provision against perpetuities, alternative contingencies must be viewed as of time instrument takes effect and may not be contemplated retrospectively. Const. art. 20, § 9.

16. Perpetuities 🔑6(10)

Where, under deed, conveying realty to bank as security, trustor's children were to assume obligation to pay balance of indebtedness, which because of its uncertainty in amount, due to limitation of payments and unlimited sum that might be appropriated to improvements, etc., could possibly result in delay of absolute conveyance by bank to period beyond lives of persons in being and beyond allowable period, there was violation of rule relating to restraints on alienation. Civ.Code, § 715.

17. Perpetuities 🔑6(10)

If, under agreement conveying realty in trust to bank as security, trustor intended that trust should if necessary continue into lives of children born after its delivery, and there was possibility that suspension of power of alienation could continue for period exceeding statutory period, trust was rendered void from its inception, and no title vested in trustee under living trust phase of document that bank should convey to children. Civ.Code, § 715; Const. art. 20, § 9.

18. Wills 🔑473

The rule of severability was not applicable to agreement conveying realty in trust to bank as security which violated rule against perpetuities and rule against restraints on alienation, where, considering document solely from its living trust phase, it was possible that absolute power of alienation could be suspended beyond period of lives in being and also beyond twenty-five year limit from creation of condition, and invalid provisions were so closely blended with those that might be valid, as to make latter ineffectual. Civ.Code, §§ 715, 749, 771; Const. art. 20, § 9.

19. Executors and administrators 🔑365

As respects statute forbidding executor to purchase property of estate or be interested in its purchase, the law assumes that official duty and personal interest are antithetical. Probate Code, § 583.

20. Courts 🔑1

"Jurisdiction" means not only authority over general subject matter, but power to make a particular order or decree.

[Ed. Note.—For other definitions of "Jurisdiction (Of Courts)," see Words & Phrases.]

21. Motions 🔑61

If order is void on its face or if court does not have jurisdiction to make it, it may be attacked collaterally.

22. Judgment 🔑486(1)
Motions 🔑61

If order is voidable, as where judgment or order entered does not truly reflect court's action, attack may be directed to untruthfulness of order, decree, or judgment.

23. Executors and administrators 🔑383

Where real point of objection went to value of property, which was not a jurisdictional question, order confirming executors' sale was not void on its face, and was not subject to collateral attack on objections and exceptions to executors' first and final account and report. Probate Code, §§ 583, 755.

◆

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Proceeding in the matter of the estate of Mabel B. Gump, also known as Mabel L. Gump, also known as Mabel Latham Gump, and also known as Mabel Beatrice Lichtenstein Gump, deceased, between Bertha L. Cohen and Abraham L. Gump and others, executors of the last will and testament of Mabel B. Gump, deceased. From a decree settling the first and final account and report of the executors and ordering final distribution, party first named appeals.

Sustained in part, and reversed in part, with instructions.

Treadwell & Laughlin, of San Francisco (Russell E. Barnes, of San Francisco, of counsel), for appellant.

Charles A. Christin and Rowland R. King, both of San Francisco, for respondents.

Heller, Ehrman, White & McAuliffe and Lawrence C. Baker, all of San Francisco, amici curiæ.

WARD, Justice.

This is an appeal by Bertha L. Cohen from the decree of the superior court settling the first and final account and report of the executors and ordering final distribution in the matter of the estate of Mabel B. Gump under whose will she was named a legatee in the sum of five thousand dollars. Her contention is that the executors should be charged with certain real property claimed to constitute part of the estate; that a trust under which it was held by the Wells Fargo Bank & Union Trust Company, a corporation, is void because not created for a lawful purpose in that it creates a perpetuity and is an unlawful restraint on the power of alienation. It is appellant's further contention that the executors should have been charged with secret profits made and to be made by them on the resale of personal property purchased from the estate.

Subsequent to the date of her will, Mabel B. Gump entered into an agreement with Wells Fargo Bank & Union Trust Company, a corporation, whereby there was executed and delivered to the bank an instrument of transfer, which may be referred to for the purpose of identification as a trust agreement, covering decedent's interest in two parcels of land and the improvements thereon. After a recital of sale and conveyance, the document provides in substance that a deed that day given by Mabel B. Gump to the bank covering the real estate in question had been given for the following uses and purposes, and subject to certain conditions, namely, that the bank hold the properties for twenty years as security for the payment of the sum of $75,000 with interest, and for such further sums in the way of taxes, assessments, liens, encumbrances, repairs, improvements, insurance premiums and any other expenses or moneys in connection with said properties that the party of the second part shall deem it necessary or proper to pay for the benefit of the first party in connection with the care of the properties, together with interest on such amounts advanced; that the bank manage and lease said properties, collect rents and pay out of such amounts the above advances, also a reasonable fee in connection with "this trust". The bank is given full authority, without notice to the first party, to incur any indebtedness it deems necessary for the protection of the properties and to carry out the intent and purposes of the agreement; that the bank pay out of the income from the properties $750 a month on the indebtedness, together with the above amounts incurred in the management and care of the properties, the balance of the income to be paid monthly to the party of the first part. Provision is made that if the indebtedness of $75,000, together with all amounts advanced as above are fully paid, and all covenants of the agreement met during the term of the agreement, then at the expiration of the twenty-year term the bank shall deed the properties to the three children of the party of the first part, reserving to the said first party a life estate in the properties, together with the entire net rentals and income from the same. In the event, however, that at the expiration of the twenty-year term of the agreement, the above payments have not been fully discharged, then the trust shall continue and the title to said properties remain in the bank until all sums due are fully paid, at which time the properties shall be conveyed to the designated parties. In the event of the death of the first party during the term of the agreement, the second party is directed to convey the properties to the three children upon their giving a deed of trust to the properties to secure the balance of the indebtedness. In the event of the death of the first party prior to the expiration of the twenty-year term of the agreement, predeceased by any of her children, or if any of the children fail to execute a deed of trust, then the bank shall continue to hold title to the properties and shall make conveyance thereof, only if and when said indebtedness is fully paid, to such of the aforesaid three children of the party of the first part as shall then be living, and to the issue per stirpes of any of said three children who may then be dead, or, failing such issue, to the survivors or survivor of said children. Provision is made that should any of her children predecease the party of the first part or die before the expiration of the term of the agreement, leaving issue, such issue shall be named as grantee in place of such deceased child or children of the first party. Providing there is no surviving issue, such child or children of the party of the first part who may survive shall be named as grantee or grantees in the reconveyance of the properties. Said party of the second part is given the right at any time during the term of the agreement to sell and dispose of said properties, apply the proceeds to the indebtedness then due and invest the balance for the benefit of the party of the first part.

[1, 2] It is not necessary in this proceeding to determine whether the portion of the document providing for the payment of the indebtedness to the bank is in fact a deed of trust. An absolute deed, given for the purpose of securing a debt, may be treated as a mortgage, and this rule applies to deeds of trust with power to convey (Sacramento Bank v. Alcorn, 121 Cal. 379, 53 P. 813) notwithstanding the conveyance is made to the creditor instead of a third party. More v. Calkins, 95 Cal. 435, 30 P. 583, 29 Am.St.Rep. 128. If some of the essential features of a deed of trust, how-

ever, are incorporated in an instrument designed to create an inter vivos trust, it may not thereafter be successfully contended that, because rights under deeds of trust have become recognized property rules in the securing of loans and, as said in Sacramento Bank v. Alcorn, supra [121 Cal. 379, 53 P. 815], may not therefore "be reversed though erroneous", an inter vivos trust, repugnant to constitutional and statutory provisions, must be upheld for the sole reason that deeds of trust have been declared not to be restraints on alienation. In the last cited case, 121 Cal. at page 385, 53 P. at page 815, the court said: "* * * the legislature can correct the evil if there be one. The courts cannot do so without producing widespread distrust and confusion, and we think, upon well-established and sound principles of jurisprudence, ought not now to interfere." Assuming the security aspect of the conveyance to the bank may be severed from the provisions attempting to create a living trust, nothing herein is to be construed as impairing the rights, if any, of the bank to protect the loan feature of the conveyance. The bank is not a party to this proceeding and whatever rights it may have may be determined in an independent proceeding.

[3-5] Respondents contend that the probate court is without jurisdiction to determine the question of the ownership of the property as between representatives of the estate and strangers to the estate, and call attention to evidence appearing in the transcript on appeal, stipulated by the respective parties to be correct, reading as follows: "It was further established that at the time of the death of said Mabel B. Gump there was due to Wells Fargo Bank & Union Trust Company an unpaid balance on the indebtedness mentioned in said agreement in the sum of $33,000.00, and thereafter and after the death of said decedent and after the appointment and qualification of said executors and in the month of April, 1935, Robert Livingston Gump, Richard Benjamin Gump and Marcella Gump, in their individual capacities, executed to Wells Fargo Bank & Union Trust Company a deed of trust on said property to secure their promissory note for said sum of $33,000.00, and thereupon and in said month of April, 1935, the said Wells Fargo Bank & Union Trust Company, as trustee under the trust agreement dated February 14, 1928, executed a deed of said property to said parties." The court by its decree of settlement of the first and final account found "* * * that it is untrue that the following property [involved in this proceeding] described in said objections and exceptions to said first and final account and report of executors should have been inventoried as a part of the estate of said decedent". As title was the only issue in dispute upon this item, the effect of the finding is that the estate did not hold title to the property.

The probate court has jurisdiction to determine a controversy as to title between an estate and its executors in their individual capacities. Bauer v. Bauer, 201 Cal. 267, 256 P. 820; Estate of Inghilleri, 27 Cal.App.2d 664, 81 P.2d 568. Two of the claimants herein are executors of this estate. The question of the jurisdiction of the court is generally determined by the status of the claimant. Guardianship of Vucinich, 3 Cal.2d 235, 44 P.2d 567; Estate of Roach, 208 Cal. 394, 281 P. 607; In re Haas, 97 Cal. 232, 31 P. 893, 32 P. 327. The appellant herein in her opposition to the settlement of the final account and the decree of distribution was not acting adversely; on the contrary, she sought a distinct benefit to the estate by an increase of its assets. The title in dispute was not between appellant and the estate, nor between appellant and the executors, but between the estate and the executors individually. Therein lies the difference between the facts in this case and the facts in In re Haas, supra, wherein a legatee claimed that certain property listed in an estate of a minor, who was not represented in the controversy, belonged to an estate of a deceased. The minor was a stranger and the court held such a matter should be left to other courts for determination. Appellant legatee herein had a right to resist in the probate proceedings an application for final distribution. Probate Code, § 1020; Bauer v. Bauer, supra; In re Burdick, 112 Cal. 387, 44 P. 734, and being an aggrieved party had the right to appeal from the order of the court. Probate Code, § 1240; Estate of Clark, 190 Cal. 354, 212 P. 622.

[6] We believe the provisions of the decree in so far as they affect the title to this property to be erroneous, as will be hereinafter set forth, but erroneous only in the determination of a dispute between the interest of the estate and that of the executors individually. This brings us to consideration of a matter not touched upon

by the parties to this appeal, namely, the rights and interests of Marcella Gump, a legatee under the will, a beneficiary under the so-called trust document, but not a party specially represented in the determination of this question. Marcella Gump occupied the same position in all respects as Robert Livingston Gump and Richard Benjamin Gump, except that she was not named to execute the provisions of the will. To that extent she is a stranger to the determination of the question involved herein and is entitled, should she so elect, to have her rights and interests determined in a forum outside of the probate jurisdiction of the court. No relief may here be afforded to the estate against any right, claim or interest of Marcella Gump, since the probate court lacks jurisdiction to adjudicate the rights of one claiming adversely to the estate, although its jurisdiction is recognized in claims between an estate and the executors or administrators thereof individually. Estate of Inghilleri, supra. Marcella Gump's interest not being an issue upon appeal, we must rest by quoting from In re Burdick, supra, 112 Cal. at page 391, 44 P. at page 734, wherein the court said: "* * * if serious questions upon such claims arise, the duty of the court might be to delay the final decree until such claims can be determined in another forum".

The document having been stripped of its deed of trust, mortgage or security attributes, not involved in the determination of this appeal, and the court having indicated its views on the subject of the jurisdiction of the probate and other courts, it may be well to discuss generally the rule against perpetuities and restraints on alienation.

[7] Except for charitable purposes, perpetuities are not permitted under our Constitution. Art. XX, § 9, Const. of Calif. Just as the state has the right to restrain the use of property for an unlawful purpose, so it may limit and even prohibit its disposition to prevent any delay beyond the allotted time in the vesting of future interests, and, in estates already vested, to prohibit restraints upon alienation. Civ. Code, § 715. A perpetuity in its broadest sense, as applied to property rights, refers to an estate or interest created therein, without limit of duration; that is, which may possibly last forever. It originally took the form of an interest or estate descending from generation to generation of lineal issue, the effect of which was to tie up property by restricting its alienability. The "rule against perpetuities" developed rather as a regulation than as a prohibition, and though the original term is still used it has become in a sense a misnomer. The early definitions are inadequate to express its present purpose. In California some idea of the early theory upon the subject may be obtained from the Debates in the Convention of California on the Formation of the State Constitution by J. Ross Brown at page 272, upon the offer of the section on perpetuities, where the following appears: "It is to prevent perpetuities of lands from families to families. It is upon perpetuities that aristocracies are built up. Democracy would soon be overturned if this was allowed. The principle is so well established that all our courts of law have made it a rule, in the absence of any statute upon the subject. Whenever they could possibly put any such construction upon any deed or instrument they have deemed themselves bound to do it." The following statement from Tiffany indicates the trend of more recent thought. "The conception of a perpetuity as it presented itself to the minds of the early judges found its typical example in the case of a fee tail, as it existed before the introduction of methods by which it could be barred. * * * The word 'perpetuity' is still sometimes used in this primary sense, which is evidently the more natural signification of the word. This being so, the rule against perpetuities, of which we here treat, might, as stated by a leading authority on the subject, be more properly termed the 'rule against remoteness', and, if this had been done, there would now exist a much more general apprehension of its true character." (1 Tiffany, Real Property [2d Ed.] 598, 599.)

[8, 9] With the object of preventing perpetuities, there have developed rules against the creation of remote interests and restraints on alienation of present interests. All are aimed against "perpetuities" generally, but in a restricted sense the rule against perpetuities is the rule against remoteness of vesting. The constitutional rule against perpetuities has the same general purpose as the statutory provision against restraints on alienation, namely, to limit interference with the right of free transfer of property. The perpetuity rule, however, relates to a vesting beyond the permitted period, whereas the

rule relating to restraints on alienation refers to the prevention of the transfer of property already vested. Estate of McCray, 204 Cal. 399, 268 P. 647. If the vesting of a future interest is to be postponed beyond the allotted time, and such fact appears from a fair and reasonable construction of the governing instrument, it is obnoxious to the constitutional provision. The rule of remoteness is controlling upon the provision of the Constitution declaring that "No perpetuities shall be allowed except for eleemosynary purposes". Sec. 9 of art. XX of the State Const.

[10] If by the terms of a document an equitable interest is to vest remotely or actually vested at the time of the creation of the attempted trust, or at the time of the death of the maker of the instrument, in determining the validity of the provisions of such a document under the rules relating to remoteness or to restraints on alienation, the test is, not what has happened, but what may occur under the terms of the instrument. If the trust attempted to be created designates specifically or by class a person to whom a conveyance may be made, and such person may be born after the prescribed period, the instrument is invalid. It makes no difference whether the person by chance happens to be born within the time limit. In other words, it is the possibility of the invalidity of the estate or interest in its inception rather than the actual remoteness of vesting or the time designated for its termination which is the vital question for decision. The contingent happening must be one that is certain to occur within the prescribed limit. The reason for this rule is obvious. It would be against public policy to await the possibility of the occurrence. Civ. Code, §§ 715, 716, 749, 771; Sheean v. Michel, 6 Cal.2d 324, 57 P.2d 127; Estate of Troy, 214 Cal. 53, 3 P.2d 930.

[11] Analyzing the trust document and the possibilities thereof from the time of its inception, it will be noted that the bank is to hold and manage the properties as security for $75,000, for such improvements, encumbrances, taxes, interest, etc., as it shall deem necessary or proper to pay, and for any indebtedness that may be incurred in carrying out the terms of the agreement. While twenty years is designated as the life of the agreement, it was to continue and the title remain in the bank if all payments had not been discharged at the expiration of such period. In the event of the death of Mabel B. Gump during the twenty-year period, the bank was to convey the properties to her three children upon all of them executing a deed of trust to secure the balance due, "said note and deed of trust to contain such terms and provisions as may be suggested by said party of the second part [the bank]". In case any of them failed to execute such deed of trust the bank was to continue to so hold the properties until the indebtedness was fully satisfied. In the event that any of the children of Mabel B. Gump predeceased her, the properties were likewise to be so held by the bank and conveyed, only if and when said indebtedness was fully paid, to such of the three children as were living at the time, and to the issue per stirpes of any of the said three children who might then be dead, or failing such issue, to the survivor or survivors of said children. In other words, the bank was to hold and manage the properties for an indefinite and possibly distant date before conveying them to the children, or to the children of the children, of Mabel B. Gump. This provision offends against the rule of remoteness.

In the event of the death of Mabel B. Gump, should any of the children fail to execute the deed of trust to the bank, the interests of not only the children, but of the children of the children of Mabel B. Gump would be affected. It may be asked, why should any of the children refuse to execute a note secured by a deed of trust? The trust agreement provided that the bank could incur indebtedness in connection with the property covered, which would represent a debt due the bank and for which it would be entitled to repayment, with interest at six per cent. The bank is given not only the power to manage, rent or sell the property, but discretion as to the amount of indebtedness it may place thereon. It is possible that conditions or bad business judgment in the management of the improvements would so encumber the property that the children or any of them, would not care to take over the burden of securing by a trust deed additional indebtedness under such terms and conditions as might be "suggested" or imposed by the bank.

[12] Let us assume that one of the children has refused or will refuse to give a promissory note and deed of trust to the bank. One beneficiary by delay in execut-

ing the deed of trust could interfere with the rights, to the possible detriment, of the other beneficiaries, and thus postpone the vesting of title. Estate of Steele, 124 Cal. 533, 57 P. 564; Estate of Whitney, 176 Cal. 12, 167 P. 399; Estate of Maltman, 195 Cal. 643, 234 P. 898; Estate of Campbell, 28 Cal.App.2d 102, 82 P.2d 22. If the trust is invalid, as already pointed out, such invalidity dates from its creation. Sheean v. Michel, supra. The trust here attempted to be created is to continue as long as the indebtedness to the trustee exists, part of the income being paid to decedent's children, or to their children, whether or not they were in being at the date of the creation of the trust. We are of the opinion that the provisions of the trust for payment of the indebtedness in the manner outlined, and the repayment of the cost of improvements, without restriction, together with interest on such amounts, from the income of the properties, which could diminish or cease, might prolong the period of the indebtedness and thereby postpone the obligation to convey beyond the legally prescribed time limit.

[13] As in the case of remote vesting, so every future interest already vested is void in its creation which by any possibility, limitation or condition whatsoever may suspend the absolute power of alienation for a period longer than during the lives of persons in being at the time of the creation of the limitation, or condition, or for a period exceeding twenty-five years from the creation of the suspension. Civ. Code, §§ 715, 716, 749, 771. In other words, assuming that title had already vested as applied to the facts and circumstances here presented, the rule is that if, at the time of the execution and delivery of this agreement, there was even a bare possibility that in carrying out the purposes of the trust the absolute power of alienation would be suspended beyond the permissible period, it violates the statutory rules and must be declared void. Estate of Troy, supra; Sheean v. Michel, supra, and cases cited therein.

[14] The vesting of title in the children could not occur at the time of the execution and delivery of the document to the bank, and could not occur immediately upon the death of Mabel B. Gump because of the contingency that the children must give a promissory note and deed of trust to secure the loan at least concurrently with the execution of the deed of conveyance from the bank to them. The invalidity of the document appears from its inception. The deed from the bank to the children could be indefinitely postponed and indeed the conveyance never made.

[15] Assuming that all of the children of the trustor actually delivered the deed of trust to the bank, and that the operation of the trust so far has worked out in harmony with the plan of the trustor, we are still confronted by the rule that alternative contingencies must be viewed as of the time the instrument takes effect and may not be contemplated retrospectively. It is contended that in order to comply with the rule, it is not necessary that vesting should occur prior to the death of the person whose life measures the period; that if the vesting takes place at once, it is sufficient and that mere postponement of enjoyment does not preclude the immediate vesting of a future interest. With this principle we agree. In Shepard v. Union & New Haven Trust Co., 106 Conn. 627, 138 A. 809, 813, the court said: "If a construction is fairly open which will avoid turning a bequest into an illegal perpetuity and render the bequest valid and operative, the law favors it, and courts must prefer it." The facts of the Shepard case are not sufficiently similar to those of the instant case to be used as authority or precedent herein. In the Shepard case there were express words of a definite devise—"a gift". The instrument before us does not mention a gift that could or would vest immediately upon the death of Mabel B. Gump, but simply gives direction to the trustee to convey an interest on condition that the children or the issue of the children assume an obligation.

[16] Assuming that the intent of the creator of the trust should be carried out if possible, and that whatever interest Mabel B. Gump may have held in the property at the time of her death vested immediately in the living children, or vested at the time of the deed of trust from the children to the bank in exchange for the conveyance, we are confronted with the fact that nothing more could be vested in the children than was held by Mabel B. Gump. The vesting in the children immediately without the payment of the loan or the giving of a security conveyance to the bank would have frustrated and vitiated decedent's primary purpose, namely, the payment of an indebtedness. All directive provisions of the instrument are contingent upon the payment

of the original loan plus any amount expended by the bank as a part thereof. The children were to assume an obligation to pay the balance of the indebtedness, which, because of its uncertainty in amount due to the limitation of the payments to be made upon the debt, and the unlimited sum that might be appropriated to improvements, etc., could possibly result in delay of an absolute conveyance by the bank to the children and to their issue per stirpes to a period beyond the lives of persons in being at the time of the creation of the limitation or condition and beyond the allowable period from the date of the creation of the suspension, which would be a violation of the rule relating to restraints on alienation. Civ.Code, § 715.

[17] If, as appears from the terms of the trust document, the trustor intended that the trust should, if necessary, continue into the lives of children born after its delivery to the trustee, and if it also appears, as we think it does, that there is a possibility that the suspension of the power of alienation could continue for a period in excess of the statutory period from the time of the creation of such power, the trust is rendered void from its inception and no title vested in the trustee under the living trust phase of the document that the bank could convey to the children. Sheean v. Michel, supra.

[18] Respondents do not admit that the instrument violates either the rule against perpetuities or the rule against restraints on alienation. They contend that if this court holds against their interests in this respect, the rule of severability is applicable. Again upon the theory that the intent of the creator of the trust should if possible be carried out, an attempt may be made to separate "the good from the bad" (Estate of Troy, supra, 214 Cal. at page 64, 3 P.2d at page 930) and this has been accomplished notably in Nellis v. Rickard, 133 Cal. 617, 66 P. 32, 85 Am.St.Rep. 227, by separating a valid life estate from an invalid remainder. An estate may vest without violating the perpetuity rule, and the power of alienation still be suspended. The difficulty in this case arises from the fact that the trust document from its inception was invalid. The period of the trust was twenty years, which could be postponed for an indefinite period to pay the indefinite indebtedness. Considering the document solely from its living trust phase, it is possible that the absolute power of alienation could be suspended beyond the period of lives in being and also beyond the twenty-five year limit from the creation of the condition. Civ.Code, §§ 715, 749, 771; Sheean v. Michel, supra; Estate of McCray, supra. The invalid provisions of the agreement are so closely blended with those that may be valid as to make the latter ineffectual. The trustee would be acting as the trustee for the children or the children of the children in derogation of the rule considered herein without the right on the part of the children or perhaps the grandchildren or the great grandchildren of Mabel B. Gump to an absolute conveyance until the indebtedness should be paid.

Next, answering appellant's contention that the executors should have been charged with secret profits, the facts are that personal property was sold at public auction, under instructions, after petition duly filed and notice of the hearing given appellant. Subsequently a return of sale was filed and notice of the hearing thereon also given appellant. No objection to the petition or to the return of sale was presented. Objections and exceptions to the first and final account and report of the executors, however, were filed, covering the items, and at the hearing, regularly called, the objections were overruled, the court in its decree finding that the allegations contained in the objections were untrue and disallowing the same. The sale was confirmed prior to the filing of the objections, and no appeal was taken from the order of confirmation. Probate Code, § 1240.

With regard to the sale of said personal property, it was shown that at the time of the auction, S. & G. Gump Company, referred to as "Gumps", was a corporation engaged in the business of the purchase and sale of curios, bric-a-brac, jewelry, works of art, etc.; and that one of the executors had a sizable interest in the stock of the corporation. At said sale, some of the articles were purchased by strangers or buyers independent of Gumps; others, by Robert Livingston Gump, one of the executors, under authorization of and for the corporation; still others, for the corporation, but without authorization; and some articles were purchased personally for himself or his family. In many instances the Gump corporation was overbid by other parties. In connection with the articles purchased by Gumps, the highest bid was accepted by the auctioneer. At the conclusion of the sale, articles purchased for Gumps were delivered to their store for resale. Some of these articles were subsequently resold at a profit and some still remained unsold at the time of the settlement of the account.

[19] From the foregoing, it is possible that Robert Livingston Gump appeared in a triple capacity—as an authorized agent, an unauthorized agent, of the corporation, and personally. In each capacity separate individuality as a buyer and executor may have existed. An executor is not permitted to purchase property of an estate, directly or indirectly, or be interested in its purchase. Probate Code, § 583. The law assumes that official duty and personal interest are antithetical. Jones v. Hanna, 81 Cal. 507, 22 P. 883. It is not necessary on this appeal to differentiate these possible capacities. The objections to the decree set forth that the executors aided and abetted "Gumps" in the purchase of articles through a "certain dummy bidder"; that upon the resale of the property certain benefits inured to the executors. The legatee appellant prayed that the executors account for the property referred to, and that the court determine title as between the estate and the executors.

The contention of appellant is that a resulting trust existed on the part of the executors, interested in the Gump corporation, to account for any profit arising through the resale of the articles by the corporation. She seeks to present a direct attack upon the validity of a former order in the same court in the same proceeding. In fact, she endeavors to have reexamined the sufficiency of the facts to justify the order of confirmation of sale. The probate court would be called upon to approve or disapprove its former order. The petition for the sale and the petition to approve the sale admittedly recited sufficient jurisdictional facts. The order did not adjudge that any profit, legal or otherwise, should be retained by the executors. The order confirmed the sale and thereby vested the legal title in the respective purchasers. Probate Code, § 755.

[20-23] Jurisdiction means not only authority over the general subject matter, but the power to make a particular order or decree. If the order is void on its face, or if the court does not have jurisdiction to make the same, it may be attacked collaterally. Texas Co. v. Bank of America etc. Ass'n, 5 Cal.2d 35, 53 P.2d 127. If the order is voidable, as where a judgment or order entered does not truly reflect the action of the court, the attack may be directed to the untruthfulness of the order, decree or judgment. The real point of objection here goes to the value of the property at an auction sale. The value of articles is not a jurisdictional question. Lucas v. Todd, 28 Cal. 182. The parties were not precluded from contesting the sufficiency of the facts to justify the order. The order of confirmation is not void upon its face and therefore is not subject to collateral attack. Wood v. Roach, 125 Cal. App. 631, 14 P.2d 170; Gerini v. Pacific Employers Inc. Co., 27 Cal.App.2d 52, 80 P.2d 499.

The decree has become final subject to annulment, reversal or modification by an appellate court. Security-First National Bank v. Superior Court, 1 Cal.2d 749, 37 P.2d 69. It is valid on its face. If the legatee seeks further relief upon the allegations set forth in the objections, sounding as they do in fraud, she should apply to a court of proper jurisdiction. In Campbell-Kawannanakoa v. Campbell, 152 Cal. 201, 208, 92 P. 184, 187, the court said: "This character of relief is very common in the matter of fraudulent probate proceedings. The order or decree from the effect of which relief is sought cannot constitute a bar to such equitable action. As has been said, it is solely because of the order or decree, collaterally unassailable and valid on its face, that the equitable jurisdiction is necessary and exists."

The parcels of land should have been inventoried in the estate subject to whatever rights or interest may be held by the bank. Unless Marcella Gump indicates by appropriate procedure that she desires to have her rights and interest tested in another forum, the probate court may proceed in the ordinary manner. That part of the decree of distribution disallowing the objections to the sale of personal property is sustained; and that part of the decree adjudging that the two pieces of real property should not be inventoried in the estate is reversed, with instructions to enter a decree in accordance with the views herein expressed, appellant to recover costs.

We concur: PETERS, P. J.; GOODELL, Justice pro tem.

14 Cal.2d 752

DENMAN et al. v. SMITH et al.

Sac. 5275.

Supreme Court of California.

Dec. 26, 1939.

1. Appeal and error 🔑846(5)

Where judgment denied plaintiffs' right to have their alleged title to mining claims quieted, but trial court made no finding as to whether defendants were entitled to have their alleged title quieted, and none of defendants appealed from judgment, no question was before Supreme Court with regard to soundness of the judgment as far as it affected rights of any of defendants to have their alleged title quieted.

2. Mines and minerals 🔑19(1)

Generally, notices of location of mining claims should be liberally construed. Civ. Code, § 1426 et seq.

3. Mines and minerals 🔑18

Generally, as to mining claims, monuments erected in the field should control courses and distances as indicated on paper. Civ.Code, § 1426 et seq.

4. Mines and minerals 🔑38(15)

Recitals in location notice cannot be accepted as proof of the various steps essential to perfect a mining claim. Civ. Code, § 1426 et seq.

5. Mines and minerals 🔑38(22)

The question, whether the location of a mining claim as designated by boundaries marked on the ground is clearly ascertainable, is a question of fact for the trial court. Civ.Code, § 1426 et seq.

6. Mines and minerals 🔑38(22)

The question as to the accuracy and sufficiency of a natural object, as constituting an adequate compliance with statutory provisions requiring that mining claims be described in notices by reference to a permanent monument, was for the trial court under conflicting evidence. Civ.Code, § 1426 et seq.

7. Quieting title 🔑10(1)

In action to quiet title, plaintiff cannot prevail because of weakness of defendant's title, but must depend on strength of his own title.

8. Quieting title 🔑10(1)

In an action to quiet title, plaintiff must establish clear title in himself before he may be permitted to prevail because of alleged possible defects in defendant's title.

9. Appeal and error 🔑1002, 1011(1)

Where evidence is conflicting, a decision reached thereon, either by a court or by a jury, is conclusive on an appellate tribunal.

10. Mines and minerals 🔑38(15)

In action to quiet title to mining claims, evidence sustained trial court's finding that it was not true, as contended by plaintiffs, that they made a valid location or locations on the lands in question. Civ.Code, § 1426 et seq.

11. Mines and minerals 🔑26

Where evidence, in action to quiet title to mining claims, clearly disclosed that, prior to date when plaintiffs attempted to make location of mining claims, defendants had made a valid location and had actually operated claims, lands did not become open to relocation, though defendants' notices of location may have been defective, in absence of showing that defendants had failed to perform the necessary yearly assessment work. Civ.Code, § 1426 et seq.

12. Mines and minerals 🔑38(20)

A forfeiture of a mining claim cannot be established except on clear and convincing proof of the failure of the locators or owners of the claim to have the work done or improvements made in the amount required by law. Civ.Code, § 1426 et seq.

In Bank.

Appeal from Superior Court, Mono County; Pat R. Parker, Judge.

Action by Frank P. Denman and Frank Conner against Joe B. Smith and others, for possession and to quiet title to mining claims from which the plaintiffs had allegedly been dispossessed by the defendant, and for damages for the loss of the use of the claims. From an adverse judgment, the plaintiffs appeal.

Judgment affirmed.

P. E. Cavaney, of Los Angeles, for appellants.

Arthur A. De Chambeau, of Bridgeport, and Jess Hession, of Sacramento, for respondents Joe B. Smith and Florence Smith.

E. H. Woodard, of Los Angeles, for respondent Alice Lovatt et al.

PER CURIAM.

In accordance with the allegations of a complaint which was entitled "Action possessory and quiet title mining claims", the plaintiffs sought judgment for the restitution to themselves of certain quartz mining claims of which they assertedly had been dispossessed by the defendants, to have the title thereto quieted in themselves, and for damages for the "value, use and occupancy" of the said premises by the defendants. Each of the defendants answered the said complaint, specifically denied in his answer each and all of the essential allegations of the complaint, set up a title and right of possession in himself, alleged that the plaintiffs claimed some right or title to the premises, and prayed that title thereto be quieted in each or all of said defendants. On the trial of the action each of the several defendants Smith, Alice Lovatt, Jenny Brandon, Harry Charles, E. H. Woodard and "Mrs. E. H. Woodard" were represented by an attorney; no one appeared for any of the other defendants. The asserted title of the plaintiffs was predicated upon their allegation to the effect that on March 11, 1935, they went upon the public domain of the United States, "theretofore wholly unoccupied and unclaimed", and thereupon located those certain lode mining claims which were described in the complaint as Early Dawn Nos. 1, 2, 3, 6, 7 and 8,—which said allegation the trial court specifically found was *"not true"*. (Emphasis added.) In addition to such finding the trial court found that, "It is not true that at the time the Plaintiffs attempted their location of each and every one of said claims that the lands sought to be so impressed by such locations, and each and every one thereof, were subject to location by anyone"; that "said lands, by reason of the same and all thereof being held by valid locations of Defendants Joe B. Smith and Florence Smith under and by virtue of those certain locations of said Joe B. Smith and/or Florence Smith of said claims being known as the 'White Cloud' [placer claim], 'Florence', 'Florence Extension', and 'Ella' [lode claims], were not unappropriated public domain",—and, in substance, that the lands embraced in the claims assertedly located by the plaintiffs were practically identical with the lands held by the defendants Joe B. Smith and Florence Smith under [said] claims known as the "White Cloud", "Florence", "Florence Extension" and "Ella". Other material findings of fact made by the trial court were that "* * * long prior to March 11, 1935, * * * defendant Joe B. Smith had located said lode mining claims named and known as the Florence, Florence Extension and Ella", as well as the White Cloud placer claim; that "said defendants had performed the necessary assessment work required by law to be performed on each and every one of said claims for the year ending July 1, 1934, and filed the necessary Proof of Labor therefor"; that "said claims were not subject to relocation, if at all, until the 1st day of July, 1935"; that for the said "year ending July 1, 1935, Defendants Joe B. Smith and Florence Smith had performed the required assessment work on the White Cloud placer, the Florence, Florence Extension and the Ella mining claims"; and that "Plaintiffs' locations and each and every one thereof were a nullity, the same being placed on lands already held by valid mining locations".

However, the trial court did not find that the defendants Joe B. Smith and Florence Smith were entitled to have their title quieted, by reason of the fact that they had failed to offer sufficient evidence to establish that right.

Based on the findings hereinabove set forth, as well as on the conclusions of law made in accordance therewith, the judgment which was rendered recited that "Plaintiffs have no estate, right, title or interest in and to" the so-called Early Dawn mining claims; that "Plaintiffs' locations of said mining claims were placed upon lands already located and appropriated by Joe B. Smith and Florence Smith"; that "Plaintiffs' purported locations were therefore a nullity and void and no right attached to said lands, therefore, Plaintiffs have no title therein that could be quieted"; and that "Plaintiffs are not entitled to receive any damages whatsoever from Defendants or from any of them".

Following the denial of their motion for a new trial, the plaintiffs have appealed to this court from such judgment.

[1] As hereinbefore has been indicated, no decree was entered regarding the request of each or any of the defendants to have quieted as against the plaintiffs the respective titles, if any, of the said defendants in the properties here concerned. But since no appeal from the judgment

that was rendered has been presented to this court in behalf of any of the defendants, no question is before this court with regard to the soundness of the said judgment as far as it may or does affect the rights of any of the defendants to have quieted his or their asserted title in the said properties.

On the trial of the action, at the close of plaintiffs' case the defendants offered evidence to show a prior location by them of the claims here in dispute, including evidence as to the validity of their locations as far as compliance with statutory provisions is concerned, as well as evidence relating to the performance by them of the required annual assessment work, including the period ending July 1, 1935.

[2-4] However, in each of several respects appellants contend that the evidence failed to show that the several locations assertedly made by the defendants Smith were made in accordance with the provisions of the statutes in that regard. Sec. 1426 et seq., Civ.Code. The principal objections made in that connection by appellants, in effect, are: that some of the location notices filed by defendants Smith were defective for the asserted reason that they failed to properly describe the respective claims in that some of the said notices specified a description different from that indicated by the boundaries as erected on the claims by the defendants Smith; that the designation of Chalfant station as the "natural object" by which to identify the claims in dispute was so inaccurate and insufficient that it could not be said to constitute the "permanent monument" contemplated by the provisions of the statute; also that some of the boundaries indicated by defendants were not sufficiently marked on the ground to meet the statutory requirements in that respect. Although under the rule to be hereinafter discussed it is not here essential to determine whether such asserted defects were or are present—as far as they may or might affect defendants' title—nevertheless, it may be said, generally, that it has been ruled, in effect, that notices of location should be liberally construed, and that "monuments erected in the field should control courses and distances as indicated upon paper", which statement it was held "embodies a correct rule many times declared by this court". Schroder v. Aden Gold Mining Co., 144 Cal. 628, 629, 78 P. 20. As was said in the case of McInerny v. Allebrand, 107 Cal.App. 457, 461, 290 P. 530, 531, "* * * the recitals in the location notice cannot be accepted as proof of the various steps essential to perfect a mining claim. * * * 'And, besides, if it [the location notice] had contained every essential requisite of a location notice, the copy of the record would have proved nothing except the bare fact that such a notice had been recorded. It would not have proved that * * * the location was so marked on the ground that its boundaries could be readily traced, * *' ". Also, in the case entitled McLean v. Ladewig, 2 Cal.App.2d 21, 26, 27, 37 P.2d 502, 504, one of the claimants to certain mining properties asserted that a location made by another claimant thereto was not valid because of alleged defects in the location notice, which defects were similar to those here asserted by plaintiffs; and in that case the court said: "Plaintiff concedes that the location notice does not describe the Good Luck Mine in accordance with the monuments which at the time of the location were erected on the ground. She contends, however, that such monuments control over the description and courses as contained in the location notice. It is said in 40 Corpus Juris, p. 807: 'As a general rule, a mining location is not rendered invalid by a mere variation or discrepancy between the boundaries of a claim as marked on the ground and the courses and distances described in the location notice or certificate. In such a case if the markings on the ground are clearly ascertainable and can be definitely located they will control, as to the location and extent of the claim.'" And again: "The natural objects or permanent monuments referred to in the instant location notice are 'the ridge east of Lyons Gulch,' 'William Dougherty's Spring,' 'Frank Lord's residence,' and 'Charles Frank's Ranch.' All of these are presumed to be well-known natural objects or permanent monuments until the contrary appears. Hammer v. Garfield Mining & Mill. Co., 130 U.S. [291] 299, 9 S.Ct. 548, 32 L.Ed. 964. Notices of location are to be *liberally construed*. McCann v. McMillan, 129 Cal. 350, 62 P. 31; Carter v. Bacigalupi, 83 Cal. 187, 23 P. 361; Mitchell v. Hutchinson, 142 Cal. 404, 76 P. 55. At 40 Corpus Juris, p. 805, it is said in referring to the sufficiency of the location notice: 'If it is made in good faith, it should receive a liberal and rea-

sonable construction in favor of the locator; and if by such construction the language employed in describing the claim, *when taken in connection with the markings on the ground* and other surrounding circumstances, will enable a reasonably intelligent person to find the claim, and trace its boundaries, and therefore imparts notice thereof to subsequent locators, it is sufficient.'" (Emphasis added.)

[5, 6] Furthermore, the question whether the location of a mining claim as designated by boundaries marked on the ground is clearly ascertainable, is properly a question of fact for the trial court. McKinney's Digest, vol. 16, p. 192; McCarthy v. Phelan, 132 Cal. 404, 64 P. 570; Huckaby v. Northam, 68 Cal.App. 83, 228 P. 717; Hammer v. Garfield Mining Co., 130 U.S. 291, 9 S.Ct. 548, 32 L.Ed. 964. And where, as in the instant case, the evidence relating thereto is conflicting, so, also, for the determination of the trial court is the question with respect to the accuracy and sufficiency of the "natural object" (here designated in the location notices to be "Chalfant Station") as constituting an adequate compliance with the statutory provisions, which require that the claims be described in the notices by reference to a permanent monument.

[7, 8] But it is well-settled law that in an action to quiet title plaintiff cannot prevail because of the weakness of the title of the defendant therein, but that plaintiff's success in such an action must depend upon the strength of his own title. In other words, plaintiff must establish clear title in himself before he may be permitted to prevail because of alleged possible defects in the title of his adversary. Thus in the case entitled McInerny v. Allebrand, 107 Cal.App. 457, 467, 290 P. 530, 534, it was said: "The rule is well established in California that in a possessory action of this character, the plaintiff must rely upon the strength of his own title, rather than upon the weakness of that of his adversary. * * * Weed v. Snook, 144 Cal. 439, 77 P. 1023; Reay v. Butler, 95 Cal. 206, 30 P. 208; Schroder v. Aden Gold Min. Co., 144 Cal. 628, 78 P. 20". And in the Schroder case, last cited, it was said: "It is also urged that there was no evidence that the locators of defendant's claims marked the boundaries thereof by monuments. These are matters which do not concern the plaintiffs. When it has been determined that they [plaintiffs] have no interest in the land in controversy, the case is ended. This is in the nature of a suit to quiet title, and in such a case the plaintiffs must obtain judgment upon the strength of their own title, and if it be shown that they have no title, it becomes immaterial to inquire into defendant's rights. * * The want of title in plaintiffs renders it unnecessary to examine the title of defendant. City and County of San Francisco v. Ellis, 54 Cal. 72; McGrath v. Wallace, 116 Cal. 548, 48 P. 719." To the same effect is the case of Nobel v. You Bet Mining Co., 22 Cal.App.2d 623, 627, 72 P.2d 205.

It follows that if the specific finding of the trial court—to the effect that it was not true that on or about the 11th day of March, 1935, the plaintiffs made a valid location or locations on the lands in question—is supported by substantial evidence either to the effect that the attempted location by the plaintiffs was not made in accordance with the provisions of the statute, or that at such time the lands legally were not open to location by the plaintiffs, none of the several objections which are presented by the appellants may be sustained.

Appellants contended that on March 11, 1935, they "laid out" the Early Dawn group of claims, using a tape and compass; that they marked the discovery points, placed location notices on, and put up corner markers for, each claim; that on a day soon thereafter, accompanied by a mining engineer, they did certain other location work on the claims. The latter testified that on the day last mentioned he and the two plaintiffs checked the lines for each of the claims, chained from corner to corner, and put up corner monuments on each claim; that the monuments were made of rock, four or more feet in height, and that all the work just described was done in a single day, beginning at about 5 o'clock in the morning and ending some time between 2 and 3 o'clock in the afternoon of that day. On the other hand, the defendant Joe Smith testified that when he located *one* of the claims (the "Florence Extension") on June 6, 1933, "it took us [himself and another man, or boy] a good three days to monument that claim. * * *" The testimony showed that the land on which the mines were located was very precipitous, there being in places a rise of 2000 feet in altitude from the lower to the upper end of the several claims. The testimony of another witness for the defendants was to the effect that, in the early part of 1935, in his capacity as sheepherder he was in a position to note the approach of any person who might go upon the properties whereon the claims were located, and that during the period from about February 22 until May 22, 1935, he saw no one "making locations" in that vicinity, nor did he see "any monuments there". Defendant Joe Smith further testified that he was on the claims during the latter part of March, 1935, at which time he saw no new monuments, and that when he was on the land on or about July 1, 1935, he saw none which had been erected by the plaintiffs. The son of the defendants Joe and Florence Smith also testified that on July 18, 1935, he was on the claims known as Florence, Florence Extension, Ella and White Cloud, and that although he made a search for monuments or location notices at that time, he found none other than those monuments which theretofore had been placed on the claims by his father.

[9-11] Since it is well-established law that where the evidence is conflicting a decision reached thereon either by a court or by a jury is conclusive on an appellate tribunal, it follows that none of appellants' several contentions with regard to the insufficiency of the evidence to sustain the findings may be upheld. However, notwithstanding such conclusion, appellants contend that the finding of fact, which was reiterated in the judgment, to the effect that prior to the pretended location by plaintiffs of the claims here in dispute each of such claims had been legally located theretofore by the defendants Joe B. Smith and Florence Smith, was not supported by the evidence; also, the same objection was made with regard to the findings that the said defendants had performed the required assessment work on each of said claims for the year ending July 1, 1934, and that at the time when plaintiffs attempted to locate them the lands were not "unappropriated public domain". However, the evidence discloses beyond the possibility of question that, prior to the date when the plaintiffs attempted to make their location of the several claims, the defendants in good faith not only had made location of each of said claims by monumenting them, marking the boundaries thereof on the ground, placing the required notices of their locations within the monuments, recording the several notices of location, and performing the required annual assessment work by constructing roads, a cabin, a mill and tunnels on the property, but also had actually operated the property as a mine or mines,—all of which facts were personally and well known to the plaintiffs. It is well settled that under such circumstances the land would not become open to relocation by another unless and until defendants failed to perform the necessary yearly assessment work. Von Gal-Scale v. Cottrell, 2 Cal.App.2d 29, 37 P.2d 715; Calico-Odessa Min. Co. v. Britt, 135 Cal. App. 744, 27 P.2d 778.

[12] In the case entitled Moodey v. Dale Consol. Mines, 9 Cir., 81 F.2d 794, 797, the rules governing the right to relocate a mining claim are aptly set forth as follows: "* * * A forfeiture of a mining claim cannot be established except upon clear and convincing proof of the failure of the locators or owners of the claim to have the work done or improvements made to the amount required by law. Hammer v. Garfield [Mining and] Milling Co., 130 U.S. (291) 292, 9 S.Ct. 548 (32 L.Ed. 964)." Again, at page 796 of 81 F.2d the same court said: "'Mining claims are not open to relocation until the rights of a former locator have come to an end. A relocator seeks to avail himself of mineral in the public lands which another has discovered. This he cannot do until the discoverer has in law abandoned his claim, and left the property open for another to take up. The right of location upon the mineral lands of the United States is a privilege granted by Congress, but it can only be exercised within the limits prescribed by the grant. A location can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence a relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator, but all the world, because the law allows no such thing to be done.' * * *" See, also, Lind v. Baker, 31 Cal.App.2d 631, 637, 88 P.2d 777.

Therefore, in view of the evidence of a valid prior location by defendants, assertions made by appellants such as those to the effect that some of the notices of location were defective—in that the property was incorrectly or inadequately described therein—should not be permitted to prevail against the facts hereinbefore set forth. Besides, as hereinbefore stated, the judgment of the trial court did not provide for the quieting of title in the defendants. Neither of the parties to the action was granted any relief in that regard; and it is clear that the plaintiffs were entitled to no judgment for damages.

Appellants register further objections to the judgment to the effect that on the trial of the action the trial court erred in the admission of certain evidence offered by the defendants. Such objections related generally either to the order of "proof" or to evidence which in no way could have affected the decision that was reached by the trial court.

No miscarriage of justice resulted from the judgment from which the appeal was taken.

The judgment is affirmed.

WEST KEY NUMBER SYSTEM

14 Cal.2d 736

In re ANDREANI.

L. A. 17309.

Supreme Court of California.

Dec. 22, 1939.

Rehearing Denied Jan. 18, 1940.

1. Attorney and client 🔑61

The law does not penalize its devotees for actions which are open to satisfactory explanation, nor for those which viewed from one standpoint might bespeak a wrong intent if, upon subjection to the light of a fair investigation and full disclosure of facts, a different or more favorable perspective may appear.

2. Attorney and client 🔑61

In proceeding for reinstatement by attorney who had been disbarred for appropriation of moneys belonging to corporation, attorney's claim to offsets against judgment was entitled to consideration on question of restitution.

3. Attorney and client 🔑58

The disbarment of an attorney has for its aim the protection of the public and the reformation of the offender.

4. Attorney and client 🔑61

An order of disbarment is not necessarily final or conclusive for all time, and does not preclude court, for good cause, from setting it aside and restoring the delinquent attorney.

5. Attorney and client 🔑61

Generally, on an application of a disbarred attorney for readmission, the court will not weigh the evidence in its relation to the original order of disbarment, particularly where a review of the disbarment proceeding was had by the Supreme Court, but where Supreme Court has not previously had opportunity of considering entire record prior to application for readmission, the general rule should be qualified to meet the situation.

6. Attorney and client 🔑61

On an application by disbarred attorney for readmission where proceeding on disbarment had not been reviewed by Supreme Court, the court should not be precluded from considering evidence in the light of charges originally made.

7. Attorney and client 🔑61

In proceeding for reinstatement to practice law by attorney who had been disbarred on charge of misappropriation of funds, evidence *held* to warrant an order of reinstatement. Code Civ.Proc. § 287, subd. 5.

In Bank.

Proceeding in the matter of the petition of Farnese M. Andreani for reinstatement to practice law.

Petitioner restored as an attorney and counselor.

Harold E. Prudhon, of Los Angeles, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent State Bar of California.

PER CURIAM.

This is an application by F. M. Andreani for readmission to practice law in this state. Among other things, the record herein discloses that on October 22, 1915, petitioner was admitted to practice law in all the courts of this state; that on or about March 2, 1933, petitioner was ordered to show cause before a local administrative committee of

The State Bar why he should not be disciplined for specified professional misconduct, which, in effect, consisted of charging a "highly excessive and unreasonable" fee and of the appropriation to his own use and benefit of moneys belonging to a corporation for which petitioner was acting as attorney; and that following a hearing on such charges the local administrative committee made its findings of fact, upon which it concluded that petitioner had been "guilty of acts of misconduct in violation of rule 9 of the Rules of Professional Conduct of The State Bar of California," also that "the said acts of misappropriation and embezzlement of the said funds of said corporation and the failure to pay the said moneys to the said P. D. Estate Company and to the persons lawfully entitled thereto, were knowingly committed by the said respondent attorney as an attorney at law and involve moral turpitude and dishonesty within the meaning of subdivision 5 of section 287 of the Code of Civil Procedure of the State of California". In pursuance of such findings and conclusions the said committee made its recommendation to the state board of bar governors that petitioner "permanently be disbarred * * *". Thereafter, in due course, the said board approved the findings of fact which theretofore had been made by the committee, and recommended to this court that petitioner be disbarred from the practice of law in this state,—with the result that, in the absence of any contest thereof by petitioner, an order of this court of date December 11, 1933, was made in accordance with said recommendation.

Thereafter, on January 24, 1936, on the filing by petitioner of his application for reinstatement the said board of bar governors denied his petition "without reference to a Committee for formal hearing and without taking testimony". On June 14, 1936, petitioner again "duly and regularly filed his written petition with the said Board of Governors of The State Bar of California, requesting its favorable consideration and recommendation that he be readmitted to The State Bar of California"; and in pursuance thereof, but not until September 8, 1938, a duly appointed committee filed with the said board its report, findings of fact and conclusions thereon, together with its recommendation that petitioner be reinstated as a member of The State Bar. On March 24, 1939, the board of bar governors rereferred the matter to the committee, with special instructions to "receive all evidence and further testimony which may be presented to it by the Petitioner and the Examiner pertaining to the repayment by Petitioner of his obligations, the rehabilitation of Petitioner and the present attitude of Petitioner with respect to restitution",—which reference resulted in amended findings and a second recommendation by the committee that petitioner "be reinstated as a member in good standing of The State Bar of California". Thereafter, on August 12, 1939, the board of bar governors, "without taking evidence of any kind other than said Report of the Administrative Committee, adopted a Resolution whereby the Petition of the said F. M. Andreani for readmission was denied". On the conclusion thus finally reached by the state board of bar governors, at his request therefor, petitioner has been granted a writ of review; and the matter, which has been briefed and argued by the respective parties, is now ready for determination by this court.

For the reason that after the board of bar governors had made its order recommending petitioner's disbarment the latter voluntarily declined to avail himself of the right to have such proceedings reviewed by this court, and to the end that a fair understanding may be had herein with regard to the facts which form the background of the instant petition, a consideration of the principal incidents which led to the commission of the offense of which petitioner was found guilty are here set forth: At the inception of the legal business which resulted so disastrously as far as he was concerned, petitioner was a practicing lawyer with a rather select clientele, especially among the more prosperous of the foreign population of the city of Los Angeles and its environs. It appears that, prior to the time when petitioner became involved in the instant transaction, two maiden ladies of advanced years, named respectively Francesca and Caledonia Domec, had deeded to their niece, Marie More (reserving unto themselves a life interest therein), a tract of land containing approximately 140 acres. The consideration for such transfer was "love and affection", which had accrued throughout the many preceding years during which the niece had lived with her aunts as a member of their household in a house which formerly had been the property of the mother of the niece, long since deceased. Soon after the date of such conveyance, the two Misses Domec began to consult petitioner with regard to their business affairs. They offered to sell the entire acreage to petitioner for the sum of $16,000. He declined the offer, but suggested that they and Miss More form a corporation, to the end that the property might be more expeditiously handled in the event its sale or other disposition were contemplated. Accordingly a corporation known as the P. D. Estate Company was organized, with an authorized capitalization of $50,000, divided into 500 shares of the par value of $100 per share. It appears that petitioner personally paid all fees, costs and expenses of the organization of such corporation. All the shares of stock of the corporation were divided and distributed,—140 shares to each of the Misses Domec and Miss More, and 80 shares to petitioner, in payment for his services in performing not only the legal work which was required in the organization of the corporation, but also that which thereafter might be required in the conduct of its "business". Each of such stockholders became an officer of the corporation and so remained during all the time here under consideration. It was petitioner's original idea that the property of the corporation advantageously might be subdivided into small parcels which could be sold as cabin sites. Thereupon he bestirred himself to the accomplishment of that purpose, and eventually succeeded in consummating a sale of the property at a price of $84,750. A trust was created which contained a provision to the effect that, as and when sold, a fixed proportion of the sale price of each lot would be paid to the corporation. At or about the same time that the trust agreement was executed, but entirely distinct and separate therefrom, a resolution was regularly adopted by the corporation which provided, in substance, that no funds should be withdrawn from its bank account except by check carrying the signature of both petitioner (as secretary) and Miss More (as treasurer). But also at about that time it was agreed, orally, by at least one of the Misses Domec together with Miss More and petitioner that as moneys were received from the sale of the property of the corporation, such proceeds would be divided among the four stockholders thereof in the respective proportion that the stock of each shareholder bore to the total number of shares of stock of the corporation,—which apportionment of moneys was to be accomplished without and in the absence of the legal formality usually employed by a corporation in the business of declaring a dividend. The evidence does not fully disclose whether both of the Misses Domec were present and agreed to such manner of dividing the assets and profits of the corporation. The one who possibly or probably was absent was quite ill and infirm; but the other Miss Domec, who was able to go about, usually acted as agent for her absent sister and transacted all business in which they were commonly or mutually interested. But, however the facts in that regard may be, it is certain that during a period of five or six years following the date of such oral agreement the plan thereby adopted was carried into execution, in that as proceeds from the sale of the property were received they were appropriated either by petitioner or by Miss More either to his or her respective personal use, or by a division of such moneys by each of them respectively with either or both of the Misses Domec. In that regard Miss More testified as follows: That "* * * *every* time I got a check I got the money for *them* [her aunts]. I kept some of it as it was agreed that I should keep some"; that it was agreed that her *aunts* should have some; that *Andreani* should have some, and that *she* should have some; that it also was agreed that "it should be paid out *equally as it came in*"; that she was present when the agreement was made; that her aunt Francesca and Mr. Andreani were also present; that it "was one of the agreements *when the corporation was formed*"; that the understanding was that the money *was to be divided equally between them,* that is, it was to be divided among those interested in the corporation; that *it was so divided;* that *she* knew that *Andreani* was receiving funds from the corporation as they came in; that she kept no books as to how much money she gave to her *aunts* or how much *she* retained; that the agreement was made about dividing the profits at a regular stockholders' meeting *called for that purpose* in Mr. Andreani's office. (Italics added.) Thus it appears that each and all of the stockholders (and officers) knowingly participated in the irregular distribution of the assets and profits of the corporation, amounting in the aggregate at the first of the year 1930 to the sum of approximately $19,000. Of that amount petitioner was apparently chargeable with $10,000, as against which he claimed some offsets, including a distribution of *over $2000 to one of the Misses Domec*. During the period of years that such assets and profits of the corporation continued to be apportioned as hereinbefore has been outlined, Miss More went to Mexico, where she remained for approximately a period of two years. While in Mexico, and at her insistent request therefor, petitioner caused several hundred dollars, in the aggregate, of the funds of the corporation to be forwarded to Miss More, which she used for her own private purposes. On her return to Los Angeles, in January, 1930, she became dissatisfied with the manner in which petitioner was or had been managing the business of the corporation and soon thereafter, either because of her suggestion in that regard or at his own initiative, petitioner ceased to concern himself with the financial affairs of the corporation, and he accordingly notified the bank with which the funds of the corporation were deposited that, following such notice, funds would be withdrawable without his authorization but on the signature of Miss More alone. Thereafter that plan was followed. At about the same time, each of the Misses Domec also indicated a lack of confidence in petitioner, with the result that they consulted other counsel whom they engaged to represent them in matters relating to the corporation. A little later, a portion of the stock of the corporation which had been the property of Miss More was acquired by an estate, through execution of a judgment which had been rendered against her. Thereupon the attorney who was the executor of such estate, together with the new attorney who represented the Misses Domec, joined in an investigation of the affairs of the corporation, with the immediate result that an action was brought against each of several different banking institutions to recover judgment for the amount represented by checks that had been cashed by such bank on an inadequate or improper endorsement thereof by petitioner alone, in violation of the corporate resolution which required that such endorsement be made by both petitioner and Miss More. In each of such actions a judgment was recovered and thereafter paid by the defendant bank. The evidence which was introduced in one of such actions was the direct cause of the institution of proceedings for the disciplining of petitioner, which resulted in the order for his disbarment. At or about that time an action was brought against petitioner and Miss More, in which they were jointly charged with having committed certain fraudulent acts in connection with the corporation. Petitioner stipulated that a judgment in the sum of $10,088.63 be entered against him in that action. It further appears that he agreed to that stipulation for the asserted reason that he believed "other actions would not be pressed upon the same checks involved and charged to him and to other members of said corporation, or against the other stockholders, the various banks and against third and innocent parties."

Again referring to the facts with regard to the question of restitution, it appears that, extending over a period of five or six years, in accordance with the prior agreement of the officers, directors and stockholders of the corporation and with their actual knowledge and at least implied consent thereto, petitioner caused funds of the corporation to be irregularly distributed to himself, which amounted in the aggregate to approximately $10,000,—less an amount of $2,000 which assertedly was turned over to another of the officers. But it also appears that during such entire period, with the exception of taxes and the like, the corporation had no financial liabilities of any sort, and that all the other officers, directors and stockholders of the corporation committed similar acts involving the irregular appropriation of corporate funds. However, no one was directly injured. Petitioner owned 16 per cent of the stock of the corporation. As a result of his efforts and management, the corporation had sold all its property for the sum of $84,750. If the purchase price had been paid in cash, instead of in instalments, petitioner's total share therein would have amounted to $13,560. With the knowledge and consent of the stockholders in the corporation, he actually appropriated the sum of $8,000. However, the corporation was but the "alter ego" of its four stockholders; so that from a financial standpoint, at least, neither the corporation nor any of its stockholders had any just cause for complaint. In fact, in all probability "all would have been well" had not a new situation arisen. Times became hard; cabin sites on the property of the corporation no longer were readily salable; no money was being received; and it was but a natural result that distrust and dissatisfaction should take the place of the mutual trust, confidence and contentment which theretofore apparently had prevailed among the stockholders. But obviously the altered situation in that respect could not affect the former acts of petitioner concerning the distribution of corporate funds, which previously had been performed by him with the consent of the interested persons. And although petitioner originally was accused by The State Bar of having charged an "unreasonable" fee for his services as attorney for the corporation, he was not specifically found guilty thereof. His clients in the instant transaction consisted of three women, two of them being quite elderly and undoubtedly possessed of the various unfounded suspicions, whims and eccentricities that usually attend advanced age. They originally offered their property to petitioner for the sum of $16,000, but instead of accepting such offer petitioner succeeded in selling it for them at a price of $84,750, or at a "paper profit" of $68,750. Petitioner organized a $50,000 corporation for them and performed all the necessary work in appearing before the various and sundry state commissions and agencies incidental thereto, including the corporation commission which granted a permit for the issuance and distribution of the stock of the corporation. Additionally, it appears not only that he drew all necessary legal papers and documents connected with the organization of the corporation and the creation of the trust pertaining to the sale of the lots, but that his services, in the course of five or six years of intensive efforts in the interests of the corporation, included consultations with his clients, attendance upon directors' and stockholders' meetings,—all for a purported fee of $8,000 to be paid to him in stock of the corporation. Merely in making the sale of the property, had petitioner received as payment therefor only the regular (lesser) commission of five per cent ordinarily charged by a real estate broker—instead of ten per cent, frequently charged as commission for the sale of country property—his fee therefor would have amounted *in cash* to $4,237.50, which would have left a remainder amounting to only $3,762.50 to be paid for all the other legal services which he rendered to his clients. With reference to the question of restitution by him to the various persons who suffered financially because of his irregular diversion of funds of the corporation, petitioner asserts (without contradiction of the facts) that: "Long before these disciplinary proceedings were instituted, * * * without distinction as to the amounts chargeable to him as recipient of funds or dividends from said corporation", and "in order to prevent innocent third parties from suffering losses occasioned by the negotiation of the aforementioned checks", he *"sacrificed his last resources to reimburse all known negotiators thereof"*; that he "suffered a judgment to be entered against him by stipulation, based on a complaint alleging embezzlement, in the sum of $10,088.63, and *greatly in excess of the amounts* [*properly*] *chargeable to him*", notwithstanding the surrender by him to the corporation of "his [remaining] 40 shares of the capital stock of said corporation, at that time reasonably well worth over $4,000.00, upon the assumption and in the belief that other actions would not be pressed upon the same checks involved. * * *" (Italics added.) When questioned with regard to the judgment last mentioned, petitioner testified that his "idea in confessing that judgment was to evade any trouble in litigation, particularly to protect Miss More from further trouble and litigation", but that he "didn't go into the fine points of what the allegations contained"; that he "also surrendered the stock * * * with the same idea in view", and "also repaid to innocent third parties, these intervening endorsers of these checks and others, in order not to make innocent persons suffer, all with a view to evading trouble and litigation". Incident thereto petitioner likewise asserts that although he was charged with having "improperly appropriated to his own use and benefit funds of said corporation and that the amount thereof was evidenced by the aforementioned judgment, * * * counsel and present secretary of said plaintiff corporation now admits that the said judgment should be reduced to from $2,000.00 to $3,000.00"; but that "in recapitulating the accounting between petitioner and said corporation and his previous repayment to parties involved in the various transactions * * * nearly all of the $3,963.37 recovered by said corporation from several defendants (* * * the present directors of plaintiff corporation would credit petitioner with the entire said amount, * * *) had been paid by petitioner in reimbursement to third parties, with the exception of an undetermined amount, some $800.00, advanced by Bank of America, but for which no claim has been advanced or pressed against petitioner"; that "out of the total amount charged and [on the] basis of the judgment entered against petitioner, a total of $2,850.00 had been by him paid at various times and in divers ways to other stockholders of said corporation during the four years in which [he] we received or took monies therefrom. * * * Moreover, at the time of said accounting and entry of judgment, * * * petitioner was reasonably entitled to approximately $3,000.00 in regular dividends from said corporation"; and that "All of the above would reflect a reduction of some $9,000.00 on the aforementioned obligation, with the said plaintiff corporation still holding the 40 shares of its capital stock returned by petitioner." Petitioner makes the further assertion that "The said reckoning would make possible a compromise and settlement along the lines suggested by the petitioner at the hearing before the Local Administrative Committee on March 20 [1939] last past. However, the present directors of P. D. Estate Co. find themselves unable to compromise, modify or amend the said judgment (now of record seven years and not renewed) for the reason that the aforementioned 70 shares of corporate stock formerly held by Marie More Monjardin are retained by * * * [the] Executor of the Estate of Lucie Dubordieu, Deceased, and that the holdings of Francesca Domec, Deceased, are not administered by any personal representative, an Administrator having resigned before returning an Inventory"; that "the said directors decline to fix or accept a determined amount or assume responsibility for a settlement without adequate confirmation"; that "notwithstanding that an equitable accounting resolves the controversy of any financial obligation to his reputed victim in his favor, in further effort to make amends and by way of additional restitution [petitioner] is willing to pay the sum of $2,000.00 when the directors of the P. D. Estate Co. are in a position to effect a settlement". Furthermore, the findings of the examining committee contain the statement that "the attorneys who brought suit against him [petitioner] and obtained judgment against him submit letters which appear in the exhibits, acknowledge that he was entitled to some offsets *which he did not urge*" (Italics added); and also that, in addition to substantial credits which petitioner is entitled to have offset against the judgment, petitioner "surrendered his stock in the P. D. Estate Company, the value of which no one is able to determine but which at whatever value it had at that time should be a further credit against said judgment"; also that "in addition to the foregoing credits, there is evidence warranting a conclusion that a considerable portion of money in addition to the amounts above mentioned, which were obtained on checks endorsed by Mr. Andreani, went to other stockholders of the corporation and that he received no benefit from certain of these funds. That in so far as further restitution is concerned, the same is impossible at the present time due to petitioner having no funds which could be devoted to this purpose but that petitioner has indicated and we believe sincerely that if reinstated he will soon be in a position to effect a settlement of his obligation to the P. D. Estate Company and will be able to work out a satisfactory compromise and within a reasonable length of time will be able to liquidate said obligations in full." It also appears in that connection, as petitioner asserts, that the "petition for reinstatement has been * * * recommended by the persons or officials most directly and financially interested in the transactions growing out of which the disbarment of petitioner resulted, towit: Marie More Monjardin, former treasurer and intended principal shareholder of P. D. Estate Co., * * * Mr. W. G. Brooks, the contract purchaser of the realty holdings of said P. D. Estate Co. * * *; Edmund Nelson, Esq., counsel and vice president of Bank of America * * *; [also] H. G. Sadicoff, Esq., E. T. McGann, Esq., and Carl W. Minton, Esq., the present directors of said P. D. Estate Co. * * *"

On the situation as above revealed, this court is not prepared to say that petitioner was not justified in claiming a right to some offsets as against the amount it is asserted he still owes on the judgment.

[1, 2] However, as far as the instant situation is concerned, although petitioner's training as a law student and his experience in the practice of the law should have constrained him from committing the acts of which he was found guilty, nevertheless the law does not penalize its devotees for actions which are open to a satisfactory explanation,—nor for those which viewed from one standpoint, might bespeak a wrong intent, if, upon subjection to the light of a fair investigation and full disclosure of the facts and circumstances, a different or more favorable perspective may appear. Thus petitioner's claim to offsets against the amount of the judgment is entitled to consideration on the question of restitution.

[3] Petitioner is a man fifty-four years of age. His lesson has been hard. For six years he has suffered the ignominy of professional and social ostracism. To an attorney such as Mr. Andreani, who, prior to expulsion from the ranks of the profession, had enjoyed wide social intercourse in many different civic and fraternal groups, such a period of exclusion would indeed be bitter punishment. However, in accordance with the latter-day concept of such a situation, penalties imposed either in criminal matters or in disbarment proceedings are not intended "as punishment" of the offender. With respect to the disbarment of an attorney, expulsion from the ranks has for its aim the protection of the public and the reformation of the of-

fender. Certainly the public has not suffered from the hands of petitioner since his disbarment. On the other hand, the record shows, without contradiction, that during that period of time petitioner has refrained from seeking employment or from entering into any association which in any way might be construed as an effort on his part to enter the field of the practice of the law. His petition shows that upon occasion, throughout the past six years, he has accepted very humble employment, at modest wages—at times as low as $12 per week; that for a considerable portion of that period he has given largely of his services, gratuitously, to divers civic and public projects which have had for their aim the solution of problems relating to "unemployment relief" and other "rehabilitation" programs. The record shows that twenty-three members of the bench and numerous members of the bar, as well as many other citizens of splendid repute in the community, together with his employers during the past six years, have expressed, through letters, their confidence in petitioner's fitness for reinstatement as a member of the bar. The findings of the examining committee recite that petitioner appears to be "a man of more than average mental ability". It further appears from the record that during the past six years he has kept abreast of the law, and of the changes that have taken place therein; and that not long since petitioner passed with high rating a written and oral civil service examination for the office of referee in one of the departments of the state government.

[4] In matters of disbarment,—if properly it may be said that the function of the courts of last resort is but coldly to declare the law without regard to possibly worthy merits of the accused, or human sympathies for his plight,—it might be argued that whenever it may appear that an attorney has grievously erred in the matter of his professional conduct, and by reason thereof it has been adjudged that he is no longer fit to be entrusted with the transaction of legal business for others, an order or judgment of his disbarment should be final. But that such conclusion is not the policy of the law is attested by the well-established rule that "An order or judgment of disbarment is not necessarily final or conclusive for all time, and does not preclude the court, for good cause, from setting it aside and restoring the delinquent attorney." In re Treadwell, 114 Cal. 24, 26, 45 P. 993, and precedents there cited. In the case of In re Nisbet, 77 Cal.App. 260, 261, 246 P. 120, it also was said: "It is not the policy of the law, and is not considered to be in the interest of justice, that an attorney who has been disbarred for misconduct shall never under any circumstances be readmitted to practice." And in the case entitled In re Stevens, 197 Cal. 408, 424, 241 P. 88, 94, this court declared that "The law is interested in the regeneration of erring attorneys, and in the enforcement of a sound discipline its disposition ought not to be to place unnecessary burdens upon them." The "door of hope" should no more be conclusively or finally shut as to them than it should be thus closed as against any other person who has erred and consequently may have suffered a somewhat similar penalty through the disciplinary functioning of the law. Reformation and regeneration are open to any man and, when effected, should merit a just reward. Although it has been declared that disbarment is not adjudged as a punishment, but is a method judicially devised to insure protection to the public,—it is clear that when reformation of a disbarred member has been effected the public is no longer in need of such protection. Reformation may only be brought about by the individual. It may be manifested solely by a "state of mind" which may not be disclosed by any certain or unmistakable outward sign. Its existence may be difficult to establish affirmatively, but its nonexistence may be "proved" by a single act. Although "rehabilitation" is the word commonly employed by lawyers and the courts to designate the desired "change of heart", or reformation, of a disbarred attorney,—in reality, rehabilitation is only that status which must immediately result, not from any words, acts or creditable conduct of such attorney, but rather from that which flows from an order or judgment of the court by which such attorney is restored to his former good standing and reinvested with the powers and dignities with which theretofore he had been authoritatively clothed. In reaching a fair conclusion on the question of reformation in such a matter, the favorable testimony of acquaintances, neighbors, friends, associates and employers with reference to their observation of the daily conduct and mode of living of an attorney who has

suffered disbarment should weigh heavily in the scale of justice. Furthermore, in cases such as the one here concerned, which involve a charge of misappropriation of funds, it should be clear that although restitution may seem to indicate repentance, such act in itself "works no magic". Nor does the failure to restore, in whole or in part, definitely establish lack of contrition. The importance of making restitution, and a conclusion respecting the weight which should be attached thereto, should be determined largely by the financial or other ability of the attorney to restore that which he has misappropriated, as well as by his attitude of mind regarding the matter. A wealthy attorney who has suffered disbarment should not be commended too highly for the restoration of a sum of money, however great, where such act would involve no appreciable hardship on him. Nor should one in straitened circumstances be condemned for failure to make restitution, where the return of a comparatively insignificant amount might involve great sacrifice. In the matter of making financial amends, each should be judged not only by his ability to restore, his sacrifice of financial advantages or bodily comforts of himself or family, but also by his attitude toward the subject as evidenced by a spirit of willingness, earnestness and sincerity. From a consideration of the foregoing, therefore, in the instant matter, it would appear that greater weight might have been given to the recommendation of the local administrative committee—which not only had the opportunity to observe directly the petitioner and the numerous witnesses and to consider the testimony in the first instance, but also heard the matter anew after admonition to give careful attention to the question of rehabilitation. And if reformation may be "proved" by testimonies of meritorious conduct, the conclusion must be that petitioner has fully established his right to an order of reinstatement in the practice of the law.

[5-7] As hereinbefore has been indicated, at the time when the board of bar governors issued its recommendation of disbarment, or thereafter within the time prescribed therefor, petitioner voluntarily declined to avail himself of the right which was open to him of having the record reviewed by this court. In that connection, it is indicated by petitioner that his failure to do so, as well as his failure to present a more adequate defense to the charges made against him by either the local committee or the board of bar governors, was due, in part at least, to petitioner's ill health at or about the times in question. However, had this court been requested in the first instance to review the full and complete history of the entire transactions out of which the charges assertedly arose and that thereafter were instituted against petitioner, it may be that the order of disbarment would not have followed. And it is extremely improbable that—if the facts of the transactions upon which the recommendation of disbarment was predicated in this case had been submitted in a criminal trial—a jury would have found petitioner guilty of the offense of embezzlement. Although it is the general rule that on an application for readmission the court will not weigh the evidence in its relation to the original order of disbarment, particularly where a review of the proceedings was had by this court,—nevertheless, in instances where this court has not theretofore had the opportunity of considering the entire record prior to the application for readmission, such as is the case herein, the aforementioned rule should be qualified to meet that situation. In other words, on an application for readmission, where the proceedings on disbarment have not theretofore been reviewed by this court, the latter should not be precluded in the proceedings for readmission from considering evidence in the light of the charges originally made. However, as hereinabove has been indicated, in the instant matter, since it is the conclusion of this court that the evidence bearing on the question of the right of petitioner to readmission fully warrants the issuance of its order in that respect, it does not become necessary to weigh the evidence for any other purpose.

Accordingly, it is ordered that the petitioner be and he is hereby restored as an attorney and counselor of this court, and that his name be reinstated upon the roll of attorneys thereof, and that he be entitled henceforth to practice in all the courts of this state.

36 Cal.App.2d 278

PEOPLE v. WARREN.

Cr. 3245.

District Court of Appeal, Second District, Division 1, California.

Dec. 28, 1939.

Hearing Denied Jan. 25, 1940.

1. Receiving stolen goods ⚷8(3)

Evidence sustained conviction of receiving stolen property.

2. Criminal law ⚷1165(3)

That evidence would have justified a conviction for robbery, rather than receiving stolen goods, for which defendant was convicted, was not ground for complaint by defendant.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Jack Warren was convicted of receiving stolen property, and from a judgment of conviction and the order denying a motion for new trial he appeals.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Defendant, Jack Warren, who was charged in an information with receiving stolen property, was found guilty thereof by a jury. He appeals from the judgment of conviction, and from the order denying a motion for a new trial.

The record reveals that a robbery was committed on the night of December 23, 1938, in the home of Mr. and Mrs. Marvin Winthrop at 365 South Cloverdale street in Los Angeles. Two rings and a bracelet were taken from Mrs. Winthrop, and a diamond ring from Mr. Winthrop.

On January 9, 1939, William Allen Henry and Bud Lully, ex-convicts, were arrested in an apartment house in Los Angeles. They admitted having committed the robbery. Later in the day appellant Warren was arrested in the hallway of the apartment house, while ringing the doorbell to their apartment. It appears that Henry had met both Warren and Lilly at San Quentin prison.

The record discloses that sometime around the middle of December, 1938, a meeting was held at the home of one Maynard Groom in Los Angeles; Groom had also served time for robbery. Present at this meeting were Groom, one Freddie Kessler, Henry, Lilly and Warren. Kessler told them that he knew where they could "pull a robbery job" on some people who were well off and had jewelry and furs, and that, in fact, these people lived in the apartment house where his mother resided. Kessler's parents occupied the apartment directly under the apartment of the Winthrops; Kessler was living in a downtown hotel at the time. At this meeting the question arose as to who would drive the car to the scene of the robbery and it was decided, according to Groom's testimony, that Warren would drive his (Warren's) car. Groom testified that he was asked to go with them but that he refused and said that he did not care to have any part in the robbery.

There was evidence to the effect that about a month prior to the robbery, Warren had purchased an automobile on a conditional sales contract and that the car was in his possession until the time of his arrest on January 9, 1939.

John K. McCloud, who was in the business of selling used cars, testified that sometime in the early part of December, 1938, Warren came to the used-car lot and they discussed the price of a car. Warren returned about three days later and told McCloud that he might know some other people who would like to purchase a car. At that time Warren had sold some automobile tires to a man associated with McCloud on the lot. Warren was told that if he found a buyer for a car he (McCloud) would pay him a commission. Sometime around the 26th of December, Warren brought Henry and Lilly to the used-car lot and told McCloud that these men were interested in the purchase of an automobile. McCloud quoted them a price on a car, and Henry and Lilly left; Warren remained, however, and, according to McCloud, asked if the latter would accept a ring and some cash for the car. McCloud said that he would have the ring appraised and would allow the appraised value on a car. The next day Warren returned. The ring was in his possession and also some $50 in cash. He refused to turn over the ring to McCloud for appraisal. The latter then suggested that a man by the name of Billy

Berg, who was the manager of a restaurant in Los Angeles, could possibly lend some money on the ring, and the two men drove to the restaurant in McCloud's car. On the way over Warren showed McCloud two rings, which were the rings taken from Mrs. Winthrop in the robbery.

Defendant Warren, who it appears had known Berg for some ten years, informed the latter that he desired to purchase an automobile and needed some additional money. He showed Berg three rings and a bracelet and asked if Berg could give him some money on the jewelry. Berg gave Warren $50 for the rings and returned the bracelet to him. Shortly thereafter, Warren took the bracelet to one Thomas Mascot, the owner of a cafe in Los Angeles, who advanced him $50 thereon. This bracelet was the one removed from Mrs. Winthrop in the robbery.

After Warren was arrested he was questioned by the police, at which time he denied knowing anything about the rings and bracelet, denied having received any rings from Henry and Lilly, denied knowing Berg, denied having sold any rings to Berg, denied that he had shown a bracelet to Berg, denied knowing McCloud, denied having gone to McCloud's place of business, denied having talked to McCloud, denied having met Mascot, and denied having received $50 on the bracelet from Mascot.

Defendant Warren did not testify at the trial but submitted the defense upon the evidence of the prosecution and that given by the witnesses Henry and Lilly who testified for defendant and who in their testimony sought to exonerate Warren as a participant in the commission of the robbery, or of knowing that the jewelry was stolen. Henry and Lilly further testified that the prosecution's witness Groom drove the car used in transporting them to the place of the robbery, and that Groom participated in the fruits of the crime.

Appellant contends that the evidence is insufficient to sustain the verdict for three reasons; that there is no evidence of guilty knowledge; that the evidence is insufficient to prove that defendant "bought" and received the jewelry, as alleged in the information; and that the evidence is insufficient to prove an intent "to prevent the owners from again possessing their personal property".

[1, 2] It is also contended in substance that the evidence for the prosecution tended to establish the fact that appellant had participated and was a principal in the robbery, and therefore could not be convicted of receiving stolen property. Such contention is without merit. The evidence was and is abundantly sufficient to support the verdict and judgment. The fact that the evidence was sufficient to support the conviction of a more serious offense furnishes no grounds for the reversal of the judgment. People v. Day, 30 Cal.App. 762, 159 P. 457; People v. Bausell, 18 Cal.App.2d 15, 62 P.2d 774.

The three reasons above set forth as errors entitling appellant to a reversal of the judgment are likewise without merit; too trivial, indeed, to warrant further consideration.

The instructions were adequate and proper.

There being no errors in the record, the judgment and order appealed from are, and each of them is, affirmed.

We concur: YORK, P. J.; WHITE, J.

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36 Cal.App.2d 182

MATTHEWS v. HAMBURGER et al.

Civ. 12249.

District Court of Appeal, Second District,
Division 2, California.

Dec. 20, 1939.

Hearing Denied Feb. 15, 1940.

1. Husband and wife 🔑267(2)

Under statute providing that husband cannot sell furniture of home without written consent of wife, furniture did not lose its status as "furniture of home" because of its temporary storage in warehouse, and hence wife was entitled to recover value of furniture from those who purchased furniture from husband without wife's written consent. Civ.Code, § 172.

[Ed. Note.—For other definitions of "Furniture," see Words & Phrases.]

2. Husband and wife 🔑267(2)

The test in determining whether furniture is "furniture of home," within statute providing that husband cannot sell furniture of home without written consent of wife, is whether it is furniture of home as distinguished from such furniture as may be used in commercial pursuits. Civ.Code, § 172.

3. Husband and wife 🔑265

The gift of community property by husband without consent of wife may be set aside in its entirety by wife during lifetime of her husband and after his death may be set aside as to one-half thereof. Civ.Code, § 172.

4. Husband and wife 🔑267(8)

Wife was entitled to recover full value of furniture of home from those who purchased furniture from husband without wife's written consent, where husband was still living and no showing was made that there had been division of community property or any action taken which would effect a change in the status of property. Civ. Code, § 172.

5. Husband and wife 🔑265, 267(1)

The provision in statute that husband cannot make gift of community personal property or dispose of it without valuable consideration or sell, convey, or encumber furniture, furnishings, or fittings of home, or clothing or wearing apparel of wife or of minor children that is community, without written consent of wife, is for benefit of wife, who is given property rights which she can protect by court action. Civ.Code, § 172.

6. Husband and wife 🔑267(8), 270(1)

Where husband sold "furniture of home" without wife's written consent, wife was entitled to sue purchasers from husband alone and recover in her own name full value of property. Civ.Code, § 172; Code Civ. Proc. § 370.

McCOMB, J., dissenting.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Ruth Matthews against Louis Hamburger and Louis Mandell, individually and as copartners, doing business under the fictitious trade-name of Furniture Jobbers, and others, for value of certain household furniture which was wrongfully sold by defendants. From judgment for plaintiff, Louis Hamburger and Louis Mandell appeal.

Affirmed.

Joe Orloff, of Los Angeles, for appellants.

Ernest Eugene Walker, of Hollywood, for respondent.

WOOD, Justice.

Defendants have appealed from a judgment in plaintiff's favor for the value of certain household furniture which was wrongfully sold by defendants.

Plaintiff and her husband, Edward B. Matthews, on May 5, 1938, decided to store their furniture and take a trip to San Francisco to visit friends and relatives. They placed their household furniture and furnishings, which was community property, in storage with Birch-Smith Storage Company in Los Angeles and thereafter drove in the family automobile to Huntington Park to visit friends briefly before leaving on their trip to San Francisco. On arriving in Huntington Park plaintiff's husband left plaintiff with friends and drove away, stating he would call for her in an hour or so. The husband did not return but deserted plaintiff and went to Chico to live. Upon leaving plaintiff he sold the furniture to defendants for the sum of $350. Plaintiff did not consent to the sale in writing or otherwise and did not receive any part of the sum paid by defendants. Shortly after purchasing the property from plaintiff's husband, defendant sold the furniture to another party. One of the defendants inquired of plaintiff's husband if he was a married man and was told that he was married but that his wife was not well enough to be present at the sale of the furniture.

Plaintiff bases her claim on section 172 of the Civil Code which is as follows: "The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community personal property, or dispose of the same without a valuable consideration, or sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community, without the written consent of the wife."

[1, 2] Defendants now contend that the words "furniture of the home" as used in the code section refer to furniture actually used in the home and argue that since the furniture was in storage at the time it was

sold by plaintiff's husband it was not necessary to have plaintiff's consent to its sale. We cannot accept this construction of the section. It will be noted that the section refers to furniture *of* the home and not furniture *in* the home. The furniture was undoubtedly furniture of the home when it was located in a building occupied by plaintiff and her husband as their residence. If such furniture should be transported to a new residence clearly it would not lose its status while being transported to a new residence. Its temporary storage in a warehouse likewise did not change its status. The statute does not require that the furniture be located at any particular place. The test is whether it was furniture of the home as distinguished from such furniture as might be used in commercial pursuits.

[3, 4] The trial court did not err in ruling that plaintiff was entitled to recover the full value of the property. A distinction is made between cases in which the action by the wife is filed before the death of the husband and cases in which the action is filed after the death of the husband. In Ballinger v. Ballinger, 9 Cal.2d 330, 334, 70 P.2d 629, 631, it is stated: "The gift of community property by the husband without the consent of the wife may be set aside in its entirety by the wife during the lifetime of her husband, Britton v. Hammell, 4 Cal.2d 690, 52 P.2d 221, and after his death may be set aside as to one-half thereof, Trimble v. Trimble, 219 Cal. 340, 26 P.2d 477 [488]." In the case under review the husband is still living and no showing has been made that there has been a division of community property or any action taken which would effect a change in the status of the property.

[5, 6] The trial court correctly ruled when it permitted plaintiff to sue alone and recover in her own name. The provisions of the code section above quoted were made for the benefit of the wife, who has been given property rights which she can protect by court action. The transfer of the property by plaintiff's husband without her written consent was without effect as against plaintiff, who had the right to restore the property to the community. Duncan v. Duncan, 6 Cal.App. 404, 92 P. 310. It has been expressly provided in section 370 of the Code of Civil Procedure that a married woman may sue alone for the recovery for injuries to her person notwithstanding the sum recovered would be community property.

The judgment is affirmed.

I concur: MOORE, P. J.

McCOMB, Justice (dissenting).

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover possession of personal property or its reasonable value, defendants Hamburger and Mandell appeal.

The essential facts are these:

Plaintiff and her husband gave up their home, and prior to leaving the city, plaintiff's husband with her consent stored the furniture formerly in their home with a storage company. The same day the furniture was stored, the husband without plaintiff's consent sold it to defendants, who in turn disposed of the furniture prior to the commencement of the present action. Plaintiff and her husband separated the day the furniture was stored and have not lived together since.

This is the sole question necessary to be determined:

Is furniture stored in a warehouse, furniture "of the home" within the meaning of section 172 of the Civil Code, when the parties in fact are not maintaining a home?

This question must be answered in the negative. Section 172 of the Civil Code reads in part as follows: "The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community personal property, or dispose of the same without a valuable consideration, or sell, convey, or encumber the *furniture, furnishings, or fittings of the home* * * * without the written consent of the wife. (Italics added.)

From a reading of the code section just set forth, it is clear that the legislature intended to prevent the sale of furniture and fittings of a home without the wife's written consent. It is equally evident in the instant case that the furniture disposed of by the husband was not furniture of the home for the reason that the parties did not have a home at the time the furniture was disposed of. Therefore, it was not necessary for plaintiff to consent in writing to the disposition thereof by the husband, and the judgment in favor of the wife against defendants for the value of the furniture which they had purchased and disposed of was error.

For the foregoing reasons in my opinion the judgment appealed from should be reversed.

36 Cal.App.2d 254

In re KEELEY.

KEELEY v. CITY OF MODESTO et al.

Civ. 6185.

District Court of Appeal, Third District, California.

Dec. 26, 1939.

Rehearing Denied Jan. 25, 1940.

1. Trial 🔑404(2)

Facts found by trial court in its conclusions of law will be regarded as findings of fact.

2. Mandamus 🔑172

In mandamus proceeding to compel reinstatement of police captain who was discharged by police chief under charter authorizing discharge by chief on certain grounds, and requiring chief to file written charges with mayor specifying grounds for removal, trial court could not substitute its judgment for that of police chief.

3. Mandamus 🔑172, 174

In mandamus proceeding to compel reinstatement of police captain who was discharged by police chief under charter authorizing discharge by chief on certain grounds and requiring chief to file written charges with mayor specifying grounds for removal, issue before trial court was not truth of charges against captain except in so far as evidence might show fraud or oppression, and trial court having determined that chief acted in good faith was not required to make findings with respect to truth of charges against captain.

4. Officers 🔑7

In absence of civil service laws, head of administrative office is as a rule permitted to employ and discharge subordinates at his will.

5. Officers 🔑72(1)

Where reasons are required to be stated for dismissal of public employee, dismissal does not become effective if statement is not filed.

6. Municipal corporations 🔑185(11)

Where charter gave police chief power to remove members of police force for conduct unbecoming member, and required chief to file written charges with mayor specifying grounds for removal, discharge of police captain by chief for intoxication and for using city-owned property for purposes other than on behalf of city, became complete on filing of statement of reasons for discharge with the mayor.

Appeal from Superior Court, Stanislaus County; A. Caminetti, Jr., Judge.

Mandamus proceeding by George M. Keeley against the City of Modesto, a municipal corporation, and others, to compel the defendants to reinstate George M. Keeley as Captain of Police. From a judgment denying a writ of mandate, the petitioner appeals.

Affirmed.

E. H. Zion, of Modesto, for appellant.

R. B. Fowler, City Atty., of Modesto, for respondents.

DEIRUP, Justice pro tem., delivered the opinion of the court.

Petitioner has appealed from a judgment denying a writ of mandate to reinstate him as captain of police after he had been discharged by the chief of police of Modesto. It is alleged in the petition that "said discharge was arbitrary and without cause and said petitioner was entitled and is now entitled to be employed by the City of Modesto as Captain of Police under the terms of the charter of the City of Modesto, and by law, and that his discharge was illegal and void".

The charter in question gives the chief of police power "to suspend or remove any members of the police force for disobedience of any lawful order, for violation of rules and regulations of the Police Department, and for neglect of duty, or for conduct unbecoming a member of the police force. He shall immediately file with the Mayor written charges, specifying the grounds upon which such suspension or removal is made."

The record shows that on the morning of Saturday, July 17, 1937, E. E. Arington, Chief of Police, went to the home of the petitioner and announced to him that he had been dismissed. He then prepared written charges and served them upon the mayor on the following Monday, the office of the mayor having been closed when the statement was prepared. The following are the charges as filed:

"In accordance with the charter of the City of Modesto I am writing this letter stating causes for the discharge of Captain George Keeley.

"We have had in the past considerable trouble with Captain Keeley in keeping his bills paid. The merchants of the city calling me, the Mayor and Councilmen trying to get help in collecting their bills, which was very annoying.

"Captain Keeley was put out of service through illness, was off six weeks, his condition improved until he felt he could do the work and we took him back and gave him another chance, but he did not leave liquor alone. On several occasions Captain Keeley came to the office when he had been drinking too much, and as we are trying to curb the use of liquor in the department it set a very poor example for the younger men.

"On Saturday morning July 17th, Captain Keeley went off duty at four o'clock, took police car number one and left it parked on 'H' Street in front of the jail. When I came to the office at eight o'clock I was told Keeley had the Studebaker car with him. I went up to the jail to see why a police car would be left there. I found Captain Keeley in another car just driving away. I stopped this car and talked to Captain Keeley a few minutes, saw his condition, that he was intoxicated. Immediately I contacted Commissioner Stanley who in turn contacted you. I then went and relieved Captain Keeley of further duties in the department.

"I am sorry this came up, true the man was off duty but that does not excuse drunkenness on a public street, and the taking of police equipment away from the office."

After a trial of the matter the court filed findings as follows:

"2. That on or about the 17th day of July, 1937, E. E. Arington, Chief of the Police Department of the City of Modesto, removed the said George M. Keeley from membership in said Police Department of said City.

"3. That on said date, or as soon thereafter as possible, the said E. E. Arington filed with the Mayor of the City of Modesto written charges against the said George M. Keeley, charging the said George M. Keeley with having been guilty of conduct unbecoming a member of the Police force of the City of Modesto, and, secondly, with the act of using City-owned property for purposes other than on behalf of said City.

"4. The court further finds that on said 17th day of July, 1937, and during the morning of said date, the petitioner George M. Keeley took and consumed several drinks of whiskey while engaged in working on a public street in the City of Modesto, County of Stanislaus, State of California."

The conclusions of law were as follows:

"1. That the Chief of Police of the City of Modesto has complied with all of the provisions of the Charter of said City in effecting the removal of said petitioner from the Police force of the City of Modesto. That the Chief of Police must be granted the right and privilege to exercise his sound discretion in determining whether or not a member of his police force is guilty of conduct unbecoming an officer.

"2. That it is legally presumed that the Chief of Police acting in his capacity as an officer properly performed his duty, and that in discharging said petitioner he acted in good faith and for the well-being of his Police force.

"3. That by the terms of the Charter of the City of Modesto, wide discretion is granted to the Chief of Police relative to his determination whether or not members of his Police force have been guilty of conduct unbecoming an officer.

"Courts of law cannot properly interfere with lawful orders made in the exercise of such discretion unless proof is adduced clearly showing an abuse of the discretion lodged in said Chief of Police.

"The evidence in this case is insufficient to establish an abuse by the Chief of Police of the discretion lodged in him by the said Charter."

Petitioner contends that inasmuch as the chief of police did not specify in his statement any one of the grounds which are set out in the charter provision, but charged intoxication, it became necessary for the court to determine whether intoxication is conduct unbecoming a member of the police force and also that petitioner was intoxicated, and that the judgment should be reversed because no such finding of fact or conclusion of law was made by the trial court.

[1-3] The court found facts in its conclusions of law, but they are nevertheless to be regarded as findings of fact. Linberg v. Stanto, 211 Cal. 771, 297 P. 9, 75 A.L.R. 555; 24 Cal.Jur. 962. It sufficiently appears that the court found that the petitioner was dismissed because of conduct unbecoming a member of the police force. It is true that these precise words were not used in the written statement of charges, but it is entirely clear that the chief of police dismissed the petitioner because of his conduct and that he considered that conduct unbecoming an officer. It is found further that the chief of police acted in good faith, and that he filed the written charges in accordance with the provisions of the charter. It was not the province of the court to substitute its judgment for that of an administrative officer in this case. The issue before it was not the truth of the charges as such excepting in so far as the evidence might show fraud or oppression. Having determined that the chief of police acted in good faith, it was not necessary for the court to make findings with respect to the truth of the charges. Dorothy v. Drapeau, 9 Cal.App. 2d 280, 49 P.2d 343.

[4] As a rule, in the absence of civil service laws, the head of an administrative office is permitted to employ and discharge subordinates at will. This practice promotes efficiency. On the other hand, it is subject to abuse, in that it permits the head of a department to remove a deputy for mere political purposes or other improper motives. It is for this reason that such provisions as are contained in the Modesto charter have often been adopted. The requirement that the reasons for a dismissal must be stated in writing checks the tendency of the departmental head to act arbitrarily to a very appreciable extent.

This subject is discussed in the case of Cronin v. Civil Service Commission, 71 Cal.App. 633, 236 P. 339, where the situation under discussion was similar to the one now before us. The charter of Los Angeles county empowered the sheriff to discharge any of his deputies but required him to serve a statement of the reason for the dismissal upon the deputy, allow him a reasonable time to answer and file the statement and a copy of the answer with the civil service commission. It was held in that case that the dismissal was incomplete until these acts had been done, but that when they had been done the employee had no right to a hearing before the commission.

The Supreme Court of this state has interpreted in a similar manner the provisions of the state Civil Service Act (Stats. 1913, p. 1035) which govern the dismissal of probationary civil service employees. In Neuwald v. Brock, 12 Cal.2d 662, 86 P. 2d 1047, 1052, it was held that an employee in that status who was discharged because his services were unsatisfactory was not entitled to a hearing before the civil service commission or to a trial on the merits in court. Neuwald was discharged by the director of agriculture. He sought reinstatement by writ of mandate in the superior court. Judgment was entered in his favor, but was reversed on appeal.

Section 9 of the said act provided that: "All appointments shall be for a probationary period to be fixed by the commission but not to exceed six months. Unless such appointee shall have been dismissed within such probationary period by the appointing power, for reasons stated in writing and filed with the commission, his appointment shall become permanent, subject to the provisions of this act as to removals, suspensions and changes."

A rule of the commission provided that: "If during the probationary period, the conduct or capacity of the probationer has not been satisfactory to the appointing power, the probationer may be dismissed, in the discretion of the appointing power, and the appointing power shall inform the executive member of the commission in writing of the reason for such dismissal."

It is said in the opinion: "The reason stated by Director Brock for the dismissal of petitioner, and filed in writing by him with the commission, was that the conduct and capacity of petitioner as such probationary employee during such probationary period had 'not been satisfactory to me the appointing power'. As the reason stated by the director and filed with the commission followed the precise language of rule 9 of the Civil Service Commission, we fail to see upon what grounds the petitioner bases his contention that the reason assigned by the director in his written statement filed with the commission failed to satisfy the requirements of rule 9 of the commission."

In other words, the statement of grounds for dismissal may be couched in the words of the statute or rule. The particulars in which the employee has not been satisfactory need not be given.

In that case the employee sought to attack the truth of the reasons given for the dismissal and convinced the trial court that the true reason was not that his conduct and capacity had been unsatisfactory to the appointing power. As to this the Supreme Court said:

"It will be noted that in finding XIV mentioned above, the court found that the reason given by Director Brock in his statement to the commission for petitioner's dismissal was untrue, and was a pretext adopted by him in order to frustrate petitioner from acquiring a permanent civil service status. Relying upon this finding of the court, the petitioner contends that his dismissal was actuated by improper motives on the part of the director and was therefore illegal and should be declared so by this court. Practically the same position was assumed by the petitioner in the case of Kennedy v. State Personnel Board, 6 Cal.2d 340, 344, 57 P.2d 486, supra. The board of dental examiners had stated as the reason for Kennedy's dismissal that his conduct and capacity had not been satisfactory to the appointing power. The same reason, as we have seen, was given by Director Brock for petitioner's dismissal. Kennedy contended that this reason was untrue as the board of dental examiners had at the time of his dismissal adopted and passed a resolution that his services were satisfactory, although they subsequently passed another resolution declaring that his services were unsatisfactory and charging him with improper political activity. In passing upon this contention of Kennedy, the court said: 'The only remaining contention of petitioner which requires mention is that his dismissal was for improper motives. In this connection he alleges that his services were declared satisfactory by the dental board in a resolution adopted at the time of his dismissal, and that subsequently another resolution was passed charging him with unsatisfactory conduct and improper political activity. In our opinion, these allegations do not present an appropriate case for judicial review. There is no sufficient affirmative showing of fraud or bad faith on the part of the board, and it has been a recognized rule that an inquiry into extraneous facts to determine the possible improper motive of an executive or administrative board in dismissing an employee is not justified. See Livingstone v. MacGillivray, 1 Cal.2d 546, 36 P.2d 622; State [ex rel Williams] v. Kennelly, 75 Conn. 704, 55 A. 555.'

"From the foregoing we conclude that finding XIV of the trial court that the reason given by Director Brock for the dismissal of petitioner was not a valid or sufficient reason for his dismissal from his probationary position is not supported by the evidence. * * * In the dismissal of petitioner, Director Brock, the appointing power under which petitioner was holding his probationary position, complied with all the requirements of said section 9 of said act in order to legally dismiss petitioner from his said position. His dismissal was, therefore, legal, and the judgment of the trial court herein is reversed with directions to enter its judgment that the alternative writ heretofore issued be discharged and that a peremptory writ be denied."

[5, 6] Where reasons are required to be stated, a dismissal does not become effective if the statement is not filed. Nilsson v. State Personnel Board, 25 Cal.App. 2d 699, 78 P.2d 467; Kelly v. State Personnel Board, 31 Cal.App.2d 443, 88 P.2d 264. But in the case now before us the statement of the reasons was filed with the mayor pursuant to the terms of the city charter, and the discharge thereupon became complete.

Our attention has been called to the case of Bannerman v. Boyle, 160 Cal. 197, 116 P. 732, in which it is held that an officer who was appointed for a fixed term, under a charter provision that he could be removed for cause, could not be dismissed without notice and a hearing. That decision is not applicable here. There is nothing in the record which indicates that petitioner was appointed either for a fixed term or during good behavior. Nor are the grounds of removal set out in the charter equivalent to the term "for cause". And it has been held that where a mayor was authorized to dismiss "for cause" any officer appointed by him but was required to give notice thereof to the person removed and notify the common council, an opportunity for a hearing was not allowed the person dismissed. Matter of Carter, 141 Cal. 316, 74 P. 997. Furthermore, these cases deal with the right of a subordinate to a hearing on the charges before an administrative board or officer, not to a trial in court.

Our conclusion is that the chief of police complied with the provisions of the charter and that the judgment should be affirmed, and it is so ordered.

We concur: THOMPSON, Acting P. J.; TUTTLE, J.

36 Cal.App.2d 214

PECKHAM et al. v. WARNER BROS. PICTURES, Inc., et al.

Civ. 12166.

District Court of Appeal, Second District, Division 2, California.

Dec. 21, 1939.

Hearing Denied Feb. 19, 1940.

1. Appeal and error 🔑927(7), 934(1)

In reviewing judgment predicated on granting of motion for judgment non obstante veredicto and judgment predicated on granting of directed verdict, evidence must be viewed most favorably to plaintiffs. Code Civ.Proc. § 629.

2. False imprisonment 🔑8

Where there is unreasonable delay in taking person arrested without warrant before magistrate, arresting party is "trespasser ab initio" and liable for false arrest and imprisonment. Pen.Code, § 849.

[Ed. Note.—For other definitions of "Trespasser Ab Initio," see Words & Phrases.]

3. False imprisonment 🔑8

An officer arresting without warrant cannot justify himself in holding prisoner for unreasonable time before taking him before magistrate, on ground that such delay was necessary in order to investigate the case.

4. False imprisonment 🔑39

In action for false arrest and false imprisonment by plaintiff who was incarcerated for almost 24 hours before being released without being taken before a magistrate, and by plaintiff who was incarcerated for more than 48 hours before being taken before a magistrate and released, whether unreasonable time elapsed after arrest of plaintiffs without taking them before a magistrate, was for jury. Pen.Code, § 849.

5. False imprisonment 🔑15(3)

A principal is liable for false imprisonment by agent or employee acting within scope of authority.

6. False imprisonment 🔑39

In action for false arrest and false imprisonment, whether superintendent of safety and personnel of motion picture company was acting within scope of his authority and as agent of motion picture company in arresting plaintiffs who were active in connection with general motion picture strike, was for jury.

WOOD, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action for damages for false arrest and false imprisonment, by Ralph E. Peckham, Herbert K. Sorrell and John L. Thomson against Warner Brothers Pictures, Inc., Blaney Matthews, and others. From a judgment for Blaney Matthews notwithstanding a verdict of the jury in favor of plaintiffs Ralph E. Peckham and Herbert K. Sorrell, and from a judgment on a directed verdict for Warner Brothers Pictures, Inc., the plaintiffs appeal.

Reversed.

Bautzer & Ryan, Gregson Bautzer and G. Bentley Ryan, all of Hollywood. (Bernard M. Silbert, of Hollywood, of counsel), for appellants.

Freston & Files and John P. McGinley, all of Los Angeles (Ralph E. Lewis, of Los Angeles, of counsel), for respondents.

McCOMB, Justice.

Plaintiffs appeal from (a) judgment in favor of defendant Blaney Matthews predicated upon the granting of said defendant's motion for a judgment notwithstanding the verdict of the jury, sec. 629, Code Civ.Proc., in favor of plaintiff Peckham for $5,000 compensatory damages and $2,500 punitive damages, and in favor of plaintiff Sorrell for $3,000 compensatory damages and $2,500 punitive damages; and (b) judgment of the trial court in favor of defendant Warner Bros. Pictures, Inc., predicated upon the granting of said defendant's motion for a directed verdict, in an action to recover damages for false arrest and false imprisonment.

[1] Viewing the evidence most favorable to plaintiffs, as we must in reviewing (1) a judgment predicated upon the granting of a motion for a judgment non obstante veredicto (Reeves v. Lapinta, 25 Cal.App. 2d 680, 681, 78 P.2d 465), and (2) judgment predicated upon the granting of a directed verdict (Estate of Flood, 217 Cal. 763, 768, 21 P.2d 579), the material facts are these:

Between April 30 and June 7, 1937, a general motion picture strike was in progress in southern California. The strike was called April 30 by the Motion Picture Painters' and Decorators' Union, and practically a general walkout followed. Plaintiff Sorrell had been employed at defendant Warner Brothers Pictures, Inc., prior to the strike, and was vice-president of his union. When the strike was called, he was elected captain of the pickets and was in charge of over 4000 men on the picket lines. Plaintiff Peckham was also a member of the Motion Picture Painters' and Decorators' Union, and when the strike was called was acting as an assistant to plaintiff Sorrell. Plaintiffs' work in connection with the union consisted principally in checking the picket lines, picking up reports and reporting any men who were out of line, drinking or disorderly.

May 10, 1937, one Peterson, a truck driver for Warner Bros. Pictures, Inc., while en route from Hollywood to said defendant's studio on Dark Canyon road, was stopped by a car which pulled across the road in front of him. He was ordered out of his truck, and the truck driven into a ravine.

On the same day Mr. Belcher, employed by the Twentieth Century Fox Film Corporation while in the pursuit of his employer's business, stopped for a few minutes in Beverly Hills. He left his truck, and when he returned saw it being overturned by three or four men, who drove off in an automobile bearing license number 2R4753.

About the same time "The House of Westmore" located in Hollywood, a business supplying cosmetics and other make-up paraphernalia to motion picture studios, particularly Warner Bros. Pictures, Inc., was broken into in the nighttime, creosote thrown over the furnishings, and the place completely wrecked.

June 4, 1937, Robert H. Wiese, employed by defendant Warner Bros. Pictures, Inc., as an architectural designer and draftsman, while on his way home from work in his car was crowded off the boulevard by another car and forced to stop. The occupants of the car then assaulted him in a most barbarous and brutal manner. One man jumped on the running board of his car, seized him by the throat and pounded him in the face, knocking out or loosening all of his teeth. He then seized Mr. Wiese's arm, held it stretched out over the upper edge of the car door and threw his weight upon it, which resulted in the shattering of Mr. Wiese's elbow. He was also hit violently in the stomach. Simultaneously another man on the other side of the car took hold of Wiese's hand, pulled his arm over and then took each finger separately and bent it back until it snapped. Afterward, when he began to lose consciousness his right arm hand was further shattered by being struck with some heavy implement. He was then hit on the head and rendered unconscious. After he regained consciousness he was hit a heavy blow on the back of the head and again rendered unconscious. Mr. Wiese testified that the car in which his assailants were riding was an old black Cadillac, at least two figures of the license number being "37".

Defendant Matthews on June 7, 1937, and for some time prior thereto was employed by his codefendant as superintendent of safety and personnel, and under his jurisdiction were the police, fire and personnel departments of Warner Bros. Pictures, Inc. He had been informed of the outrages hereinbefore described. On the date last mentioned plaintiffs about 9 p. m. were in attendance at a meeting of the Motion Picture Painters' and Decorators' Union held at the corner of Santa Monica boulevard and Wilcox avenue in the city of Los Angeles. Plaintiff Peckham, about to commence his nightly duties, left the union hall at about 9 p. m. and invited a Mr. Chandler to accompany him. Getting into his automobile, he noticed the red lights of a police car headed toward him on the street. He recognized in the police car some of his fellow union members who had previously been in the union hall. He then returned to the union hall and reported to plaintiff Sorrell that he thought the police had picked up some of their boys, whereupon Sorrell, Peckham, and Chandler drove to the Hollywood police station, and, on reaching the sergeant's desk, noticed a group of men surrounding Mr. Charles Lessing, executive secretary of the Federated Motion Picture Crafts. Defendant Matthews was present, and, upon seeing Sorrell, rushed at him, rushing him down the hall and pushing him over a desk, where they were separated by officers. Matthews then said, "Arrest that man; put the handcuffs on him." The handcuffs were then taken off of Mr. Lessing and put upon plaintiff Sorrell. He was then taken outside of the police station and pushed into the back seat of a car with an officer on either side of him. As the automobile was driven out of the yard Sorrell held up his handcuffs as a symbol to plaintiff Peckham and Chandler, who were waiting for him in their car. Defendant Matthews then ordered the car stopped and went across the street to the car in which Peckham and Chandler were seated, accompanied by two police officers. Matthews told the officers to bring Peckham and Chandler with them. This was done, and plaintiffs Peckham and Sorrell were taken to the Burbank jail, where the latter was confined until 6 p. m. the next day, at which time he was released. Plaintiff Peckham was removed from the Burbank jail to the Hollywood police station, where he was retained until about 5 p. m. of June 8, at which time he was taken to the Central police station in Los Angeles. At 10 p. m. June 9 he was released.

A.

Plaintiffs rely for reversal of the judgment in favor of defendant Matthews on the proposition that, *where there is an unreasonable delay in taking a person arrested without a warrant before a magistrate, the arresting party becomes a trespasser ab initio and liable for false arrest and imprisonment.*

[2, 3] This proposition is tenable. Section 849 of the Penal Code reads as follows: "When an arrest is made without a warrant by a peace-officer or private person, the person arrested must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made, and an information, stating the charge against the person, must be laid before such magistrate."

It is the law in California that it is the duty of one making an arrest without a warrant to bring the person so arrested before a proper magistrate without unnecessary delay, and if this is not done the officer or private person who made the arrest becomes a trespasser from the beginning. 12 Cal.Jur. (1923) 433. It is also the law that an officer arresting without a warrant cannot justify himself in holding the prisoner for an unreasonable time before taking him before a magistrate upon the ground that such delay was necessary in order to investigate the case. Harness v. Steele, 159 Ind. 286, 64 N.E. 875, 879; Keefe v. Hart, 213 Mass. 476, 100 N.E. 558, 559, Ann.Cas.1914A, 716.

In 22 American Jurisprudence (1939) 366, False Imprisonment, section 20, the rule is thus stated: "It is the duty of an officer or other person making an arrest to take the prisoner before a magistrate with reasonable diligence and without unnecessary delay; and the rule is well settled that whether the arrest is made with or without a warrant, an action for false imprisonment may be predicated upon an unreasonable delay in taking the person arrested before a magistrate * * *, regardless of the lawfulness of the arrest in the first instance * * * an officer arresting a person without a warrant, as on view under statute, is liable for a false imprisonment where he detains the prisoner an unreasonable time without securing a warrant or other legal authority for his detention."

In Vernon v. Plumas Lumber Co., 71 Cal.App. 112, 117, 234 P. 869, 871, Mr. Justice Plummer, speaking for the court, says:

"We do not need to decide whether the agents of the appellant brought themselves within the provisions of section 145, Penal Code, further than to state that there is nothing in the record establishing any necessity for the action of the agents of the defendant, in taking the plaintiff to the county jail instead of taking him with themselves at the time they repaired to the presence of the magistrate. Under the circumstances, we do not very well see how the trial court could have come to any other conclusion than that there was an unnecessary delay in taking the plaintiff before the committing magistrate, and therefore that his imprisonment, as found by the trial court, was wholly unwarranted. That the agents of the appellant were ignorant of the provisions of section 849 of the Penal Code does not lessen their duty in such cases, nor obviate the results of the clear showing in the transcript that the plaintiff was unnecessarily confined in the county jail while deliberations were being had as to the further proceedings to be taken. In Keefe v. Hart et al., 213 Mass. 476, 100 N.E. 558, Ann.Cas.1914A, 716, the Supreme Court, considering similar questions, said: 'It cannot be determined as a matter of law that a delay of an hour and a half, by officers arresting without warrant, in taking the prisoner before a magistrate, was reasonable, since such delay might have been beyond the time of adjournment of the magistrate's court, and involved a further delay; the question becoming one of law only when the facts are agreed.' And the same court in its opinion further said: 'The defendants had no right to detain the plaintiff to enable them to make a further investigation of the charge against him. It was their duty to bring him before the court as soon as reasonably could be done.'

"The defendant's agents in this case did exactly what the Supreme Court of Massachusetts has said is unlawful to be done under such circumstances. The plaintiff was not only imprisoned while the agents of the appellant were not only not investigating the charge against the plaintiff, but were making efforts to have some charge placed against the plaintiff, and his arrest thereafter effected under a warrant charging him with an offense. In Jackson v. Miller, 84 N.J.L. 189, 86 A. 50, it was held that the detention in a public place for even an hour of a person arrested without a warrant, by a deputy fish and game warden, upon what seemed to be probable or good cause to believe that the law had been violated, constituted false imprisonment. The rule is well established that a prisoner is entitled to a hearing within a reasonable time after his arrest, and that a delay for an unreasonable time in bringing him before the magistrate for examination constitutes false imprisonment."

[4] Applying the above stated rules of law to the facts of the instant case, since plaintiff Sorrell was incarcerated for almost twenty-four hours before being released, and in fact never taken before a magistrate, and plaintiff Peckham was incarcerated for more than forty-eight hours before being taken before a magistrate and released, the case was properly submitted to the jury for a determination of the issue as to whether an unreasonable time had elapsed after the arrest of said plaintiffs without taking them before a magistrate.

B.

Plaintiffs rely for reversal of the judgment in favor of defendant Warner Bros. Pictures, Inc., on this proposition:

It was a question of fact for the determination of the jury whether or not defendant Matthews acted as an agent of his codefendant in making the arrests.

[5] This proposition is likewise tenable. The law is established in California that a principal is liable for false imprisonment by an agent or employee acting within the scope of his authority. Weir v. Continental Oil Co., 5 Cal.App.2d 714, 716, 43 P.2d 375. The cases of Mackie v. Ambassador Hotel etc. Corp., 123 Cal.App. 215, 11 P.2d 3, and McInerney v. United Railroads, 50 Cal.App. 538, 195 P. 958, are factually different from the present case and therefore inapplicable.

[6] Applying the rule above stated to the present case, it was a question of fact for the determination of the jury whether or not in making the arrests defendant Matthews was acting within the scope of his authority and as an agent of his codefendant.

For the foregoing reasons the judgments appealed from are and each is reversed.

MOORE, Presiding Justice (concurring).

I concur. Under the facts of this case, while there was much to arouse suspicion, there does not appear to have been probable cause for the arrests of plaintiffs. But in view of the extraordinary events that surrounded the barbarous maiming and beating of certain workers while a strike was in progress, it appears no more than reasonable that an officer in the discharge of his duties should have taken pains to get legal evidence before accusing those suspected. Whether he took more than a reasonable time after taking them into custody before releasing or bringing the suspects before the magistrate, was a question for the jury's determination.

I dissent: WOOD, J.

33 Cal.App.2d 274

Ex parte CARPENTER.

Cr. 2097.

District Court of Appeal, First District, Division 1, California.

Dec. 28, 1939.

1. Habeas corpus ⊙⇒22(2)

In habeas corpus proceeding for release from custody under order of commitment for contempt in disobeying order to make payments for support of petitioner's minor children, adjudication of her ability to comply with such order in order of commitment is conclusive.

2. Habeas corpus ⊙⇒92(1)

On habeas corpus, court is limited to question of jurisdiction and generally cannot review adjudication of fact questions by court having jurisdiction of person and subject matter.

3. Parent and child ⊙⇒17(7½)

In proceedings for contempt in failing to make payments ordered in alimony or support case, prima facie case is established by production of original order to pay and proof of nonpayment, and no other proof of ability to pay need be offered.

4. Parent and child ⊙⇒17(7½)

A contemner may purge himself of contempt in failing to make payments ordered in alimony or support case by presenting at hearing any legitimate excuse he may have, including fact that he has become unable to comply with original payment order since making thereof.

5. Habeas corpus ⊙⇒92(1)

Whether one charged with contempt in disobeying order to make payments for support of her minor children sustained burden of purging herself of contempt by presenting legitimate excuse at hearing is fact question, which cannot be inquired into on habeas corpus for release from custody under order of commitment for contempt.

◆

Habeas corpus proceeding by Pearl Kennedy Carpenter for release from custody under an order of commitment for contempt in disobeying an order to make payments towards partial support of her minor children.

Writ discharged, and petitioner remanded.

George D. Collins, Jr., of San Francisco, for petitioner.

Edward M. Leonard, Deputy Dist. Atty., of San Francisco, for respondent.

PETERS, Presiding Justice.

The petitioner was adjudged guilty of contempt for failing to pay $20 per month towards the partial support of her five minor children, all wards of the juvenile court. The record shows that for several years the public authorities have attempted, so far unsuccessfully, to compel petitioner to either care for her children, or to partially pay for their support. Some two years ago the court ordered Mrs. Carpenter to receive her children into her home, and care for them. Upon her failure to comply with this order she was cited and committed for contempt. Upon habeas corpus she was discharged from custody on the ground that her second husband, who is not the father of the children, could not be compelled to support them. In re Carpenter, 21 Cal.App.2d 658, 70 P.2d 227. After the determination in the prior case, an investigation was made by the juvenile probation officer, and a hearing had before the referee of the juvenile court. The referee found that Mrs. Carpenter and the father of the children were each able to contribute the sum of twenty dollars a month towards the maintenance and support of the five children. The father has regularly made his payments. Based on the referee's report, the trial court found that Mrs. Carpenter was able to pay the sum in question and she was ordered to do so. This order was made on February 2, 1938. Mrs. Carpenter failed to make the payments as ordered. Thereafter, in August of 1939 the assistant probation officer of the juvenile court filed an affidavit for an order to show cause why Mrs. Carpenter should not be punished for contempt for failing to comply with the court's order of February 2, 1938. The affidavit recites the making of the prior order, the failure to comply therewith, the fact that there is due and payable from Mrs. Carpenter over $300, and then alleges that Mrs. Carpenter "has the ability to pay the aforesaid sum * * * and refuses and neglects to pay said sum". After due service, a hearing was had by the trial court resulting in the commitment of Mrs. Carpenter for contempt. The order of commitment recites, among other things, the making of the order of February 2, 1938, and that Mrs.

Carpenter *"with knowledge of the making of said order and being able to comply with the terms thereof,* disobeyed and is on this day in the immediate view and presence of this Court disobeying said order and wilfully refusing and failing and neglecting to obey said order". (Italics added.)

[1] In this proceeding it is the contention of petitioner that the recital of ability to pay contained in the commitment is totally unsupported by any evidence. The respondent contends that in this proceeding the adjudication of ability to comply with the order is conclusive. With this contention we are in accord. The proper rule supported by the citation of many cases, in a case factually similar to the instant case, is thus succinctly stated by the Supreme Court in Ex parte Levin, 191 Cal. 207, 208, 215 P. 908: "The court found as a fact in its order of commitment that the petitioner was able to comply with the order, and this adjudication is conclusive on habeas corpus." In the case of In re Wilson, 123 Cal.App. 601, 603, 11 P.2d 652, the rule is stated as follows: "It is essential to bear in mind that in a habeas corpus proceeding we are precluded from inquiring into the reasonableness of the order for the payment of alimony. We are concerned solely with the question whether the court had the jurisdiction to adjudge the petitioner guilty of contempt. The court in the instant case found as a fact that petitioner was able to comply with the order which had been made in the previous month. In the case of Ex parte Levin, 191 Cal. 207, 215 P. 908, it is said that such 'adjudication is conclusive on habeas corpus,' citing a number of cases to which reference may be had. We are in accord with this statement as the general rule of law applicable in such cases. It is probably true that where there is an entire failure to establish the jurisdictional facts, or where the processes of law have been simulated to give the appearance of a trial although in fact and in law there has been no trial of the issue, the record may be resorted to for the purpose of showing the lack of jurisdiction in this particular. But the writ of habeas corpus may not be utilized to review, as though by appeal, the order of the trial court." Another case stating the same rule is Ex parte Von Gerzabek, 63 Cal. App. 657, 660, 219 P. 479, 480, where it is stated: "It is an established doctrine that, in a proceeding to punish for an alleged contempt, the finding of the court as to the ability of the contemner to comply with the terms of the order is conclusive on habeas corpus, and the prisoner cannot be discharged from custody, if the facts showing jurisdiction appear upon the record. Ex parte Spencer, 83 Cal. [460], 461, 23 P. 395, 17 Am.St.Rep. 266. The writ of habeas corpus cannot be used as a basis for review as upon appeal. Ex parte Cottrell, 59 Cal. 417; Ex parte Clark, 110 Cal. 405, 42 P. 905; Ex parte Levin [191 Cal. 207] 215 P. 908. The question is one of fact which the court making the order has the right to determine. Here the court found in its order of commitment that petitioner was able to comply with the order, and this adjudication is conclusive upon this hearing." See, also, In re Gutierrez, 46 Cal.App. 94, 188 P. 1004; In re Hallinan, 126 Cal.App. 121, 14 P.2d 797.

[2-5] These cases are sound. It is elementary that on habeas corpus the court is limited to the single question of jurisdiction. Adjudication of questions of fact, the court having jurisdiction of the person and subject-matter, cannot be reviewed. There are, it is true, some exceptions to this rule. Thus where a judgment, although apparently valid, is founded upon facts and proceedings from which alone it may be made to appear that the court was without jurisdiction, a review of the entire record, including the evidence, will be made as in certiorari. This is the explanation of the statement appearing in some of the cases that the scope of the inquiry upon either habeas corpus or certiorari is precisely the same. See In re Chaus, 92 Cal.App. 384, 268 P. 422; In re Drew, 188 Cal. 717, 207 P. 249; Commercial Bank etc. v. Superior Court, 192 Cal. 395, 220 P. 422. Proper illustrations of the exceptions to the general rule are to be found in In re Lake, 65 Cal.App. 420, 224 P. 126; In re Chaus, supra, and other cases relied upon by petitioner. But the finding of ability to pay contained in commitments for contempt in alimony and support cases does not come within the exception, but rather within the general rule that findings of fact are binding in contempt cases. The reason for this was clearly explained in In re McCarty, 154 Cal. 534, 98 P. 540. In that case the affidavit which is filed prior to the institution of such a contempt proceeding, failed to allege the ability of the person charged to comply with the prior order of the court ordering him to pay. The court pointed out that in such cases there is always a prior order

ordering the person involved to pay. That order, similar to the one made on February 2, 1938, in the instant case, is predicated on a finding of ability to pay. When the person so ordered fails to pay, and contempt proceedings are instituted, a prima facie case is established by the production of the original order to pay and proof of nonpayment. No proof of ability to pay, other than this, need be offered. The contemner may purge himself of the contempt by presenting at the hearing any legitimate excuse he may have, including the fact that since the making of the original order he has become unable to comply therewith. The burden is on the contemner, and whether he has complied therewith is a question of fact which cannot be inquired into on habeas corpus. See, also, Ex parte Von Gerzabek, 63 Cal.App. 657, 219 P. 479.

The writ is discharged and the prisoner remanded.

We concur: WARD, J.; GOODELL, Justice pro tem.

In re KINNEY'S ESTATE. *

Civ. 6314.

District Court of Appeal, Third District, California.

Dec. 21, 1939.

Hearing Granted Feb. 19, 1940.

1. Wills 🔑111(2)

Wherever signature on an instrument intended as a will is placed, fact that it is intended as an executing signature must satisfactorily appear on face of document itself.

2. Wills 🔑111(2)

If a signature is at end of a document purporting to be a will, it must be concluded that signature was appended as an execution, if nothing to contrary appears; but, if signature is placed elsewhere, court must say from an inspection of language, form, and relative position of parts of document, whether there is a positive inference in document that signature was placed with intent that it should serve as a token of execution.

3. Wills 🔑386

The due execution of a will is a question of fact, and its determination by trial court must be sustained unless unsupported by evidence.

4. Wills 🔑133

A document executed by a deceased, which contained deceased's signature in first line, but which was not signed at the end thereof, disposed of all deceased's property, and which was carefully punctuated and ended with a period, was properly admitted to probate as a holographic will, as against contention that document was not signed.

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

Proceeding to secure revocation of probate of will of Anna Leona Graves Kinney, deceased, by Keith Kinney, as administrator of the estate of Grant Kinney, deceased, opposed by John B. Gardella, administrator with the will annexed of the estate of Anna Leona Graves Kinney, deceased, and others. From a judgment refusing to revoke the probate of the will, contestant appeals.

Affirmed.

Taft & Spurr, of Ukiah, for appellant.

Snyder & Snyder, of San Andreas, and Clark, Nichols & Eltse, of Berkeley, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from a judgment refusing to revoke the probate of the will of Anna Leona Graves Kinney, deceased.

The instrument so admitted to probate as an holographic will reads as follows:

"July 19, 1934

"I Anna Leona Graves Kinney, do bequeath all of my possessions to my four sisters who were living in 1923.

"They are:

"Mrs. Joe Ella Graves Yeargin,
Nashville, Tenn.
"Mrs. Cora Graves Hall,
Sunnyside Davidson Co. Tenn.
"Mrs. Maggie Odessie Graves Englishman,
Nashville, Tenn.
"Miss Mary Almedia Graves
Nashville, Tenn."

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*For subsequent opinion see 104 P.2d 782.

It is the contention of contestant and appellant that the will was not signed by the deceased and therefore was not entitled to probate.

As pointed out in Estate of Brooks, 214 Cal. 138, 4 P.2d 148, in admitting a will, the first line reading, "This is my will—Elizabeth Ryan Brooks * * *", followed by various specific devises, said that although the usual place of signing a will is at the end, nevertheless the signature of the testator found elsewhere than at the end may, if the circumstances warrant, constitute a signature of execution, but that the only evidence which will warrant such conclusion must be found in and on the instrument itself, and in so holding, the court there considers and distinguishes many cases, some of which are found in the brief of this appellant.

The case principally relied upon by appellant is the Estate of Manchester, 174 Cal. 417, 163 P. 358, 359, L.R.A.1917D, 629, Ann.Cas.1918B, 227. The purported will there read: "I, Matilda Manchester, leave and bequeath all my estate & effects * * * to the following legatees, viz." followed by a statement of devises to several persons, and ending "Whereunto I hereby set my hand this fourteenth day of January, 1914." The court held that this instrument showed affirmatively that the writer had not finished the things she intended to do, in that, among other things, the closing words, "Whereunto I hereby set my hand," etc., are apt words to precede a signature of a testator.

[1, 2] The rule is clearly laid down, however, in the Manchester case, supra, as follows: "The true rule, as we conceive it to be, is that, wherever placed, the fact that it was intended as an executing signature must satisfactorily appear on the face of the document itself. If it is at the end of the document, the universal custom of mankind forces the conclusion that it was appended as an execution, if nothing to the contrary appears. If placed elsewhere, it is for the court to say, from an inspection of the whole document, its language as well as its form, and the relative position of its parts, whether or not there is a positive and satisfactory inference from the document itself that the signature was so placed with the intent that it should there serve as a token of execution. If such inference thus appears, the execution may be considered as proven by such signature."

A document was refused probate in the Estate of Devlin, 198 Cal. 721, 247 P. 577, because, as in the Manchester case, supra, it appeared upon the face of the paper that the writer had not finished his task.

In the Estate of Hurley, 178 Cal. 713, 174 P. 669, the document was refused probate because there was nothing in the body of the instrument or in the closing paragraph to indicate the testatrix intended to adopt the signature in the first line as the executing signature of the will, and the opinion also pointed out that the will terminated without a period indicating that the testatrix ceased writing before she completed the instrument, and was not regarded by her as a completed will. In Estate of Bernard, 197 Cal. 36, 239 P. 404, the instrument was denied probate because there was nothing in any part of the document to show affirmatively that the signature in the exordium was intended as a signature. Likewise, in the Estate of Leonard, 1 Cal.2d 8, 32 P.2d 603, the Supreme Court sustained the trial court in holding there was nothing on the face of the instrument which showed an intention on the part of the author to adopt the name in the exordium clause executing signature. The document ended abruptly several inches from the bottom of the page with a dash following the last words, "we had our suit and he got licked——".

Examining the document here before us it is to be noted the instrument is written in ink; it is dealing with the entire property of the testatrix,—"all my possessions"—and it was given to her four sisters who were specially named. The document was carefully punctuated and ended with a period. The original document also shows that the "a" in Anna, the "s" in sisters and "e" in were, were retraced, indicating such care as would be bestowed upon a completed and final document.

Among the cases cited and relied upon by respondent is Estate of Sullivan, 94 Cal. App. 674, 271 P. 753; Estate of Morgan, 200 Cal. 400, 253 P. 702; Estate of Brooks, 214 Cal. 138, 4 P.2d 148; Estate of McMahon, 174 Cal. 423, 163 P. 669, L.R.A. 1917D, 778; Estate of Bauman, 114 Cal. App. 551, 300 P. 62; Estate of Streeton, 183 Cal. 284, 191 P. 16, all of which analyze and distinguish the various cases dealing with the effect of wills where the signature appears in the exordium clause.

[3, 4] An examination of these cases and the application of the rule in the Man-

chester case, supra, to the facts here, together with the rule that the due execution of a will is a question of fact, and its determination by the trial court must be sustained unless the determination is unsupported by the evidence (Estate of Bernard, 197 Cal. 36, 239 P. 404) convinces us the order and judgment from which the appeal is taken must be affirmed. It is so ordered.

We concur: TUTTLE, J.; THOMPSON, J.

36 Cal.App.2d 194

In re McCARTHY'S ESTATE.

Civ. 2375.

District Court of Appeal, Fourth District, California.

Dec. 21, 1939.

1. Executors and administrators 🔑314(12), 510(2)

In proceeding involving the settlement of executrix' final account and final distribution, an order denying a motion for new trial is not appealable. Probate Code, § 1240.

2. Executors and administrators 🔑315(9)

Where, under decree of partial distribution which had become final, certain property had been distributed absolutely and without reservation to a son of deceased, provision in final decree authorizing executrix to retain such property until deceased's son reimbursed executrix for payment of inheritance tax and authorizing executrix to sell property in event deceased's son did not reimburse executrix was unauthorized.

3. Executors and administrators 🔑315(9)

Decree of partial distribution which had become final could not be collaterally attacked or amended by decree of final distribution.

4. Executors and administrators 🔑315(9)

Even if two legatees acquired lien on personal property which was awarded to a third legatee by decree of partial distribution by reason of payment of inheritance tax, the two legatees could only satisfy the amount of such lien out of the sale price of the personal property and would not be entitled to divide the excess, if any, between themselves.

5. Executors and administrators 🔑314(12)

Where two legatees had a sufficient remedy whereby they might collect from third legatee debt arising from their payment of inheritance tax properly payable by third legatee, cause would be closed rather than sent back for further trial.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Proceeding in the matter of the estate of Charles F. McCarthy, also known as Charles Francis McCarthy, deceased. From an order settling the final account of the executrix of the last will and testament of Charles F. McCarthy, deceased, and from a decree of final distribution, Francis C. McCarthy appeals.

Order settling the final account and decree of final distribution modified and, as modified, affirmed.

Lewis R. Kirby and George A. Malette, both of San Diego, for appellants.

Luce, Forward & Swing, of San Diego, and Henry E. Barbour and William B. Backlund, both of Fresno, for respondents.

MARKS, Justice.

[1] This is an appeal by Francis C. McCarthy, son of Charles F. McCarthy, deceased, from an order settling the final account of the executrix of the last will and testament of Charles F. McCarthy, deceased, and from the decree of final distribution. Appellant has attempted to appeal from an order denying his motion for new trial. Such an order is not appealable. Section 1240, Probate Code. Mayzellia Ann Thompson McCarthy has attempted to appear in this appeal. Francis C. McCarthy is the only appellant named in the notice of appeal. Mrs. McCarthy has no interest in the estate nor in its property. McCarthy v. McCarthy, 23 Cal.App.2d 151, 72 P.2d 255; Estate of McCarthy, 23 Cal.App.2d 389, 73 P.2d 910; Estate of McCarthy, 23 Cal.App.2d 395, 73 P.2d 913; Estate of McCarthy, 23 Cal.App.2d 398, 73 P.2d 914.

We have disregarded the glaring deficiencies in appellant's briefs and have carefully studied the entire record. With a single exception we have found nothing that requires any comment here. With that exception the evidence supports the findings and the findings support the order and decree.

Under date of December 23, 1937, Kate A. Schwerin, Charlotte M. Morrow and Francis C. McCarthy, the legatees named in the will of deceased, entered into a contract settling pending litigation and agreeing to give Francis C. McCarthy certain property and money from the estate as his distributive share thereof and in settlement of the litigation and in full payment of his interest in the estate. This contract required him to pay the inheritance tax on his portion of the estate property. Mayzellia Ann Thompson McCarthy joined in this agreement and was paid $500 by Kate A. Schwerin and Charlotte M. Morrow for relinquishing all claims she might have had on the estate and its property and for joining Francis C. McCarthy in a quitclaim deed to certain real property. Francis C. McCarthy was paid $2,500 for executing this deed.

Under date of December 24, 1937, a decree of partial distribution was rendered. It distributed to Francis C. McCarthy, without condition or reservation, the property set aside to him in the contract. This decree has long since become final. Among other things it distributed to him the following property: "Ten (10) shares Ambassador Hotel Company of Los Angeles Participating Certificate in Respect of Capital Stock; * * * The following personal property now in the house at 352 San Antonio Avenue:

"One French living room table;

"Six (6) chairs;

"Two (2) pedestals;

"One (1) chest;

"One (1) painting—large forest fire scene;

"One (1) painting—still life, with shell, Bible, etc;

"One (1) painting—small water color, Italian girl's head;

"One (1) gold watch which belonged to the said Charles F. McCarthy at the time of his death;

being the property referred to and described in the last will and testament of Charles F. McCarthy, Deceased, and bequeathed to the said Francis C. McCarthy."

By a receipt dated December 24, 1937, and January 26, 1938, and filed January 27, 1938, Francis C. McCarthy acknowledged receipt of all property distributed to him except as follows: "It is further understood between said distributee and the said special administratrix that there will be delivered to the said Francis C. McCarthy ten (10) shares of the Ambassador Hotel Company of Los Angeles Participating Certificate in Respect of Capital Stock as soon as the same can be transferred into his name by the said special administratrix, and that the furniture described in said decree of partial distribution located at 352 San Antonio Avenue will be delivered to the said Francis C. McCarthy upon his request." We find no mention in this receipt of the pictures and gold watch distributed to him.

Objections to the final account and petition for distribution were filed by Francis C. McCarthy and a hearing was had on December 12, 1938. Findings of fact and conclusions of law were filed and also the order settling the final accounts and decree of final distribution. In the latter we find the following:

"It is further ordered, adjudged and decreed that the said executrix shall retain in her possession ten (10) shares of the Ambassador Hotel Company of Los Angeles Participating Certificate in Respect of Capital Stock, and all furniture described in the decree of partial distribution to Francis C. McCarthy, and all paintings described in the decree of partial distribution to Francis C. McCarthy, said furniture and paintings now located at 352 San Antonio Street, San Diego, California, and a certain gold watch which belonged to Charles F. McCarthy at the time of his death, all of which said personal property which was described in the decree of partial distribution heretofore made to Francis C. McCarthy, until such time as said Francis C. McCarthy shall reimburse the said executrix for the payment of the said above referred to inheritance tax, and that in the event the said Francis C. McCarthy does not so reimburse the said executrix before the expiration of sixty (60) days from this date that said executrix shall sell said property so retained and divide the proceeds equally between herself and the said Charlotte M. Morrow.

"Done in open Court this 27th day of December, 1938."

[2, 3] We find no authority for the quoted portion of the decree. A year before the decree was rendered the precise

property had been distributed absolutely and without reservation to Francis C. McCarthy. The decree of final distribution was an attempt to modify and amend the decree of partial distribution which had become final. We know of no law giving authority for such a collateral attack upon or amendment of a decree that had become final.

[4] Further, the inheritance tax which had been paid by Kate A. Schwerin and Charlotte M. Morrow for Francis C. McCarthy, amounted to $252.38. There is no evidence of the value of the personal property described in the quoted portion of the decree of final distribution. Its value may greatly exceed the amount of the inheritance tax. If we should assume that Kate A. Schwerin and Charlotte M. Morrow acquired a lien on the personal property by reason of the payment of the inheritance tax they could only satisfy the amount of such lien out of the sale price of the personal property. They should not be permitted to divide the excess, if any, between themselves.

[5] We see no good reason for sending the cause back for further trial because of the quoted portion of the decree. The law furnishes Kate A. Schwerin and Charlotte M. Morrow a sufficient remedy whereby they may collect the debt from Francis C. McCarthy. Because they are afforded another remedy, this estate can and should be closed without extending further its tempestuous journeys through the courts.

It is ordered that the decree of final distribution be modified by striking therefrom the following paragraph:

"It is further ordered, adjudged and decreed that the said executrix shall retain in her possession ten (10) shares of the Ambassador Hotel Company of Los Angeles Participating Certificate in Respect of Capital Stock, and all furniture described in the decree of partial distribution to Francis C. McCarthy, and all paintings described in the decree of partial distribution to Francis C. McCarthy, said furniture and paintings now located at 352 San Antonio Street, San Diego, California, and a certain gold watch which belonged to Charles F. McCarthy at the time of his death, all of which said personal property which was described in the decree of partial distribution heretofore made to Francis C. McCarthy, until such time as said Francis C. McCarthy shall reimburse the said executrix for the payment of the said above referred to inheritance tax, and that in the event the said Francis C. McCarthy does not so reimburse the said executrix before the expiration of sixty (60) days from this date that said executrix shall sell said property so retained and divide the proceeds equally between herself and the said Charlotte M. Morrow."

As so modified, the order settling the final account and the decree of final distribution are affirmed, and the attempted appeal from the order denying the motion for new trial is dismissed. Neither party will recover costs on appeal.

I concur: BARNARD, P. J.

GRIFFIN, J., being disqualified, does not participate herein.

36 Cal.App.2d 221

Ex parte CAMPBELL.

Cr. 2092.

District Court of Appeal, First District, Division 1, California.

Dec. 22, 1939.

1. Constitutional law 🔑203

The statute providing that from suspension, cancellation, or revocation of parole of any prisoner until his return to custody, he shall be deemed a fugitive from justice and no part of time during which he is a fugitive shall be part of his term, is a statutory declaration of what was already the law as declared by judicial decisions, and hence cannot be deemed "ex post facto." Pen.Code, § 1168, as amended by St.1931, pp. 1053, 1058.

[Ed. Note.—For other definitions of "Ex post Facto," see Words & Phrases.]

2. Criminal law 🔑1216(6)

Where parole was revoked and time credits canceled, term served by prisoner in Colorado penitentiary for robbery committed during parole would not be credited as time actually served on his pending sentence in state penitentiary, notwithstanding that statute providing that, from revocation of

parole until prisoner's return to custody, prisoner shall be deemed fugitive from justice and such time shall not be credited as part of term was not in effect when parole was suspended, since statute was mere codification of what was already law of the state. Pen.Code, § 1168, as amended by St.1931, pp. 1053, 1058.

◆

Proceeding in the matter of the application of Fred C. Campbell for a writ of habeas corpus.

Writ discharged and proceeding dismissed.

Fred C. Campbell, in propria persona.

Earl Warren, Atty. Gen., and F. Walter French, Deputy Atty. Gen., for respondent.

GOODELL, Justice pro tem.

The petitioner claims that he is unlawfully imprisoned and restrained of his liberty. He was received at San Quentin on April 18, 1925, after conviction of robbery, and in due time the prison board fixed his term at ten years on one count and five years on another, to run consecutively. The deduction of five years and seven months allowable as credit for good conduct left nine years and five months to be served, and it was provided that the last four years and six months could be on parole. On November 18, 1930, he was paroled, with permission to go to Denver, Colorado, where he had employment. On April 28, 1931, he was arrested for robbery in Denver, and at the June, 1931, meeting of the board the parole officer made a showing that petitioner had been tried for robbery, convicted, and sentenced to a term of from ten to twelve years in the Colorado penitentiary, whereupon the board ordered that his parole be suspended and revoked pending investigation, and that he be returned to custody. On March 19, 1937, petitioner was released from the Colorado penitentiary, and on March 24, 1937, was again lodged in San Quentin. On April 8, 1937, at a hearing held by the board, after due notice to the prisoner, he pleaded guilty to a violation of his parole, whereupon the board declared a forfeiture of the five years and seven months' credit. The time spent by petitioner outside San Quentin, between June 27, 1931, when his parole was suspended, and March 19, 1937, when he was taken into custody by the California officers, is five years, eight months and twenty-two days, which, when added to April 18, 1940 (the expiration of the fifteen years' term without credits), would fix the date for petitioner's release as January 9, 1946.

[1, 2] In 1931 the legislature (Stats. 1931, pp. 1053, 1058) added to section 1168 of the Penal Code (effective August 14, 1931) the provision that "From and after the suspension, cancellation, or revocation of the parole of any prisoner and until his return to custody he shall be deemed an escape and fugitive from justice and no part of the time during which he is an escape and fugitive from justice shall be part of his term." Petitioner contends that because this statute was not in effect when his parole was suspended it cannot apply to his case, and that it would operate retroactively as an ex post facto law if so applied; that his term expired on May 18, 1935, and that his extradition from Colorado and his confinement ever since have been illegal. In other words, petitioner's position is that because there was no statutory provision on the subject, the five years, eight months and twenty-two days should be credited as time actually served on his California sentence, *notwithstanding he was then serving time in the penitentiary of another state.* While it is true that in 1931 the legislature for the first time wrote that provision into the statute, the enactment was nothing but a statutory declaration and codification of what had been the law of this state for forty years, as declared by judicial decisions, for as far back as 1891 the Supreme Court in Ex parte Vance, 90 Cal. 208, 27 P. 209, 210, 13 L.R.A. 574, held that the time of a prisoner's absence from imprisonment in violation of law "cannot be considered as having been spent in jail in satisfaction of the judgment" and is "in effect a technical escape, from which he can derive no advantage". In that case Vance had been sentenced to pay a fine of $300 and to be imprisoned in the county jail until the fine was paid at the rate of one day for every dollar of the fine. Four days after sentence he was released by the sheriff and remained at liberty for over a year and a half. Upon being rearrested he contended, as this petitioner contends, that the term of his sentence had expired. Vance also contended that there had been no legal suspension of the judgment. In denying these claims the court said, "it would seem from the mere statement of the proposition that the contention * * * cannot be sustained". See, also, People v. Patrich, 118 Cal. 332,

50 P. 425; and In re Collins, 8 Cal.App. 367, 370, 97 P. 188. In In re Tanner, 178 Cal. 792, 175 P. 81, the petitioner claimed, on habeas corpus, that he was entitled to have credited as part of his time served, six months and eighteen days while he was in the Ohio penitentiary (after completing a term of imprisonment therein for an Ohio offense) awaiting the arrival of officers to return him to California to complete his term, after a violation of parole. If these six months and eighteen days should have been credited, then the writ should have been granted, for his term would have expired. Tanner in that case did not go as far as to claim, as petitioner does here, that the time served on the Ohio sentence itself counted. The court held that he "was not, while in the Ohio prison, imprisoned in execution of the California judgment, and that he cannot be credited with any portion of such time". The Tanner case was followed in In re Sichofsky, 201 Cal. 360, 365, 257 P. 439, 53 A.L.R. 615, where there is a full and comprehensive discussion of this subject. At page 364, of 201 Cal., 257 P. at page 440, 53 A.L.R. 615, the court says: "An equally absurd situation would arise in a case where a criminal, who had been tried and convicted for an offense against our state laws, but who had escaped before his actual incarceration in our state prison and while thus a fugitive from justice had committed a crime against the laws of another jurisdiction and had been there arrested, indicted, convicted, and sentenced to prison in that jurisdiction, would be also serving time there for the crime for which he was convicted and sentenced here, but for which, by reason of his escape, his actual commitment in the state prison had been rendered for the time being impossible." The situation thus characterized as absurd is essentially the situation presented by the instant case. In re Forbes, 108 Cal.App. 683, 292 P. 142, is directly in point. There Forbes, after violating his parole, served six months in a county jail in California, whereas this petitioner, after violating his parole, served over five years in the penitentiary in Colorado. In the Forbes case it is pointed out, 108 Cal.App. at page 687, 292 P. at page 142, that under the holding in Ex parte McGuire, 135 Cal. 339, 67 P. 327, 87 Am. St.Rep. 105, Forbes should have been returned to Folsom instead of being sent to the county jail; in the instant case that rule could not have been invoked, for Campbell had violated the law of a sister state, and that jurisdiction had a right to hold and punish him for his offense. In re Daniels, 110 Cal.App. 638, 294 P. 735, 736, presented precisely the same question as the Forbes case, and the same result was reached. There the court said: "While a prisoner remains without the prison walls after his parole has been revoked, in effect, he may be deemed to be an escaped prisoner or a fugitive from justice, during which period he may not claim the benefit of the running of his sentence." It is interesting to note that the 1931 amendment to section 1168 is in substantially this language. In re Sommers, 135 Cal.App. 541, 27 P.2d 649, and In re Falconi, 22 Cal.App. 2d 604, 71 P.2d 948, are to the same effect. In each of the four cases last cited the suspension of the prisoner's parole took place before the 1931 amendment of section 1168; yet in each of them the rule which that amendment enunciated was applied in the absence of statute. It is therefore clear from the three Supreme Court cases (Vance, Tanner and Sichofsky, supra) and from these four cases in the District Court of Appeal, that said rule had been the law of this state for four decades before it was put into statutory form in 1931. That rule of course is applicable to petitioner's case.

In re Herriff, 104 Cal.App. 222, 285 P. 927, upon which the petitioner relies, is distinguishable from the case at bar. An examination of the record in that case shows that the board made an order on February 9, 1929, suspending the parole but did nothing thereafter toward forfeiting the prisoner's credits. Twenty-three days later, on March 4, 1929, Herriff's term, *as reduced by credits,* expired. Herriff had violated his parole and had been arrested by a parole officer on January 9, 1929. He was turned over to the police and later pleaded guilty to a violation of section 476a of the Penal Code, and was sentenced to serve one year in the county jail in San Francisco, where he was confined until his term therein expired on January 17, 1930. Then, other things being equal, he would have been entitled to his liberty. The sheriff, however, detained him on a "hold" of the state parole officer until February 3, 1930, when he filed his petition for a writ of habeas corpus. The sheriff's return to the writ showed that Herriff was then held in custody "by virtue of a certain warrant of arrest issued by the State Board of Prison Directors on the 9th day of February, 1929". In other words, from January 9, 1929, when he was arrested by the parole officer, until the habeas corpus proceeding in February, 1930, *a period of over a year,* the prison authorities had done nothing toward forfeiting Herriff's credits, notwithstanding he should have been returned to prison. Ex parte McGuire, supra. In the meantime, on March 4, 1929, his term—with credits not forfeited—had expired and the petition for a writ was filed almost eleven months thereafter. The decision in the Herriff case seems to turn upon the point that the law (Stats.1915, p. 981) provides that no credits can be forfeited without notice to the prisoner, and a hearing. In the Herriff case the prisoner's credits were never forfeited; in the case at bar they were forfeited at a hearing, on notice, at which petitioner pleaded guilty to violating his parole, which hearing was long before the expiration of his term. The Herriff case must be read in the light of the facts which we have summarized, which show that the cases are distinguishable.

The writ is discharged and the proceeding is dismissed.

We concur: PETERS, P. J.; WARD, J.

RUBIN et al. v. BOARD OF DIRECTORS OF CITY OF PASADENA et al. *

Civ. 12109.

District Court of Appeal, Second District, Division 2, California.

Dec. 20, 1939.

Hearing Granted Feb. 15, 1940.

1. Mandamus 🔑72

Mandamus is not proper remedy to review finding of local board or officer vested with discretionary power by statute or ordinance, providing that such board's or officer's determination shall be final, in absence of abuse of discretion.

2. Mandamus 🔑87

The superior court erred in issuing writ of mandate, requiring city board of directors to issue permit for removal of house from petitioners' lot and use of such property as parking lot as exception to zoning ordinance declaring board's finding on appeal from zoning committee's decision final, in absence of showing of abuse of discretion by committee or board.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Proceeding by David R. Rubin and another for a writ of mandate to compel the Board of Directors of the City of Pasadena and the members thereof to grant petitioners a permit to remove a house from their lot and use such property as a parking lot in variation of and as exception to a zoning ordinance. From an order directing the issuance of the writ, respondents appeal.

Reversed.

Harold P. Huls, City Atty., and Thomas W. Le Sage, Deputy City Atty., both of Pasadena, for appellants.

Joseph L. Lewinson and Donald Armstrong, both of Los Angeles, for respondents.

McCOMB, Justice.

From an order directing the issuance of a writ of mandate requiring appellants to issue to respondents a permit to remove a house located on a lot owned by them in the city of Pasadena and to permit them to use said property as a parking lot, in variation and as an exception to the Pasadena zoning ordinance, appellants appeal.

The essential facts are these:

In March of 1925 respondents purchased a piece of property in the city of Pasadena having a frontage 79.4 feet on Mentor avenue and 104 feet on California street. At the time the property was purchased it was and now is in zone R-2, that is, the property was restricted to single family dwellings, two family dwellings, one-room apartments, bungalow courts, three or four-family flats, boarding houses or rooming houses with the usual accessories, including garages. There was situated thereon a house. In 1930 respondents were permitted to use the west 40 feet of the property for commercial purposes, and a grocery store was placed thereon. At this time respondents moved the house which was on the lot to the northeast portion of the property.

April 26, 1938, respondents filed an application with the zoning committee of the planning commission of the city of Pasadena for an exception or variance from the use restrictions of the zoning code, so that

*For subsequent opinion see 104 P.2d 1041.

they might use the east 64 feet of their property as a parking lot in conjunction with the grocery store located on the west 40 feet thereof. After a public hearing before the zoning committee, their request was unanimously denied, whereupon they appealed from such decision, as permitted by the zoning code, to the Board of Directors of the City of Pasadena. Thereafter on May 10, 1938, a public hearing of their appeal was heard before the Board of Directors. At this hearing there was received both oral and documentary evidence and the Board of Directors viewed the property in question. At the conclusion of the hearing the board denied respondents' request and affirmed the decision of the zoning committee. July 19, 1938, respondents filed a petition in the superior court for a writ of mandate to compel appellants to grant their request for a variance under the city zoning ordinance. After a hearing before said court a judgment was rendered in favor of respondents herein and a writ of mandate was ordered issued as prayed, directed to appellants.

[1] This is the sole question necessary for determination:

If a statute or ordinance reposes in a local board or officer discretionary powers, and also provides that such board's or officer's determination shall be final, will the exercise of the discretion so conferred be reviewed on mandamus in the absence of a showing that the board has abused its discretion?

This question must be answered in the negative. The law is settled in California that mandamus is not a proper remedy, in the absence of an abuse of discretion for reviewing the finding of a local board or officer vested with discretionary power by a statute or ordinance, if the statute or ordinance vesting the powers also provides that the board's or officer's determination shall be final. Wood v. Strother, 76 Cal. 545, 553, 18 P. 766, 9 Am.St.Rep. 249; Kerr v. Superior Court, 130 Cal. 183, 186, 62 P. 479; Mitchell v. McKevitt, 128 Cal.App. 458, 465, 17 P.2d 789.

In Wood v. Strother, supra, our Supreme Court says, 76 Cal. at page 553, 18 P. at page 771, 9 Am.St.Rep. 249: "In every case the tribunal that is to act must determine in the first instance whether the case is a proper one for its action. And in our opinion the true tests are whether its determination is intended by law to be final, and, if not, whether there is any other 'plain, speedy, and adequate remedy.' If the determination of the tribunal was intended to be final, it is plain that it cannot be disturbed, either on mandamus or in any other way."

In Kerr v. Superior Court, supra, 130 Cal. at page 186, 62 P. at page 480, our Supreme Court again says: "* * * Moreover, it has been held that there is no appeal from a judgment rendered upon an accusation under section 772, at least by the accuser. In re Curtis, 108 Cal. 661, 41 P. 793, and cases there cited. Therefore (query), Is not the case at bar within the rule declared in Lewis v. Barclay, supra [35 Cal. 213], Fairchild v. Wall, 93 Cal. 401, 29 P. 60, and Wood v. Strother, 76 Cal. 545, 18 P. 766 [9 Am.St.Rep. 249],—that, where the determination of the tribunal or officer is final, it cannot be disturbed, either on mandamus or in any other way?"

In Mitchell v. McKevitt, supra, 128 Cal. App. at page 465, 17 P.2d at page 792, the rule is thus stated: "Looking to the language of the charter as it relates to the civil service and considering its general purpose, we are of the opinion that it is the intent of the charter that the decision of the commission upon the question of the examination before us should be final. Mandamus, therefore, will not lie. [Citing cases.]"

The cases of McDonough v. Goodcell, 13 Cal.2d 741, 91 P.2d 1035, 123 A.L.R. 1205, and Drummey v. State Board of Funeral Directors, 13 Cal.2d 75, 87 P.2d 848, relied upon by respondents are not controlling in the present situation, for in those cases the statutes conferred powers upon officials exercising state-wide jurisdiction without making their decisions final. It is to be noted that in the instant case the officials to whom the writ is directed are officials exercising purely local jurisdiction in matters in which the city charter makes their decisions final.

[2] The zoning code referred to herein provided that the Board of Directors' determination on appeal from a decision of the zoning committee should be final, subsection (j), section 12 of the zoning code of the city of Pasadena reading: "The Board, in conformity with the provisions of this ordinance, may reverse or affirm wholly or partly, or may modify any decision, determination or requirement of the Zoning Committee, and may make such decision or determination or may impose such conditions as the facts warrant, and may grant a variance or exception, *and its decision or*

determination shall be final." (Italics added.)

Applying the foregoing rule of law to the facts of the instant case, it is evident that, since mandamus will not lie to review the finding of a local board or officer whose finding is by statute or ordinance made final, in the absence of a showing of abuse of discretion on the part of the board, and since in the present case the finding of the Board of Directors upon appeal from a decision of the zoning committee was made final by ordinance and there is no showing that the zoning committee abused its discretion, as the facts proved were susceptible of more than one conclusion, the trial court was in error in issuing the writ of mandate herein.

For the foregoing reasons the judgment appealed from is reversed.

I concur: WOOD, J.

MOORE, Presiding Justice (concurring).

I concur in the judgment but I dissent from the majority view *that mandamus is not a proper remedy, in the absence of abuse of discretion for reviewing the finding of a local board vested with discretionary power by statute or ordinance to render a final decision.* If the opinion means that the courts will not review the proceedings unless the petition alleges abuse of discretion, to that extent it is correct. But if it is intended that the writ will not be granted if the evidence fails to establish abuse of discretion, then it must be acknowledged that the remedy were necessarily exercised, otherwise the demonstration of an abuse of discretion could not have been made.

But abuse of discretion is not the only justifiable basis for the exercise of mandamus against a board vested with powers for final decision. It is readily conceivable that a board might have heard with patience all of the evidence presented and might have searched vainly for precedent for its guidance, and though it be free from fraud, caprice and arbitrary disregard for the petitioner's rights, yet it may have violated a fundamental right by virtue of following the very statutory language which created it and endowed it with said powers. Constitutional safeguards furnish us security in the enjoyment of property rights, of life, and of liberty, and when any of these through inadvertence or innocence on the part of a board is disregarded, the courts will, by the exercise of the writ of mandate, correct such misjudgments of an administrative board. To announce that the courts shall not review the proceedings of a board after it has ignored a right guaranteed by the federal Constitution would mean that one so aggrieved would be without a remedy. Of course, if the alternative writ were never issued because of the failuse of the petition to allege the board's abuse of discretion, or its refusal to act, or its denial of a constitutional right, no trial could occur. But where the petition alleges the deprivation of rights by reason of either an abuse of discretion in making a finding of fact or of the denial of a constitutional guarantee, then, a judicial inquiry is demanded and the trial court must hear the cause to determine whether the finding is justified or the petitioner has been denied a constitutional right.

Moreover, if a petition were presented showing that an administrative board had made a determination without evidence, or had refused to hear legal evidence, or had chosen to act upon hearsay as against direct and conclusive evidence or had ignored a constitutional guarantee, surely the court would be required to try the issue de novo and to enter a judgment on the findings made, and the fact that the statute creating the board made its determination final, would add no virtue to its decision. Thus, when a petition shows that an administrative board has made a prejudicial determination because of its ignorance of constitutional guarantees, the alternative writ must issue, a trial must be had and findings and decision must be made. If petitioner prevails, the writ will issue compelling the board to grant the relief requested, unless an appeal be taken. If an appeal be taken, it then becomes the duty of the appellate court to review the proceedings, as in the case of all other appeals from judgments of the trial court.

The writ of mandate had its origin in the necessities of supplying defects in the processes of justice where no other remedy was available. 16 Cal.Jur. 764. It is the only writ by which the acts of inferior tribunals and administrative boards may be brought for review before the courts for the reason that the writ of certiorari is appropriate only for the purpose of reviewing acts of a board exercising judicial power (Standard Oil Co. v. State Board of Equalization, 6 Cal.2d 557, 59 P.2d 119) and the use of prohibition is confined to the restraint of threatened exercise of judicial power in excess of jurisdiction. Whitten v. State Board of Optometry, 8 Cal.2d 444, 65 P.2d 1296, 115 A.L.R. 1.

Since "no person shall be * * * deprived of life, liberty, or property, without due process" (Const. of the United States, amendts. V and XIV, U.S.C.A.), a complaint that due process has been denied by the determination of an administrative board impels the court to grant a hearing upon the issues tried by the administrative board and entitles the complainant to a trial de novo. Drummey v. State Board of Funeral Directors, 13 Cal.2d 75, 87 P.2d 848. To hold that the decisions of administrative boards are conclusive even though the petition alleges the denial of a right or the abuse of discretion, would place the constitutional rights of a citizen at the mercy of the administrative officials and seriously impair the security inherent in our constitutional safeguards. "Under our system there is no warrant for the view that the judicial power of a competent court can be cicumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority." St. Joseph Stock Yards v. United States, 298 U.S. 38, 56 S. Ct. 720, 726, 80 L.Ed. 1033; Crowell v. Benson, 285 U.S. 22, 52 S.Ct. 285, 76 L. Ed. 598.

Not only are the courts required, under appropriate allegations, to review the proceedings of administrative boards when constitutional rights have been invaded by the determination of the administrative board but if the court does not exercise an independent judgment on the facts as well as on the law, the party adversely affected as to his constitutional rights is deprived of due process. Drummey v. State Board of Funeral Directors, supra. At the same time, it must be remembered that although the court is required in a mandate proceeding where constitutional rights are in issue to try the case de novo, it must be assisted in all cases by the findings of the administrative board. While such findings are not conclusive they come "with a strong presumption of their correctness, and the burden rests upon the complainant to convince the court that the board's decision is contrary to the weight of the evidence". Drummery v. State Board of Funeral Directors, 13 Cal.2d 75, 87 P.2d 854. St. Joseph Stock. Yards v. United States, supra.

Upon the facts of the petition in the instant case, the court was required to hear the evidence de novo in order to determine whether discretion had been abused or a property right of the petitioner's had been confiscated. Upon a review of the entire case, it appears that the administrative board, in the proper exercise of its powers, denied the application of petitioner for a variance of the zoning ordinance in so far as it affected the lot which he purchased within the zoned area in 1925. That area including his lot was already zoned to residential uses then as it is now. In the exercise of their judgment, they determined that such variance would be detrimental to the public health, comfort, peace and welfare and that the alleged extraordinary conditions recited by the petitioner were insufficient to warrant the variance. No facts were introduced before the trial court that would warrant the substitution by the court of its opinion for the decision of the defendant Board of Directors. The entire record is devoid of any content calculated to indicate that the petitioner was denied a full hearing and the same treatment accorded to all persons presenting similar applications.

The power to vary the zoning ordinance should be exercised sparingly. Prusik v. Board of Appeals etc., 262 Mass. 451, 160 N.E. 312. One buying in a district zoned to residential uses cannot be heard to complain of small profits from the permitted use. Home for Hebrew Infants of City of New York v. Walsh, 131 Misc. 581, 227 N.Y. S. 570. Whether one's property is more suitable for a purpose other than that permitted is immaterial. Stillman v. Board of Standards and Appeals, 222 App.Div. 19, 225 N.Y. S. 402, affirmed 247 N.Y. 599, 161 N.E. 197. Where the administrative board granted a variance solely because of the owner's inability to rent his property as a residence, even though it had no rental value at all, the board's decision should be reversed. Phillips v. Board of Appeals, 286 Mass. 469, 190 N.E. 601. In the case of Blake v. Zoning Board of Appeals, 117 Conn. 527, 169 A. 195, said board had denied the permit to operate a parking lot in a business zone. Although the court after trial reversed the order of the zoning board, the supreme court of Connecticut reversed the judgment and approved the action of the zoning board on the ground that the board had properly exercised its discretion in refusing the request.

I am satisfied that the judgment should be reversed but I think the proceedings of the trial court should have been reviewed as any other record customarily presented there and reviewed here. The judgment should be reversed upon the ground that the superior court was not justified in annulling the decision of the Board of Directors of Pasadena for the reasons that said board was not actuated by fraud or caprice or by arbitrary impulse against petitioners or their rights and did not violate any constitutional right of petitioners with respect to their said property.

36 Cal.App.2d 226

BRUNVOLD v. JOHNSON.

Civ. 10788.

District Court of Appeal, First District,
Division 1, California.

Dec. 22, 1939.

Rehearing Denied Jan. 20, 1940.

Hearing Denied Feb. 19, 1940.

1. Damages 🔑40(2), 147

As respects action for breach of contract, loss of profits in business already established, definitely ascertainable or even expected, if not too remote or conjectural, is basis for damages and allowable without special pleading thereof. Civ.Code, §§ 3300, 3301.

2. Damages 🔑142

Damages which may be said to be the normal and natural result of breach complained of may be denominated "general damages" and pleaded accordingly, while those suffered as a consequence, though not necessarily the certain result of the breach, must be pleaded specially.

[Ed. Note.—For other definitions of "General Damages," see Words & Phrases.]

3. Damages 🔑147

Loss of profits, as result of incapacity due to personal injury, or in connection with contemplated, as distinguished from established, business, must be specially pleaded.

4. Damages 🔑147

In action for breach of contract, where the only damage was loss of profits consisting of commissions, general allegation of damage "in the loss of profits" was sufficient. Civ.Code, §§ 3300, 3301.

5. Damages 🔑147

Unless some special loss is claimed, damage for loss of profits on account of breach of contract is generally the subject of evidence rather than pleading, knowledge thereof being reasonably imputed to offending party.

6. Contracts 🔑10(2)

An agreement whereby one party gave second party exclusive right for 5 years to sell cordage products and other lines, and agreed to maintain complete warehouse stock in certain city and pay expenses of warehousing and commissions, and whereby second party agreed to exercise reasonable diligence in sale of products and pay expenses incidental to sale, was bilateral, and not void for want of mutuality.

7. Principal and agent 🔑50

Under agreement whereby one party gave second party exclusive right for 5 years to sell cordage products and other lines, and agreed to maintain complete warehouse stock in certain city and pay expenses of warehousing and commissions, and whereby second party agreed to exercise reasonable diligence in sale of products and pay expenses incidental to sale, second party was an "agent" or "factor," his powers being circumscribed by agreement, subject only to contingencies beyond control of parties.

[Ed. Note.—For other definitions of "Agent" and "Factor," see Words & Phrases.]

8. Contracts 🔑175(1)

It must be assumed that parties to an agreement intended to enter into a legal and binding contract.

9. Appeal and error 🔑1010(1)

Where there was evidence sustaining trial court's conclusion that change in commercial relations between the United States and the Philippines affecting cordage was not a sufficient contingency, under contract for exclusive right to sell certain cordage products, to warrant termination of contract, reviewing court could not interfere. 48 U.S.C.A. § 1236a.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Action for breach of contract by Louis A. Brunvold against Victor Johnson, doing business under the firm name and style of Victor Johnson & Co., wherein a cross-complaint was filed. From a judgment for plaintiff, defendant appeals.

Affirmed.

Thomas D. Aitken, of San Francisco, for appellant.

Halverson & Halverson, of Los Angeles, for respondent.

WARD, Justice.

An appeal by defendant and cross-complainant from a judgment in the sum of $9,280.50 in favor of plaintiff and cross-defendant in an action for loss of profits in connection with an alleged wrongful cancellation of a contract.

The complaint alleges that defendant Victor Johnson is the sole agent and distributor "west of the Mississippi" for the sale and distribution of cordage products of the Johnson-Pickett Rope Company, manufacturers, at Manila, Philippine Islands; that on or about the 1st day of February, 1932, plaintiff and defendant entered into an agreement in writing whereby Victor Johnson of San Francisco, for a valuable consideration, appointed plaintiff as his agent, with the exclusive right to sell the Johnson-Pickett Rope Company cordage products, and other domestic lines which "we now have and may in the future acquire" in territory comprising the southern part of the state of California and all of the states of Arizona, New Mexico, Texas and Oklahoma. Provision was made that should conditions warrant, the territory would be extended. Plaintiff was to receive commissions, due and payable on the 15th of each month, on products so sold the previous month in the above territory, provided the amount of such commissions exceeded the amount of a drawing account of $200 a month which defendant agreed to allow plaintiff for a period of two years. Plaintiff was also to receive commissions on cordage products sold to certain named purchasers located in northern California. Victor Johnson agreed to maintain a complete warehouse stock in Los Angeles and to pay all expenses incidental to the shipping and warehousing of this stock, also the taxes and insurance thereon. Plaintiff agreed to sell the products mentioned and to pay all such incidental costs as traveling expenses, hire of salesmen, clerks, office space and equipment. Victor Johnson also agreed to carry all accounts and reserved unto himself the right to pass upon all credits, both parties agreeing to cooperate in an endeavor to sell to responsible parties only, to their mutual best interests. The agreement was to run for a period of five years, subject to contingencies beyond the control of either of the contracting parties. The complaint further alleges that plaintiff entered into the performance of the agreement, and with defendant's consent and permission carried on the business in Los Angeles under the name of Victor Johnson Company of Los Angeles, renting and equipping an office, advertising, selling and creating and building up a valuable and expanding demand for defendant's products; that in June of 1935 Victor Johnson, without sufficient cause, terminated the agreement and took over and conducted the business, notifying plaintiff's customers of such termination and continuing to carry on the business, to plaintiff's damage in the loss of profits in the sum of $25,000.

The answer admitted the appointment of plaintiff as exclusive agent, for a consideration, but denied that the contract had been terminated without sufficient cause, and in this behalf alleged: "* * * that subsequent to the execution of the same defendant and plaintiff discussed between themselves the conditions relative to the Philippine Islands and their then and probable future commercial and political relations with the United States and especially the relations affecting the commerce between said countries relating to the exporting of rope and fiber from the Philippines and the importing of the same into the United States and agreed that any substantial change made by agreement between the two said governments affecting the amount of hemp rope and/or twine allowed to be exported to the United States or in the terms thereof that such change, if restrictive as to the amount or more onerous on the importer would constitute a contingency beyond the control of either of the contracting parties contemplated by the terms of said contract and would be a sufficient and valid reason for the defendant to terminate the said contract." The answer further alleged that on June 14, 1935, the Congress of the United States enacted as a law Senate Bill No. 2530, an act described as Public No. 137—74th Congress, Tydings-McDuffie Bill, 48 U.S.C.A. § 1236a; that this changed the trade relations between the United States of America and the Philippine Islands and resulted in an allocation of cordage materials of Manila hemp to the Johnson-Pickett Rope Company for export to the United States in an amount substantially one-half of prior allocations, such reduction causing the maintenance of a Los Angeles office to be unprofitable. As a separate defense it was alleged that plaintiff had agreed to handle defendant's products exclusively; that not only had the former absented himself from the territory provided as the scene of his operations, but that he had made other agreements with competitive concerns and in bad faith sold the products of such concerns, to the detriment of defendant; that this constituted a breach of the agreement. By way of cross-complaint for such breach, defendant prayed damages in an amount of $10,000.

In view of the "ad damnum" clause of the complaint, appellant contends that the trial court committed reversible error in not sustaining his objection to the reception of evidence, particularly evidence of damages. This clause was amended, prior to trial, upon the order of court, after the filing of a demurrer, by insertion of the words: "* * * in the loss of profits", so that it read: "* * * to the damage of the plaintiff in the loss of profits in the sum of Twenty-five Thousand Dollars". No further demurrer was filed.

[1, 2] In an action for the breach of an obligation based upon a contract, the measure of damages is an amount that will compensate the injured party for the detriment proximately caused by such breach, or which in the ordinary course of things is likely to result therefrom. Sec. 3300, Civ. Code. Damages to be recoverable must be clearly ascertainable in both their nature and origin. Sec. 3301, Civ.Code. Loss of profits in a business already established, definitely ascertainable or even expected, if not too remote or conjectural, is the basis for damages, and allowable without special pleading thereof. McConnell v. Corona City Water Co., 149 Cal. 60, 85 P. 929, 8 L.R.A.,N.S., 1171; California Press Manufacturing Co. v. Stafford Packing Co., 192 Cal. 479; 221 P. 345, 32 A.L.R. 114; Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service, Inc., 217 Cal. 131, 17 P.2d 712. Damages which may be said to be the normal and natural result of the breach complained of may be denominated general damages and pleaded accordingly, while those suffered as a consequence, though not necessarily the certain result of the breach, must be pleaded specially. Zvolanek v. Bodger Seeds, Ltd., 5 Cal.App. 2d 106, 42 P.2d 92.

[3-5] In many of the cases cited by appellant the confusion in establishing the measure of damages arose from an attempt to assess damages for loss of profits in connection with contemplated business as distinguished from profits of an established business. Hawthorne v. Siegel, 88 Cal. 159, 160, 167, 25 P. 1114, 22 Am.St.Rep. 291; Gibson v. Hercules Mfg., etc., Co., 80 Cal. App. 689, 252 P. 780; Hacker Pipe & Supply Co. v. Chapman Valve Mfg. Co., 17 Cal. App.2d 265, 61 P.2d 944. Likewise some of the authorities cited by appellant deal with loss of profits as the result of incapacity due to personal injury. These are items that must be specially pleaded (Maus v. Scavenger Protective Ass'n, 2 Cal.App.2d 624, 39 P.2d 209) to enable the trier of the facts to compute the total damages. Lombardi v. California St. Ry. Co., 124 Cal. 311, 57 P.2d 66, but these cases do not apply in an action for breach of contract where the only damage sustained is loss of profits consisting of commissions. Unless some special loss is claimed, damages for loss of profits on account of breach of contract is generally the subject of evidence rather than pleading, knowledge thereof being reasonably imputed to the offending party.

The measure of damages in this case is of small interest since the answer to the complaint sets forth an accounting which proximately alleges the amount of damages, if any. In addition, it was stipulated that if plaintiff was entitled to "anything at all", damages should be fixed in the sum of $9,280.50; and that, should it develop that plaintiff was a servant or agent of defendant, such amount would be subject to a deduction to the extent of any other earnings by plaintiff.

Prior to entering into the agreement, respondent was employed by appellant as a salesman at a fixed salary, plus commissions. Appellant contends (1) that the agreement was a continuation of this employment under different conditions as set forth in the agreement (2) that the contract was a unilateral one wherein Johnson obligated himself to pay certain commissions but Brunvold assumed no obligation toward Johnson; that if the second theory is correct the agreement was without consideration as to all unexecuted parts and could be terminated at the pleasure of either party; in brief, it is the contention of appellant that the contract was void for want of mutuality.

[6, 7] Brunvold was not required to perform personal service but he was required to exercise reasonable diligence in the sale of the cordage commodities and to pay all expenses incidental to such sale; Johnson contracted to maintain a complete warehouse stock in Los Angeles and to pay the expenses of warehousing, thus a completed bilateral contract is evidenced. Davis v. Jacoby, 1 Cal.2d 370, 34 P.2d 1026; Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214. It is true that Johnson maintained and controlled the quantity of cordage of his company in Los Angeles; that he paid the insurance thereon and reserved unto himself the right to fix prices, but Brunvold had not only the privilege of selling, but the duty of paying the expenses of making the sales. He was acting as an agent or factor, his powers being circumscribed by the terms of the contract, including the five-year fixed term, subject only to contingencies beyond the control of either of the contracting parties.

Appellant's claim that the contract is void for want of mutuality finds some support in Scott v. Cline Electric Mfg. Co., 104 Cal. App. 122, at page 125, 285 P. 349, 350, wherein the court held that "where one party was not obliged to do anything and the other parties might" the contract was unilateral. The facts of the cases are similar but not identical. In the Scott case, an agent agreed "to push the sale" of certain motors. In the instant case, the agent promised to promote the business of the Johnson-Pickett Rope Company and in addition he obligated himself to pay all expenses incidental to selling their products, including the salaries and traveling expenses of salesmen, the hire of necessary clerks and the equipment of an office. In addition there was an implied obligation to use reasonable diligence and fidelity in the consummation of sales and the protection generally of defendant's business. Wood v. Lucy, Lady Duff-Gordon, supra.

[8, 9] The court found that all of the material allegations of the complaint were true. The second paragraph thereof alleges the pertinent features of the agreement including the allegation that it was entered into by the respective parties "for a valuable consideration". In addition, "it must be assumed, of course, that the parties hereto intended to enter into a legal and binding contract". Robbins v. Pacific Eastern Corp., 8 Cal.2d 241, 272, 65 P.2d 42, 58. The answer admitted paragraph II but alleged that the change in the commercial relations between the United States and the Philippines affecting cordage was a sufficient contingency under the contract to warrant its termination. This is the real issue in dispute—a question of fact, and was determined by the trial court contrary to the position of appellant. There is evidence sustaining the trial court's conclusion, and we therefore may not interfere.

The finding that sales by Brunvold for other domestic concerns were not in competition with defendant's interests was a fact borne out and confirmed by the evidence introduced, which disposes of appellant's claim that defendant was entitled to damages as alleged in the cross-complaint.

The judgment is affirmed.

We concur: PETERS, P. J; GOODELL, Justice pro tem.

36 Cal.App.2d 100

HUNTER v. SUPERIOR COURT IN AND FOR RIVERSIDE COUNTY et al.

Civ. 2468.

District Court of Appeal Fourth District, California.

Dec. 14, 1939.

1. Prohibition 🔑3(2)

The petitioner was not precluded from obtaining writ of prohibition enjoining court from taking further proceedings against petitioner for contempt for violation of a stipulated judgment on ground that petitioner could have appealed from order denying motion to set aside judgment, where no appeal could be taken from a consent judgment.

2. Appeal and error 🔑125

An appeal from a consent judgment will not lie.

3. Appeal and error 🔑113(2)

Under rule that a party may not do indirectly that which he is forbidden to do directly, an order not subject of appeal cannot be made reviewable by moving to set it aside and appealing from order denying motion.

4. Prohibition 🔑3(1)

The pendency of equitable action attacking judgment and seeking to restrain enforcement thereof did not preclude issuance of writ of prohibition enjoining court from taking further proceedings against petitioner for contempt for violation of judgment.

5. Prohibition 🔑5(2)

Prohibition is a proper remedy for a petitioner about to be imprisoned or fined for contempt under a void judgment.

6. Judgment 🔑18(2)

The provisions of consent judgment outside issues in pleadings would not be enforced where judgment was to a certain extent void.

7. Injunction 🔑59(1)

Equity will not interfere to prevent breach of negative covenant in contract when affirmative covenant thereof is of such nature that it cannot be specifically enforced by judicial decree. Civ.Code, § 3423, subd. 5; Code Civ.Proc. § 526, subd. 5.

8. Specific performance 🔑75

Equity will not decree specific performance of contract stipulating for a succession of acts whose performance cannot be consummated by one transaction, but will be continuous and require protracted supervision.

9. Specific performance 🔑28(1)

Greater certainty is required in terms of agreement which is to be specifically enforced in equity than is necessary as basis of action at law for damages.

10. Injunction 🔑57
Specific performance 🔑28(1)

A valid contract because of its inherent nature or its lack of definiteness may be unenforceable either by direct decree of specific performance or by a prohibitory injunction.

11. Injunction 🔑208

A judgment which was rendered in action to enjoin the manufacture and sale of machine appropriate for manufacture of Venetian blind slats and the manufacture of slats for resale other than in completed Venetian blind form, and which was void because in restraint of trade, could not be upheld on ground that action was one to prevent disclosure of trade-secrets gained in a confidential relationship.

12. Contracts 🔑137(4)

A contract in restraint of trade is entirely void where it is indivisible, but when divisible and severable, those provisions not in restraint of trade may be enforced.

13. Judgment 🔑8, 16

Nullity of judgments results from a want of legally organized court or tribunal, want of jurisdiction over subject-matter or parties or want of power to grant relief contained in the judgment.

14. Prohibition 🔑10(1)

Whether judgment was void on its face was required to be determined from inspection of judgment roll alone, and whether the judgment was subject to summary action of court in prohibition proceeding depended upon whether record showed affirmatively that court was without jurisdiction.

15. Contracts 🔑134

Contracts restricting right of parties to manufacture and sell machine for manufacture of Venetian blinds and restricting manufacture of Venetian blind slats, if void because in restraint of trade, could not be ratified either by right, by conduct or by stipulated judgment. Civ.Code, §§ 1673–1675.

16. Monopolies 🔑14

Contractual provisions under which petitioner was not to manufacture any machine for use anywhere at any time in manufacture of metal Venetian blinds for anyone other than parties to agreement without their written consent, and which were to be binding for ten years after termination of contract, were void as against public policy. Civ.Code, §§ 1673–1675.

17. Monopolies 🔑12(2)

The provisions of reciprocal stipulated judgment restraining petitioner for over 17 years from manufacturing or selling machine in certain prescribed territory except with other parties' permission, and restraining other parties in like manner, were void because in restraint of trade. Civ.Code, §§ 1673–1675.

18. Judgment 🔑18(2)

Where court grants relief which it has no authority to grant, its judgment is to that extent void.

Prohibition proceeding by J. L. Hunter against the Superior Court of the State of California in and for the County of Riverside and others to prevent the Superior Court from taking any further steps or proceedings in connection with an order to show cause citing the petitioner to show cause why he should not be punished for contempt.

Writ of prohibition issued.

Sarau & Thompson and C. L. McFarland, all of Riverside, for petitioner.

Best & Best, of Riverside, and Richard K. Gandy, of Santa Monica, for respondents.

GRIFFIN, Justice.

The petitioner seeks a writ of prohibition preventing and enjoining the Superior Court of Riverside County from taking any further steps or proceedings in connection with a certain order to show cause citing petitioner to show cause why he should not be punished for contempt for violation of a certain judgment therein rendered.

The right to such writ is predicated upon the claim that the trial court is acting in excess of its jurisdiction in that the judgment upon which the citation for contempt has been issued is void upon its face.

The plaintiffs in that action were the respondents C. W. Morse and L. S. Morse. The petitioner, J. L. Hunter, was the defendant. The complaint set forth three causes of action and sought both injunctive relief and an accounting based upon two alleged contracts (exhibit A, dated January 12, 1937, and exhibit B, dated April 1, 1938). Exhibit A provides in part as follows:

"Whereas, the parties * * * have heretofore planned, designed and perfected designs for a machine to be used in forming, cutting and punching metal for use in the manufacture of Venetian blinds, and, * * * desire to employ the party of the first part (J. L. Hunter) to develop and manufacture said machine, and, * * * all the parties have agreed that the parties of the second part (Morses) shall pay to the party of the first part the sum of four hundred and fifty ($450.00) dollars for the purpose of developing and perfecting the first machine according to the ideas and designs of the parties of the second part, in form, substance and detail satisfactory to the parties of the second part, and to deliver the same to them. * * *

"I. It is mutually agreed that the parties of the second part shall receive 25¢ for each and every one thousand lineal feet of metal run through or processed by all machines which may under the terms hereof or otherwise be bought, sold, leased or otherwise disposed of or acquired by any one and that none of the parties hereto shall dispose of, sell, lease, hypothecate or otherwise deal in said machines, save and except when the same shall be subject to a contract with such purchaser, lessee, donee or other persons acquiring or dealing in the same, requiring the payment of the said 25¢ per one thousand lineal feet to the parties of the second part.

"II. * * * that it is the intention of the parties of the second part to sell and/or lease as many of such machines as may be possible, consistent with good business practice to do so and that all of said sales and/or leases shall be made subject to the restrictions contained in this agreement.

"III. * * * that said party of the first part shall have the sole and exclusive right to manufacture any and all machines sold, leased or otherwise disposed of during the life of this agreement, subject" (to certain conditions) * * *

"IV. The party of the first part promises and agrees not to manufacture any such or similar machines or any machines or tools for the purpose of cutting, shaping, punching, finishing, processing or painting metal for use in the manufacture of metal Venetian blinds, for any other person, firm, company, or corporation other than the parties of the second part, their successors or assigns, without the written consent of the parties of the second part.

"V. * * * agrees to manufacture any and all said machines after the said first machine has been perfected, developed, and delivered to the satisfaction of the parties of the second part, at a cost * * *", etc.

"VI. As an essential condition hereof, the party of the first part agrees to manufacture, complete and place in shipment to the parties of the second part or their order, all machines ordered after the said first machine has been perfected and accepted, not later than thirty days after receipt of the order for said machines. If and in the event the party of the first part shall fail to make such shipment within said thirty day period after receipt of said order, then parties of the second part shall have the right to give the party of the first part a written notice terminating the right of the party of the first part to manufacture machines under this contract and upon receipt of said notice, all rights of the party of the first part hereunder shall cease and this contract be terminated, save and except, the party of the first part agrees he will not thereafter, at any time within a period or ten years from that date manufacture any machines for the purpose of cutting, shaping, punching, finishing, processing or painting metal for use in the manufacture of metal Venetian blinds. * * *

"VIII. The primary purpose of this agreement is that the party of the first part shall have the benefit of manufacturing all such machines put into use and the parties of the second part shall have the disposal and sale of said machines and the right to collect said 25¢ per one thousand lineal feet, upon the production of such machines.

"IX. It is expressly understood and agreed that the parties of the second part own all property rights in and to the design, idea and purpose of said machines whether patented, patentable, or neither and that the party of the first part, by virtue of this contract acquires no rights in and to the same, save and except the right to manufacture said machines according to the terms and conditions of this contract * * * unless terminated by mutual agreement or as provided herein, it shall be binding upon the parties hereto for a period of ten years from date.

"X. * * * that upon the termination or cancellation of this contract in any manner, the party of the first part will not for a period of ten years after such cancellation or termination, manufacture any machines or tools for the purpose of cutting, shaping, punching, finishing, processing or painting metal for use in the manufacture of metal Venetian blinds."

Exhibit B provides generally that:

"Whereas, the said party of the first part is engaged in the business of producing said machines and other machinery products, by doing business as the Hunter Engineering Company, and,

"Whereas, the said party of the first part is also engaged in the manufacture of Venetian blinds, and as such manufacturer of Venetian blinds is using the machinery and flexible metal slat which is the subject of the aforementioned contract of June 12, 1937; * * * each party hereto agrees that he will not engage in the manufacture of cut and punch Venetian blind slats for resale other than in the completed Venetian blind form, the product which is his own business, save and except as the parties of the other part may authorize in writing. Party of the first part further agrees that he will be bound by such rules and regulations in the use of his machines and in the sale of the product of said machines and of the flexible metal slat, as the parties of the second part may arrange by agreement or contract with other Venetian blind manufacturers; it being the intention of the parties by this proviso to provide that the party of the first part may operate as a Venetian blind manufacturer under as favorable terms and conditions as any other manufacturer of Venetian blinds, but under no more favorable terms, and to prohibit the party of the first part from operating the business of manufacturer of punched and cut and metal slats for use in assembling Venetian blinds for other manufacturers, save and except such exceptions as may be authorized by the party of the first part."

The prayer for relief in the complaint is (1) "That the defendants and each of them be enjoined and restrained from the manufacture, sale, leasing or other disposal of any machines appropriate for the manufacture of metal Venetian blind slats, or any of the essential parts thereof;" and (2) "That the defendants and each of them be restrained and enjoined from the manufacture of cut and punched Venetian blind slats for resale, other than in the completed Venetian blind form."

Upon the filing of the complaint the court issued a temporary restraining order restraining and enjoining the defendant in accordance with the prayer of the complaint. A general and special demurrer were filed by the defendant Hunter, through his then attorney. It is claimed that these demurrers were never argued.

On June 28, 1938, a judge in another department of the superior court issued a temporary injunction restraining defendant from doing the acts related in the temporary restraining order.

No answer was filed and no trial was had upon the merits. On December 8, 1938, and after entry of the temporary injunction, a stipulated judgment was entered upon written stipulation of the parties in said action. The judgment provides generally:

"1. That the defendant J. L. Hunter, sued herein as J. G. Hunter, and the Hunter Engineering Company, their servants, agents and employees, and each of them, is hereby permanently enjoined and restrained to January 1st, 1956, from:

"(a) Manufacturing any machine, machinery, or the essential parts thereof, developed and/or perfected by any of the parties hereto as provided in a certain agreement dated June 12th, 1937, between the parties hereto, as set out in the complaint on file herein as Exhibit A, for the purpose of cutting, punching, shaping, finishing, processing or painting metal for use in the manufacture of metal Venetian blinds for any person, firm or corporation whatsoever other than plaintiffs herein or for the defendant himself, and from selling, giving or alienating title to said machinery to anyone whatsoever other than the plaintiffs herein, except with their written permission and consent;

"(b) From renting, leasing, shipping, delivering or otherwise disposing of any of the machine, machines, or essential parts thereof, as described in the preceding paragraph, to any person, firm or corporation whatsoever, save and except the plaintiffs herein, in that certain territory composed of the states of Washington, Montana, Oregon, Idaho, Wyoming, California, Nevada, Utah, Colorado, Arizona, and New Mexico, Hawaiian Islands, Philippine Islands, Mexico, Alaska and British Columbia;

"(c) Selling, giving or contracting for, directly or indirectly, engineering services in connection with the manufacturing, processing, painting, shaping and finishing of metal for use in the manufacture of metal Venetian blinds, to any person, firm or corporation in the territory described in the preceding paragraph hereof;

"(d) Manufacturing, selling, shipping, delivering or otherwise disposing of cut and punch Venetian blind slats or from manufacturing, selling, leasing, painting, processing, delivering or otherwise disposing of metal for use as metal Venetian blind slats in non-assembled or cut and punched form in the territory described in paragraph (b) hereof, save and except with the written consent and permission of the plaintiffs herein.

"It is Further Ordered, Adjudged and Decreed:

"2. That as long as the defendant J. L. Hunter shall have fully complied with all the terms and conditions of that certain contract dated the 14th day of October, 1938, by and between plaintiffs and the defendant herein, that the plaintiffs L. S. Morse and C. W. Morse, and each of them, and their servants, agents and employees, and each of them, be, and they are hereby enjoined and restrained to January 1st, 1956, from:

"(a) Manufacturing any machine, machinery, or the essential parts thereof, developed and/or perfected by any of the parties hereto as provided in a certain agreement dated June 12th, 1937 between the parties hereto, as set out in the complaint on file herein as Exhibit A, for the purpose of cutting, punching, shaping, finishing, processing or painting metal for use in the manufacture of metal Venetian blinds for any person, firm or corporation whatsoever other than plaintiffs herein or for the defendants, and from selling, giving or alienating title to said machinery to anyone whatsoever other than the parties hereto, except with the written permission and consent of the defendants.

"(b) From renting, leasing, shipping, delivering or otherwise disposing of any of the machine, machines, or the essential parts thereof, as described in the preceding paragraph, to any person, firm or corporation whatsoever, save and except the defendant herein, in that territory in the United States and the Dominion of Canada not specifically hereinabove set out as the territory in which the defendant is restrained from serving or operating, as hereinabove set forth.

"(c) Selling, giving or contracting for, directly or indirectly, engineering services in connection with the manufacturing, processing, painting, shaping and finishing of metal for use in the manufacture of metal Venetian blinds, to any person, firm or corporation in the territory described in the preceding paragraph hereof;

"(d) Manufacturing, selling, shipping, delivering or otherwise disposing of cut and punch Venetian blind slats or from manufacturing, selling, leasing, painting, processing, delivering or otherwise disposing of metal for use as metal Venetian blind slats in non-assembled or cut and punched form, in the territory described in paragraph (b) hereof, save and except with the written consent and permission of the defendant herein.

"This restraining order may be totally dissolved at any time after January 1st, 1944, by either party hereto, upon motion, without notice, provided said Motion is based upon the failure of the parties hereto to renew their agreement of the 14th of October, 1938, upon a verified affidavit, of any of the parties hereto."

On May 18, 1939, and within six months from the entry of the judgment of December 8, 1938, the petitioner herein served and filed a notice of motion to set aside and vacate the judgment. Thereafter and on the 6th of June, 1939, the motion to vacate and set aside the judgment was heard. It is alleged that the motion was argued at length, and the court's attention was particularly directed to the fact that the judgment was void for lack of the jurisdiction of the court to make and enter the judgment and that the same was void upon its face as being a judgment beyond the jurisdiction of the court to make and enter.

The court on the 4th of August, 1939, denied the motion. On the 25th day of August, 1939, the petitioner herein commenced an action in the Superior Court of Riverside County against the respondents directly attacking the judgment of December 8, 1938, and by said action sought to set aside the judgment upon the ground that it was void upon its face, and in addition thereto prayed that the defendants be enjoined and restrained from taking any action whatsoever seeking to have the Superior Court of Riverside County enforce the judgment.

Upon affidavit, on the 5th day of October, 1939, the respondent, G. R. Freeman, as Judge of the Superior Court of that County, issued his certain order to show cause directed to the petitioners herein, citing petitioner to appear before that court to show cause why he should not be punished for contempt for violation of paragraphs (a) and (b) of the judgment of December 8, 1938. The petition for writ of prohibition followed.

Petitioner now argues: (1) That the complaint does not state facts sufficient to constitute a cause of action for injunctive relief; (2) that the contracts upon which the complaint is predicated are not susceptible to specific performance, and therefore no injunctive relief could be granted; (3) that a stipulation for a judgment is no waiver of the right to attack its validity; (4) that the contracts upon which the complaint is predicated, the relief sought and the judgment entered are in restraint of trade and void; (5) that the judgment and decree of December 8, 1938, was beyond the power or authority of the court to make; and (6) that the judgment is void upon its face.

[1-3] Respondent herein argues that petitioner should not be granted the relief as prayed for in the petition because he could have appealed from the order denying the motion to set aside the stipulated judgment. We see little merit to this contention. That an appeal from a consent judgment will not lie seems well established. People v. Hodges, 205 Cal. 476, 271 P. 897. Where an order is not the subject of appeal, it cannot be made reviewable by the device of moving to set it aside by appealing from the order denying the motion. This is in accord with the rule which forbids a party to do indirectly that which he is forbidden to do directly. 2 Cal.Jur., p. 164, sec. 30; 2 Cal.Jur., p. 169, sec. 31; In re Estate of Baker, 170 Cal. 578, 150 P. 989.

[4, 5] Respondents urge as an additional reason why the writ of prohibition should not issue, the fact that there is now pending in the Superior Court of Riverside County, an equitable action directly attacking the judgment and in addition thereto praying that the defendants (Morses) be enjoined and restrained from taking any action whatsoever seeking to have the Superior Court enforce the judgment of December 8, 1938. The relief sought in the equity suit is neither speedy nor adequate. If the trial court is about to imprison or fine petitioner for contempt under a void judgment, prohibition is a proper remedy. Evans v. Superior Court of San Francisco, Cal.Sup., 96 P.2d 107.

[6] The next contention of respondents noted is the claim that although the provisions of the consent judgment may be outside the issues in the pleadings, they should be, nevertheless, sustained and enforced, citing 15 Ruling Case Law, page 643, section 86; Freeman on Judgments,

5th edition, pages 2772-3, sections 1349-50; Lodge v. Williams, 195 Ky. 773, 243 S.W. 1011; Jackson v. Brown, 82 Cal. 275, 23 P. 142; 14 Cal.Juris, page 878; Eichhoff v. Eichhoff, 107 Cal. 42, 40 P. 24, 48 Am.St. Rep. 110. This contention is disposed of by the general conclusion.

[7, 8] Petitioner argues the point and the authorities of the several states are in irreconcilable conflict upon the question whether equity will interfere to prevent a breach of the negative covenant in a contract when the affirmative covenant is of such a nature that it cannot be specifically enforced by a judicial decree. The conflict is discussed at length in Anderson v. Neal Institutes Co., 37 Cal.App. 174, 173 P. 779, and Long Beach Drug Co. v. United Drug Co., 13 Cal.2d 158, 88 P.2d 698, 89 P.2d 386, reaffirms the rule in this state to be that under subdivision 5 of section 3423 of the Civil Code, and subdivision 5 of section 526 of the Code of Civil Procedure, where a contract contains both affirmative and negative stipulations, equity will not interfere to prevent a breach of the negative covenant when the affirmative covenant is of such a nature that it cannot be specifically enforced by judicial decree, and courts of equity will not decree the specific performance of contracts which by their terms stipulate for a succession of acts whose performance cannot be consummated by one transaction, but will be continuous and require protracted supervision and direction.

Respondents contend that the question of susceptibility of contracts to specific performance is not open to argument on this hearing, citing Morris v. Iden, 23 Cal. App. 388, 395, 138 P. 120; and General Petroleum Corp. v. Loughead, 218 Cal. 554, 24 P.2d 457. Respondents herein cite in support of the validity of the judgment and order Coombs v. Burk, 40 Cal.App. 8, 180 P. 59; Ghirardelli Co. v. Hunsicker, 164 Cal. 355, 128 P. 1041; Davis v. Kittle Mfg. Co., 134 Cal.App. 254, 25 P.2d 253; Holley v. Hunt, 13 Cal.App.2d 335, 56 P.2d 1240; LeMesnager v. Variel, 144 Cal. 463, 77 P. 988, 103 Am.St.Rep. 91; In re Estate of Ross, 180 Cal. 651, 182 P. 752; Behrens v. Superior Court of Yuba County, 132 Cal. App. 704, 707, 23 P.2d 428.

[9, 10] A greater degree or amount of certainty is required in the terms of an agreement which is to be specifically performed in equity than is necessary in a contract which is the basis of an action at law for damages. And the contract may be valid, and yet because of its inherent nature or because it lacks the necessary degree of definiteness, may be unenforceable either by a direct decree of specific performance, or indirectly by means of a prohibitory injunction.

From reading the contracts and the judgment rendered, we are convinced that a decree compelling specific performance would be most difficult, if not practically impossible, or impossible of enforcement.

[11] The respondent also argues that the original action could be construed as an action enjoining petitioner from divulging trade secrets gained in a confidential relationship, and cites Holley v. Hunt, supra, in which case plaintiff was an inventor of a "metal toe protector". The action was one in declaratory relief seeking the construction by the court of the contract which had been entered into between the plaintiff and the defendant. Injunctive relief was also asked to prevent the defendant from further making or selling the device. The basis of the case was the protection of respondent's trade secrets. The court held that the law recognized property rights in trade secrets, and that a court of equity may, when its jurisdiction is properly invoked, enjoin the one in whom confidence has been reposed from divulging them to third persons or from taking advantage of them himself to the injury of the *owner*. We do not construe the original action here involved as one to enjoin petitioner from divulging trade secrets of the *respondents*. The contracts set up in the complaint as part of the judgment roll remove this contention from further consideration.

It is finally contended that the provisions of the judgment are severable and that should any one of such provisions be void the court could, nevertheless, enforce such provisions as were valid, citing Stack v. Welder, 3 Cal.2d 71, 43 P.2d 270; Corbett v. Corbett, 113 Cal.App. 595, 298 P. 819; Reichert v. Rabun, 89 Cal.App. 375, 265 P. 260.

[12] A contract in restraint of trade is entirely void where it is indivisible, but when divisible and severable, those provisions not in restraint of trade may be enforced. Morey v. Paladini, 187 Cal. 727, 203 P. 760; Fidelity Credit Assur. Co. v. Cosby, 90 Cal.App. 22, 265 P. 372;

Rossiter v. Thompson, 66 Cal.App. 491, 226 P. 806.

Petitioner is seeking to determine and maintain that the judgment given under the contract is void in its entirety. The violation claimed, i. e., soliciting for, selling and delivering one of the machines mentioned to a corporation in Los Angeles county, California, involves not only paragraphs (a) and (b) of the judgment but would also bring into consideration paragraph (c) and other provisions of the judgment.

Considering all of the issues presented, the court here is mainly concerned with whether or not the judgment is on its face void, and whether or not it is such a judgment as the court had no power or jurisdiction to make under the circumstances.

[13, 14] Nullity of judgments results from a want of legally organized court or tribunal; want of jurisdiction over the subject-matter or the parties; or want of power to grant the relief contained in the judgment. Freeman on Judgments, 5th Ed., sec. 325, p. 650; and 5th Ed., sec. 226, at p. 444. See, also, 34 Cor.Jur., p. 268, sec. 492; Jellen v. O'Brien, 89 Cal. App. 505, 264 P. 1115; Luckenbach v. Krempel, 188 Cal. 175, 204 P. 591; Grannis v. Superior Court, 146 Cal. 245, 79 P. 891, 106 Am.St.Rep. 23; People ex rel. Lynch v. Harrison, 107 Cal. 541, 40 P. 956. Whether the judgment is void on its face must be determined from an inspection of the judgment roll alone, and unless this record shows affirmatively that the court was without jurisdiction, the judgment is not subject to this summary action. Canadian & A. Mortgage & T. Co. v. Clarita Land & Inv. Co., 140 Cal. 672, 74 P. 301.

[15] Section 1673 of the Civil Code provides: "Contract in restraint of trade, void. Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is *to that extent* void." Section 1674, Civil Code, provides: "Exception in favor of sale of goodwill. * * *" Section 1675 of the same code provides: "Exception in favor of partnership arrangements. * * *" The contracts under consideration involve neither the sale of a business nor its good will, nor the dissolution of a copartnership. The legality or illegality of the judgment must be determined by the terms and provisions of section 1673 of the Civil Code. If the judgment comes within the inhibition of that section, then it is to that extent void. There is nothing which the parties to the action could do which would in any way add to its validity. If the contracts upon which the judgment is based are to that extent void, they cannot be ratified either by right, by conduct or by stipulated judgment. 14 Cal. Jur. 1016; Palace Hardware Co. v. Smith, 134 Cal. 381, 66 P. 474; Wood v. Imperial Irrigation District, 216 Cal. 748, 17 P.2d 128; Thompson v. Alford, 128 Cal. 227, 60 P. 686; Bernheim v. Cerf, 123 Cal. 170, 55 P. 759.

In Wright v. Ryder, 36 Cal. 342, 95 Am. Dec. 186, the California Steam Navigation Company sold a steamer to the Oregon Steam Navigation Company upon the condition that for a period of ten years the operator would not operate the boat in any California waters. The question was whether or not this condition was in restraint of trade and void. The court stated:

"'Contracts which go to the total restraint of trade, as that a man will not pursue his occupation or carry on his business *anywhere in the State, are void, upon whatsoever consideration they may be made.*'" (Italics ours.)

To the same effect are the cases of Getz Bros. & Co. v. Federal Salt Co. 147 Cal. 115, 81 P. 416, 109 Am.St.Rep. 114; Vulcan Powder Co. v. Hercules Powder Co., 96 Cal. 510, 515, 31 P. 581, 31 Am.St. Rep. 242; Merchants' Ad-Sign Co. v. Sterling, 124 Cal. 429, 57 P. 468, 46 L.R.A. 142, 71 Am.St.Rep. 94.

Mr. Freeman, in his work on judgments, volume 1, 5th edition, page 759, says:

"A different rule has been observed where the contract is wholly void as being absolutely prohibited by statute. When, for example, no penalty is provided for a violation of the statute and the contract is prohibited as being against good morals and the public interest, such contract is entirely void and unenforceable, and a judgment or decree purporting to enforce it does not impart any validity to it and the same may be taken advantage of in a collateral attack." Citing People v. Burke, 72 Colo. 486, 212 P. 837, 30 A.L.R. 1085.

See, also, People v. H. Jevne Co., 179 Cal. 621, 178 P. 517; 6 R.C.L. 791; 2 R.C.L.

Supp. 207; Summerhays v. Scheu, 10 Cal. App.2d 574, 52 P.2d 512, 513.

[16] Under the authorities cited, it cannot be said that the agreement whereby the party of the first part promises and agrees not to manufacture any similar machines, *or any machines* (unpatented) or tools for the purpose of cutting, shaping, punching, finishing, processing or painting metal for use (anywhere, any place, or any time) in the manufacture of metal Venetian blinds for any other person, firm, company, or corporation other than the parties to said agreement, namely, the respondents herein, without their written consent, is not void.

Likewise, it cannot be said that the agreement, which provides that after it has been terminated by an expiration of time provided, shall nevertheless be binding upon the petitioner herein for a period of ten years so as to prevent the said petitioner from manufacturing any machines or any tools for the purpose of cutting, shaping, punching, finishing, processing or painting metal for use in the manufacture of metal Venetian blinds is not void.

In Summerhays v. Scheu, supra, it was claimed the oral agreement was that defendant "would never again enter into the orchard heater business at any place, especially in California". The court held that such a contract was void under section 1673 of the Civil Code as being a contract in restraint of trade. See, also, Rossiter v. Thompson, supra.

It is unnecessary to determine whether other provisions of the contract and judgment entered thereunder are susceptible of a similar interpretation, but the ones mentioned will suffice to hold the contract to that extent void as against public policy and therefore those portions are unenforceable under the terms of the decree. People v. Burke, 72 Colo. 486, 212 P. 837, 30 A.L.R. 1085; Dial v. Kirkpatrick, 168 Okl. 21, 31 P.2d 591, 95 A.L.R. 1263; Kenoly v. Hawley, 84 Okl. 120, 202 P. 494. The contract and decree based thereon do not come within the exceptions specified in sections 1674 and 1675 of the Civil Code. The declarations in section 1673 of the Civil Code must, therefore, prevail.

The only provision in the contract as to renting, leasing and disposing of the machines is paragraph 1. Subdivision (c) of the judgment enjoins the petitioner from "selling * * * directly or indirectly * * * in the territory described, * * engineering services in connection with the manufacturing. * * *" Nowhere in the agreement or the complaint do we find any foundation for such an injunctive clause as to a territorial limitation.

[17] From a careful examination of those portions of the reciprocal stipulated judgment which we have fully set out to illustrate its effect, it clearly sets forth an intention of the parties to create a monopoly in the manufacture, sale, leasing, and use of the described machines in controversy. Santa Clara Val. Mill & L. Co. v. Hayes, 76 Cal. 387, 18 P. 391, 9 Am.St. Rep. 211; Herriman v. Menzies, 115 Cal. 16, 44 P. 660, 46 P. 730, 35 L.R.A. 318, 56 Am.St.Rep. 81; Pacific Factor Co. v. Adler, 90 Cal. 110, 27 P. 36, 25 Am.St.Rep. 102; 17 Cal.Jur, pp. 640-1-2, secs. 2, 3, 4. By the terms of this judgment it will be noted that Hunter is restrained until January 1, 1956, from manufacturing, leasing, selling, or disposing of said machines or machinery, etc., except with Morses' written permission and consent, to anyone whomsoever, other than the Morses, in certain prescribed territory. In turn, the Morses are enjoined and restrained from manufacturing, leasing, selling, or otherwise disposing of the machines, machinery, etc., in the same territory, to any person, firm, or corporation except to or for the plaintiffs (Morses) or to or for the defendant (Hunter) without the consent of the defendant (Hunter). For the reasons expressed, the provisions of the judgment to which we have referred do restrain the petitioner herein from exercising a lawful profession, trade, or business, and is against public policy and to that extent void upon its face.

[18] If a court grants relief, which under no circumstances it has any authority to grant, its judgment is *to that extent* void. Grannis v. Superior Court, 146 Cal. 245, 79 P. 891, 106 Am.St.Rep. 23; People v. Davis, 143 Cal. 673, 77 P. 651; Michel v. Williams, 13 Cal.App.2d 198, 56 P.2d 546; Ritchie v. Sayers, C.C., 100 F. 520.

The writ of prohibition will issue as prayed for in the petition.

We concur: BARNARD, P. J.; MARKS, J.

36 Cal.App.2d 208

BAERTSCHIGER v. LEFFLER et al.

Civ. 12308.

District Court of Appeal, Second District, Division 2, California.

Dec. 21, 1939.

Hearing Denied Feb. 19, 1940.

1. Mandamus 🔑154(5)

A petition for writ of mandate requiring members of city council to hold special election to determine whether they and city clerk should be recalled *held* to state facts sufficient to constitute cause of action as alleging essential facts required by Municipal Elective Officers Recall Law. Deering's Gen.Laws 1937, Act 5620a.

2. Mandamus 🔑187(9)

An objection that petition for writ of mandate, requiring members of city council to hold special election to determine whether they and city clerk should be recalled, did not specifically allege that publication of notice of intention to recall was accompanied by printed statement of reasons therefor, is not before Court of Appeal for consideration on appeal from judgment granting peremptory writ after overruling of general demurrer to petition. Deering's Gen.Laws 1937, Act 5620a.

3. Mandamus 🔑163

A general demurrer to petition for writ of mandate does not reach mere defects in allegations in matters of form or defects that essential facts appear only inferentially as conclusions of law or by way of recital.

4. Statutes 🔑71

The Municipal Elective Officers Recall Law does not violate constitutional requirement that all general laws shall operate uniformly, as such act operates uniformly on all within its purview. Deering's Gen. Laws 1937, Act 5620a; Const. art. 1, § 11.

5. Statutes 🔑107(5), 125(2)

The Municipal Elective Officers Recall Law does not violate constitutional requirement that each act shall embrace but one subject, expressed in title. Deering's Gen. Laws 1937, Act 5620a; Const. art. 4, § 24.

6. Statutes 🔑101(1)

The Municipal Elective Officers Recall Law does not violate constitutional prohibition of local or special laws for conducting elections or designating voting places, as such law is general law, uniformly applying to all holders of elective offices of any incorporated city or town. Deering's Gen.Laws 1937, Act 5620a; Const. art. 4, § 25, subd. 11.

7. Statutes 🔑76(4)

The Municipal Elective Officers Recall Law does not violate constitutional prohibition of special law where general law can be made applicable, as such law is general law. Deering's Gen.Laws 1937, Act 5620a; Const. art. 4, § 25, subd. 33.

8. Constitutional law 🔑70(3)

The policy and wisdom of Municipal Elective Officers Recall Law and technique provided therein for recalling elective officers are matters with which courts have no concern, but criticisms thereof should be addressed to Legislature. Deering's Gen. Laws 1937, Act 5620a.

◆

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding by Elizabeth M. Baertschiger for a writ of mandate requiring Nellie Leffler and others, as members of the City Council of the City of El Monte, to hold a special election to determine whether respondents and the city clerk of such city should be recalled. From a judgment granting a peremptory writ, respondents appeal.

Affirmed.

Claude A. Shutt, of Los Angeles, for appellants.

H. S. Farrell, of Alhambra, for respondent.

August J. O'Connor, and George J. Hider, both of Los Angeles, amici curiæ.

McCOMB, Justice.

This is an appeal from a judgment ordering the issuance of a writ of mandate to respondents requiring them to hold a special election to determine whether the members of the City Council and the City Clerk of the City of El Monte should be recalled.

The petition for writ of mandate alleged as follows:

"I. That at all times herein mentioned the City of El Monte was and now is a municipal corporation of the Sixth Class, organized and existing under and by virtue of the laws of the State of California.

"II. That your petitioner now is, and at all times herein mentioned has been, over the age of twenty-one years, a citizen of the

United States, a resident of the City of El Monte, California, and a duly registered and qualified voter and elector of said City of El Monte, California.

"III. That T. O. Graham, C. L. Dickinson, Emil Von Imschoot and Fred R. King are, and at all times herein mentioned have been, the duly elected, qualified and acting members of the City Council of said City, and said Nellie Leffler, T. O. Graham and C. L. Dickinson have been such members of said City Council for a period of more than six months prior to the 27th day of October, 1938.

"IV. That Mrs. Elizabeth M. Baertschiger, Keith F. Cordrey, George W. Garwood, Samuel H. Upton, Mrs. Ida B. Horrell and F. O. Brugere now are, and at all times herein mentioned have been, qualified electors and voters of said City and reside therein.

"V. That on the 27th day of October, 1938, at and in the City of El Monte, California, said Elizabeth M. Baertschiger, Keith F. Cordrey, George W. Garwood, Samuel H. Upton, Mrs. Ida B. Horrell and F. O. Brugere executed and filed a notice of intention to circulate a petition for the recall of Beatrice E. Darling, City Clerk of said City, who had been the duly elected, qualified and acting City Clerk of said City for a period of more than six months prior thereto, and for the recall of said Nellie Leffler, T. O. Graham and C. L. Dickinson, as members of said City Council.

"VI. That at the same time and place said Mrs. Elizabeth M. Baertschiger, Keith F. Cordrey, George W. Garwood, Samuel H. Upton, Mrs. Ida B. Horrell and F. O. Brugere caused a copy of said notices of intention to recall to be published in the El Monte Herald, a newspaper of general circulation, printed, published and circulated in said City of El Monte.

"VII. That on the 28th day of October, 1938, copies of said notices of intention to recall were sent to said Beatrice E. Darling, Nellie Leffler, T. O. Graham and C. L. Dickinson by registered mail, and affidavits of such mailing were forthwith filed with the Clerk of said City of El Monte.

"VIII. That thereafter and within the time required by law, said Beatrice E. Darling, Nellie Leffler, T. O. Graham and C. L. Dickinson prepared and filed an answer to the proposed recall petitions.

"IX. That thereafter and within the time provided by law, petitions for the recall of said Beatrice E. Darling, as such City Clerk, Nellie Leffler, T. O. Graham and C. L. Dickinson, as members of said City Council, were circulated in said City of El Monte by qualified electors of said City, and said petitions and each of them were each signed by qualified electors of said City in the manner and form provided by law, equal in number to more than twenty-five (25%) per cent of the entire number of votes cast for all candidates for the offices of said officers at the last preceding regular municipal election at which said offices were filled by election.

"X. That thereafter, to-wit: on the 22nd day of December, 1938, said petition for the recall of said Beatrice E. Darling, as such City Clerk of said City, and petitions for the recall of said Nellie Leffler, T. O. Graham and C. L. Dickinson, as members of the City Council of said City were filed with the City Clerk of said City of El Monte by the proponents of said recall.

"XI. That thereafter said Beatrice E. Darling and her deputy, Essie Weaver, failed and refused to attach to said petitions their certificates showing the result of their examination of said petitions, and a writ of mandate was issued out of this Court in Case No. 436208 directing the same to be done.

"XII. That a return of said City Clerk and her deputy was made to this court in the above case wherein it was stated that said petitions would be filed with said City Clerk on March 13, 1939.

"XIII. That on the 10th day of April, 1939, said City Clerk certified to said City Council that each and all of said petitions contained the required number of signatures of qualified electors of said City.

"XIV. That said City Council has ever since said 10th day of April, 1939, and now does, wrongfully and arbitrarily fail, refuse and neglect to cause a special election to be held in said City to determine whether the voters will recall such officers.

"XV. That said petitioner has no plain, speedy or adequate remedy at law."

A general demurrer was interposed to the foregoing petition, which was overruled, and a judgment entered ordering that a peremptory writ of mandate issue as prayed.

These are the questions to be determined:

First: Does the petition for a writ of mandate state facts sufficient to constitute a cause of action?

Second: Is the Municipal Elective Officers Recall Law [Stats. 1931, p. 563; Amended by Stats. 1933, p. 2117.], Act 5620a., Deering's General Laws [1937] 2631 violative of any provision or provisions of the Constitution of the State of California?

[1-3] The first question must be answered in the affirmative. From a reading of the petition it is evident that the essential facts required by the Municipal Elective Officers Recall Law are alleged in the petition; and the other objections to the pleading, such as, that in paragraph 6 thereof there is no specific allegation that the publication of the notice of intention to recall was accompanied by a printed statement not exceeding 500 words in length stating the reasons for the proposed recall, are not properly before this court for consideration. There was only a general demurrer filed to the petition, which does not reach (1) mere defects in allegations in matters of form, or (2) defects that the essential facts appear only inferentially, as conclusions of law, or by way of recital.

[4] The second question must be answered in the negative for the following reasons:

(1) The Municipal Elective Officers Recall Law does not violate article I, section 11, of the Constitution of the State of California, requiring that all laws of a general nature shall have a uniform operation, because the act has a uniform operation upon all of those who fall within its purview.

[5] (2) It does not violate article IV, section 24, of the Constitution, requiring that each act shall embrace but one subject, which subject shall be expressed in its title. The purpose of the act in question is to provide a method for the removal and recall of elective officers in incorporated cities and towns. The title of the act reads: "An act to provide for the recall of elective officers of incorporated cities and towns." Clearly, a mere reading of the title of the act shows that it embraces but one subject, and that the subject is clearly expressed in the title to the act.

[6] (3) It is not violative of article IV, section 25, subdivision 11, of the state Constitution, providing that the legislature shall not pass local or special laws for conducting elections or designating the places of voting, except on the organization of new counties, because the Municipal Elective Officers Recall Law is not a special law but rather is a general law, uniformly applying to all who fall within its purview, to-wit, the holders of elective offices of any incorporated city or town. It needs no citation of authorities to demonstrate that such a classification is a natural and reasonable one.

[7] (4) It is not violative of article IV, section 25, subdivision 33, of the Constitution, prohibiting the legislature from passing a special law where a general law can be made applicable. Since the Municipal Elective Officers Recall Law is a general and not a special law, it does not fall within the purview of the section of the Constitution just mentioned.

[8] The balance of appellants' objections are criticisms of the policy, wisdom, and technique for recalling elective officers provided for in the act. These are matters with which the courts have no concern, such arguments being proper ones to address to the legislature for its determination.

For the foregoing reasons the judgment appealed from is affirmed.

We concur: MOORE, P. J.; WOOD, J.

36 Cal.App.2d 199

McNAMARA et al. v. EMMONS et al.

Civ. 2438.

District Court of Appeal, Fourth District, California.

Dec. 21, 1939.

Hearing Denied Feb. 19, 1940.

1. Trial 🔑252(1)

The propriety of instructions depends largely on evidence in particular case in which they were given.

2. Trial 🔑250

A trial judge is only required to instruct on questions of law that relate to the issues presented by the pleadings and evidence.

3. Physicians and surgeons 🔑13

The relation of "physician and patient" is, in its inception, created by contract, either express or implied, and the contract may be general or limited by special terms.

[Ed. Note.—For other definitions of "Physician and Patient," see Words & Phrases.]

4. Physicians and surgeons 🔑13

When contract creating relation of physician and patient is general, the physician may undertake the treatment of a patient during course of an illness wherever the patient may be.

5. Physicians and surgeons 🔑13

A physician is under no obligation to enter into a general contract with a patient to treat patient during course of an illness wherever patient may be.

6. Physicians and surgeons 🔑13

A physician may limit his obligations to a patient by undertaking to treat patient only for a certain ailment or injury at a certain place and time, and when a physician so limits his employment, he is not required to treat the patient at another place.

7. Physicians and surgeons 🔑14(3)

In absence of an express contract, a physician or surgeon does not warrant cures.

8. Physicians and surgeons 🔑14(4)

A physician or surgeon, by taking a case, represents that he possesses the ordinary training and skill possessed by physicians and surgeons practicing in same or similar communities and that he will employ such training, care and skill in treatment of his patients.

9. Physicians and surgeons 🔑18(8)

What is or is not proper practice of a physician in treating a patient is a question for experts and can be established only by their testimony, as respects actions for malpractice.

10. Physicians and surgeons 🔑18(10)

Where defendants in action against physicians for alleged malpractice interposed defense that contract of employment was special and limited to treatment of patient in defendants' offices in a certain town, and evidence was admitted in support of the defense, defendants were entitled to proper instructions on such phase of the case.

11. Physicians and surgeons 🔑18(10)

In action against physicians for alleged malpractice, it was not error to instruct that contract to treat patient was to be performed in town in which contract was entered into and that in absence of proof of contract to treat patient elsewhere, there was no obligation on part of physicians to follow patient to another town and treat her there, when evidence was admitted in support of defense that contract of employment was limited to treatment of patient in town wherein contract was made.

12. Physicians and surgeons 🔑18(10)

An instruction that whether any or all of the alleged conditions of patient were brought about by alleged negligence of physicians could only be determined from testimony of expert witnesses was proper under facts.

13. Trial 🔑296(8)

In action against physicians for alleged malpractice, an instruction that burden was upon plaintiffs to establish by preponderance of evidence that alleged condition of patient was direct and proximate "cause" of alleged negligence, although erroneous for using word "cause" instead of "result," would not be construed as misleading jury, when correct statements were repeated elsewhere in instructions.

14. Trial 🔑234(7), 237(1)

In action against physicians for alleged malpractice, the use of "competent" and "material" in instructions that plaintiffs were bound to prove their case by preponderance of competent evidence and that they were bound to prove all material facts necessary to make out their case was erroneous.

15. Trial 🔑98, 138

The trial judge is bound to rule on objections to introduction of evidence and to exclude incompetent and immaterial evidence, and what evidence falls within such classifications is a question of law to be decided by trial judge.

16. Trial 🔑199

In action against physicians for alleged malpractice, questions of law should not be passed on to jury for decision.

17. Appeal and error 🔑1170(9)

On appeal, the effect of erroneous instructions was to be weighed under provisions of Constitution concerning the disregarding of harmless errors. Const. art. 6, § 4½.

18. Appeal and error 🔑1170(9)

On appeal, District Court of Appeal can reverse a judgment for errors in instructions only when such errors actually prejudiced the rights of a party, in view of provision of Constitution concerning disregarding of harmless errors. Const. art. 6, § 4½.

19. Physicians and surgeons 🔑18(8)

In an action against a physician for alleged malpractice, the standards of medical practice in a community can only be established by testimony of experts.

20. Evidence 🔑538

Physicians' testimony concerning standards of medical practice in community other than that of defendants charged with malpractice was incompetent where there was no showing that standards in both communities were the same.

21. Physicians and surgeons 🔑18(6)

In absence of proof that physicians, in treating patient, did not possess and exercise the training and skill of other ordinarily prudent, careful and skillful physicians practicing in same or similar communities as communities in which physicians practiced, plaintiffs failed to make out a case, as respects liability of physicians for alleged malpractice.

22. Appeal and error 🔑1064(1)

In action against physicians for alleged malpractice, instructions that plaintiffs were bound to prove their case by preponderance of competent evidence and to prove all material facts necessary to make out their case, although erroneous, were not prejudicial to plaintiffs where plaintiffs failed to offer competent evidence to prove that physicians, in treating patient, did not possess and exercise the ordinary training, care and skill of other ordinarily prudent, careful and skillful physicians practicing in the same or similar communities as community in which physicians practiced.

23. Appeal and error 🔑215(1), 499(4)

Where record did not show objection by appellants to trial judge's procedure in permitting courtroom clerk to read instructions to jury or to manner in which instructions were read by clerk, appellants could not urge the error for first time before District Court of Appeals, and were deemed to have waived the error by failing to object in trial court.

24. Appeal and error 🔑110

An order denying motion for new trial was not an "appealable order." Code Civ. Proc. § 963.

[Ed. Note.—For other definitions of "Appealable Order," see Words & Phrases.]

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by Iva McNamara and another against Calvert L. Emmons and others for damages from alleged malpractice. From a judgment for defendants and order denying motion for new trial, plaintiffs appeal.

Judgment affirmed. Attempted appeal from order dismissed.

A. Brigham Rose, of Los Angeles, for appellants.

Swing & Swing, of San Bernardino, for respondents.

MARKS, Justice.

This is an action for damages resulting to plaintiffs from the alleged negligence of Dr. Walter A. Sullivan, an employee of Dr. Calvert L. Emmons, in treating Mrs. Iva McNamara. Plaintiffs are husband and wife.

The amended complaint contains two causes of action. The first is for the recovery of damages suffered by Mrs. McNamara as a result of the alleged malpractice and the second for the recovery of damages suffered by Mr. McNamara consisting of the value of loss of services of his wife and the expenses incurred by reason of her protracted and serious illness. The negligence alleged and relied upon consists (1) in the failure of Dr. Sullivan to exercise ordinary care to prevent the infection of a wound suffered by Mrs. McNamara and (2) failure of defendants to leave their offices in Ontario and go to San Bernardino (or Colton) and treat Mrs. McNamara when requested to do so by her husband.

The case was tried before a jury which returned a verdict for defendants on evidence that was flatly contradictory.

For a reversal of the judgment plaintiffs principally rely on eight instructions which they maintain were erroneous and the fact that the instructions were read to the jury by the courtroom clerk rather than by the judge.

[1, 2] The propriety of instructions depends largely on the evidence in the particular case in which they were given, as the trial judge is only required to instruct on questions of law that relate to the issues presented by the pleadings and the evidence. It is necessary, therefore, for us to give a brief summary of that portion of

the evidence supporting the verdict and judgment, disregarding conflicts. The briefs of plaintiffs are entirely barren of any quotations from the evidence or summary of it with sufficient references to the reporter's transcript. They also fail to quote in full any of the challenged instructions or any other instructions bearing on the same subjects. There is also a failure on the part of plaintiffs to state the substance of the pleadings. See, sec. 953a, Code Civ.Proc; rule VIII, Rules of the Supreme Court and District Courts of Appeal.

Dr. Emmons was a duly licensed and practicing physician and surgeon with offices in the city of Ontario. During the time involved here he employed Dr. Sullivan, also a licensed and practicing physician and surgeon, as his assistant. It was not their custom to accept or treat a case which would require a journey of more than about eight miles beyond the city limits of the city of Ontario. Dr. Emmons' office was fully equipped for the care and treatment of patients that did not require immediate hospitalization. He lived a few blocks from his office, but did not treat patients at his home where there were no supplies, instruments or equipment necessary for such treatments. Dr. Sullivan also lived a few blocks from the office.

Plaintiffs lived at the place of business of Mr. McNamara in Ontario. He was a glazier. At about 10 o'clock on the night of August 10, 1937, Mrs. McNamara received a cut about two inches long and between one-half and one inch deep in the calf of her leg, from a projecting piece of glass. The wound bled profusely. Mr. McNamara wrapped her leg in bath towels and took her to the residence of Dr. Emmons for treatment. Dr. Emmons was then taking a bath preparatory to retiring. He did not see Mrs. McNamara, who remained in her husband's automobile which was parked in the street in front of the house. He instructed Mr. McNamara to take his wife to the office and told him that either Dr. Emmons or his assistant would go to the office and care for the cut. He immediately called Dr. Sullivan, who had retired for the night, and requested him to go to the office as soon as possible to render first aid to Mrs. McNamara. Dr. Sullivan reached the office in about ten minutes after this phone call and conducted plaintiffs into the surgical treatment room. He placed Mrs. McNamara on an operating table and removed the bath towels from her leg to observe the extent of the bleeding which had practically stopped at that time. He washed and sterilized his hands, put on a sterile gown and secured the necessary sterile instruments and other paraphernalia with which to proceed with his task. He placed all of these in a container filled with alcohol and poured alcohol over his hands. He dipped cotton in alcohol and washed the outside of the wound and surrounding skin of the leg. He probed the wound for particles of glass which he did not find. He sterilized the wound, administered a local anaesthetic and sewed it up. He then dressed the wound with sterile dressings and bandages. He told Mrs. McNamara to stay off from her injured leg as much as possible and to return to the office the following day. He made out a memorandum of the treatment for the office records and the three then left the office. According to the testimony of Dr. Sullivan, everything about this operation was surgically clean. It is significant that no physician who testified offered the slightest criticism of this treatment nor the manner in which it was done, as it was described by Dr. Sullivan.

A few minutes after Mr. and Mrs. McNamara returned from the physicians' offices to their Ontario home they decided to go to Mr. McNamara's brother's home on the boundary line between San Bernardino and Colton. We will hereafter assume that this home was in San Bernardino. It was about twenty miles distant from Ontario. Mr. McNamara did not take his wife to the defendants' offices on August 11th as directed by Dr. Sullivan, nor thereafter. Neither defendant saw Mrs. McNamara after the first aid treatment administered by Dr. Sullivan on the night of August 10th.

August 11th was a holiday for Dr. Sullivan on which he was not expected to and did not report to the office nor care for patients. During the night of August 11, 1937, Mr. McNamara telephoned Dr. Sullivan from San Bernardino telling him that Mrs. McNamara was in considerable pain. Dr. Sullivan recommended certain home treatments. No physician who testified thought these recommended home treatments improper.

Between 9 and 10 o'clock on the morning of August 12th Mr. McNamara called the home of Dr. Sullivan by telephone. The doctor was absent and was either attending patients in a hospital or at their homes. McNamara talked to Mrs. Sullivan who immediately left word of the call with the telephone girl at the doctors' office.

Both defendants reached their offices at about 10:30 on the morning of August 12th. A few minutes later a long distance call came in from Mr. McNamara to Dr. Sullivan who answered it. McNamara described Mrs. McNamara's condition to Dr. Sullivan and asked him to go to San Bernardino to see her. Before this telephone conversation was completed with Dr. Sullivan, Dr. Emmons took it over and completed it. He explained to Mr. McNamara the impracticability of an Ontario physician assuming the care of patients in San Bernardino and "discouraged" McNamara's plan of having Dr. Sullivan continue the treatment. He advised the calling of a San Bernardino physician and offered to do so. Mr. McNamara concurred in this suggestion and Dr. Emmons immediately telephoned a physician in San Bernardino, of excellent standing and explained the case to him. This physician agreed to make the call as soon as he had finished with the patients who were then in his office. Dr. Emmons immediately communicated these facts to Mr. McNamara who was satisfied with these arrangements.

The condition of Mrs. McNamara became rapidly worse. Shortly before 1 o'clock in the afternoon of August 12th Mr. McNamara called another San Bernardino physician who immediately responded to the call. He found the wound infected and symptoms of what laymen call blood poisoning. Shortly after the arrival of this physician the one called by Dr. Emmons reached the house. He did not see Mrs. McNamara as he was told that another physician had been called and was in charge of the case.

Mrs. McNamara was removed to a hospital where she remained until November 18, 1937. She was very seriously ill. This illness was caused by infection in the wound in her leg.

[3-6] The relation of physician and patient is, in its inception, created by contract either express or implied. The contract may be general or may be limited by special terms. When general, the physician may undertake the treatment of a patient during the course of an illness wherever the patient may be. A physician is under no obligation to enter into such a general contract for such treatment of a patient. He may limit his obligation by undertaking to treat the patient only for a certain ailment or injury at a certain place and at a specified time. When he so limits his employment the physician is not required to treat his patient at another place nor to follow him into another city. Urrutia v. Patino, Tex.Civ.App., 297 S.W. 512; Nash v. Royster, 189 N.C. 408, 127 S.E. 356; Childers v. Frye, 201 N.C. 42, 158 S.E. 744; Nelson v. Farrish, 143 Minn. 368, 173 N.W. 715.

In speaking of a contract of employment of a physician in Roos v. Jansen, 30 Cal. App.Supp.2d 773, 78 P.2d 476, 477, it was said: "In the absence of a special agreement as to the place where a contract is to be performed, it is to be deemed performable at the creditor's place of business, Bank of Yolo v. Sperry Flour Co., 1903, 141 Cal. 314, 74 P. 855, 65 L.R.A. 90, applying sections 1488 and 1489, Civil Code; Kaupke v. Lemoore, etc., Co., 1935, 7 Cal. App.2d 362, 46 P.2d 204, or, in the absence of a contrary showing, a contract is to be deemed performable where it is made. Fitzhugh v. University Realty Co., 1920, 46 Cal.App. 198, 201, 188 P. 1023; Southwestern Portland Cement Co. v. Cochrane, 1931, 114 Cal.App., Supp., 778, 781, 300 P. 445."

[7, 8] It is thoroughly settled in California that "In the absence of an express contract, the physician or surgeon does not warrant cures. By taking a case he represents that he possesses the ordinary training and skill possessed by physicians and surgeons practicing in the same or similar communities, and that he will employ such training, care, and skill in the treatment of his patients. Patterson v. Marcus [203 Cal. 550, 265 P. 222], supra; Hesler v. California Hospital Co., 178 Cal. 764, 174 P. 654, 655; Houghton v. Dickson [29 Cal. App. 321, 155 P. 128], supra; Priestley v. Stafford [30 Cal.App. 523, 158 P. 776], supra; McCollum v. Barr, 38 Cal.App. 411, 176 P. 463." McLennan v. Holder, 1 Cal. App.2d 305, 314, 36 P.2d 448, 452.

[9] It is equally well settled in California that what is or what is not the proper practice of a physician and surgeon in the treatment of a case is "a question for experts, and can be established only by their testimony". McLennan v. Holder, supra; Perkins v. Trueblood, 180 Cal. 437, 181 P. 642; Ingamells v. Goodfellow, 109 Cal.App. 62, 292 P. 162; Roberts v. Parker, 121 Cal.App. 264, 8 P.2d 908; National Automobile Ins. Co. v. Industrial Accident Comm., 132 Cal.App. 373, 22 P.2d 568.

[10, 11] Plaintiffs complain of four instructions which in effect told the jury that as the contract to treat Mrs. McNamara was made in Ontario it would follow that it was to be performed there and that in the absence of proof of a contract to treat her elsewhere or a general contract for treatment until she was cured or in San Bernardino or wherever she might be, there was no obligation on the part of the defendants to follow her to San Bernardino, and treat her there. One of the defenses interposed was that the contract of employment was special and was limited to the treatment of Mrs. McNamara in the offices of defendants in Ontario. There was considerable evidence admitted in support of this defense. Defendants were entitled to proper instructions on this phase of the case. There was no error in giving these instructions.

[12] Plaintiffs complain of an instruction which informed the jury that "Whether any or all of the alleged conditions (of Mrs. McNamara) were brought about by the alleged negligence of defendants can only be determined from the testimony of expert witnesses, that is, from doctors or surgeons * * *." This instruction was proper under the facts of this case and the authorities already cited.

[13] One instruction given contained the following: "in addition thereto, the burden is also upon the plaintiffs to establish by a preponderance of all the evidence that the alleged condition of Mrs. McNamara was a direct and proximate *cause* of the alleged negligence." This portion of the instruction is admittedly erroneous. It is clear that instead of the word "cause" which we have italicized, the word "result" should have been used. That this is a typographical error seems clear. In two other sentences of the same instruction it was clearly stated that in order to permit a recovery by plaintiffs the suffering of Mrs. McNamara must have been proximately caused by the negligence of defendants. These correct statements were repeated numerous times elsewhere in the instructions. It is hardly probable that the jury could have been misled by the erroneous use of the word "cause" in the quoted portion of the instruction.

The trial judge instructed the jury at least twice in effect that plaintiffs must prove their case by a preponderance of all *competent* evidence and also that they must prove all *material* facts necessary to make out their case.

[14-16] We regard the use of the words "competent" and "material" in these instructions as erroneous. It is the duty of the trial judge to rule on objections to the introduction of evidence and to exclude incompetent and immaterial evidence. What evidence falls within those classifications is a question of law to be decided by the trial judge. In a case of this kind questions of law should not be passed on to the jury for decision. See Holt Mfg. Co. v. Collins, 154 Cal. 265, 97 P. 516; Tabler v. Harlin, 106 Cal.App. 74, 288 P. 823; LeBlond v. Townsley, 108 Cal.App. 81, 290 P. 1051.

[17, 18] The effect of erroneous instructions to a jury must be weighed under the provisions of section 4½ of article VI of the Constitution. It is only when such errors actually prejudiced the rights of a party that we can reverse a judgment.

We have studied the entire record carefully and seriously doubt our ability to have sustained a judgment for plaintiffs had one been rendered.

[19-22] As we have already seen, it is thoroughly settled in California that physicians and surgeons are only required, in treating a patient, to possess and use the ordinary training, care and skill of other ordinarily prudent, careful and skillful physicians and surgeons practicing in the same or similar communities. It is equally well settled that the standards of practice in a community can only be established by the testimony of experts. No physician or surgeon, other than defendants, who was familiar with the standards of practice in Ontario, testified in the case, and defendants were not interrogated on this subject. Plaintiffs produced two physicians as witnesses who had never practiced in Ontario and knew nothing of the standards of practice there. Neither did they know that the communities of Ontario and San Bernardino, where they practiced, were similar or had similar standards of practice. Over the strenuous objections of defendants they were permitted to testify as to the standards of practice in San Bernardino. They were not able to testify that the same standards prevailed in Ontario. It seems clear that this evidence was incompetent for any purpose. It should not have been received and cannot supply the important defect in the case of plaintiffs and could

not prove that defendants did not use due care in treating Mrs. McNamara, in accordance with the standards of practice prevailing in Ontario. Without proof of the lack of such due care, plaintiffs made out no case. Therefore, we believe that the instructions we are considering, while erroneous, were not prejudicial to plaintiffs.

[23] Plaintiffs urge that the trial judge committed error in permitting the courtroom clerk to read the instructions to the jury rather than to read them himself. The record shows that no objection was made to this procedure or the manner in which the instructions were read by the clerk. Plaintiffs should not be permitted to urge this error here for the first time. By failing to object in the trial court we must hold that they waived any such error.

Other questions argued have no merit and do not need particular consideration.

[24] Plaintiffs have attempted to appeal from the order denying their motion for new trial. Such an order is not appealable. Sec. 963, Code Civ.Proc.

The judgment is affirmed and the attempted appeal from the order is dismissed.

We concur: BARNARD, P. J.; GRIFFIN, J.

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36 Cal.App.2d 244

HEAD v. WILSON et al.

Civ. 2161.

District Court of Appeal, Fourth District, California.

Dec. 22, 1939.

1. Automobiles ⊂⊃175(3, 4)

The test for determining whether publicly owned ambulance was authorized emergency vehicle within statutory provisions, declaring speed laws inapplicable to one driving such vehicle in response to emergency call and requiring drivers of other vehicles to yield right of way to authorized emergency vehicle giving audible signal by siren, at time of collision between such ambulance and automobile, is not whether emergency in fact existed, but whether ambulance was being used in responding to emergency call, at such time. Vehicle Code, §§ 44, 517, 554, St.1935, pp. 96, 180, 187.

2. Automobiles ⊂⊃243(1)

In action for damages sustained as result of collision between defendant county's ambulance and codefendant's automobile while ambulance driver was responding to call to take appendicitis victim to hospital, evidence as to what occurred in connection with operation on such victim after accident was inadmissible as immaterial on question whether call was received and acted on as emergency call. Vehicle Code, §§ 44, 400, 517, 554, St. 1935, pp. 96, 152, 180, 187.

3. Automobiles ⊂⊃243(1), 246(2)

In action for damages sustained as result of collision between defendant county's ambulance and codefendant's automobile while ambulance driver was responding to call to take appendicitis victim to hospital, court's rulings admitting evidence as to what occurred in connection with operation on such victim after accident and instructions that right of authorized emergency vehicle to exercise statutory privileges of such vehicles depends on whether emergency existed, that if no emergency existed at time of accident ambulance driver acted arbitrarily in exercising such privileges, and that he was not entitled to exercise them if not then responding to emergency call, were erroneous as permitting jury to adopt and act on theory that such driver was not responding to emergency call and not entitled to pass through stop sign, regardless of whether he sounded siren, if subsequent events disclosed that no emergency requiring high degree of haste in getting patient to hospital existed at time of accident. Vehicle Code, §§ 44, 400, 517, 554, St.1935, pp. 96, 152, 180, 187.

4. Automobiles ⊂⊃243(1)

In action for damages sustained as result of collision between defendant county's ambulance and codefendant's automobile while ambulance driver was responding to call to take appendicitis victim to hospital, testimony of one who received call at hospital as to what doctor who made it said and what witness told ambulance driver respecting nature of case for which ambulance was desired was admissible on question whether ambulance was being used in responding to emergency call at time of accident. Vehicle Code, §§ 44, 400, 517, 554, St. 1935, pp. 96, 152, 180, 187.

5. Automobiles 🔑243(1)

In action for damages sustained as result of collision between defendant county's ambulance and codefendant's automobile while ambulance driver was responding to call to take appendicitis victim to hospital, evidence that operation was not performed on such victim until several hours after accident was inadmissible as immaterial on question whether ambulance was being used in responding to emergency call at time of accident. Vehicle Code, §§ 44, 400, 517, 554, St. 1935, pp. 96, 152, 180, 187.

6. Automobiles 🔑175(2)

The character and extent of emergency need not be investigated and determined before responding to call for publicly owned ambulance in order to entitle driver thereof to statutory privileges of authorized emergency vehicles, but question whether such ambulance was being used in responding to emergency call when it collided with automobile depends on nature of call and situation then presented to driver's mind, not whether emergency then existed, as disclosed by future developments. Vehicle Code, §§ 44, 400, 517, 554, St.1935, pp. 96, 152, 180, 187.

7. Appeal and error 🔑1064(1)
Automobiles 🔑246(2)

In action for damages sustained as result of defendant county's ambulance colliding with codefendant's automobile while responding to call to take acute appendicitis victim to hospital, instruction that ambulance driver was not entitled to exercise statutory privileges of authorized emergency vehicle, if he was not responding to emergency call, but merely going to take sick person to hospital as quickly as possible, was misleading and prejudicial to defendant county as telling jury in effect that such call was not emergency call. Vehicle Code, §§ 44, 400, 517, 554, St.1935, pp. 96, 152, 180, 187.

8. Evidence 🔑60

A driver of motor vehicle involved in accident is presumed to have obeyed law making it misdemeanor to drive such vehicle without driver's license, in absence of evidence that he did not have license.

9. Automobiles 🔑145

In action for damages sustained as result of defendant county's ambulance colliding with codefendant's automobile, instruction that county was prima facie negligent, if it permitted one without driver's license to drive ambulance, was improper, as question whether ambulance driver had driver's license was immaterial. Vehicle Code, § 400, St.1935, p. 152.

10. Counties 🔑146

At common law, a political subdivision of state, such as county, was not liable for its employees' negligence in exercise of its governmental functions.

11. Counties 🔑210

An action can be maintained against county only where right of action is given by statute.

12. Automobiles 🔑145, 187

The statute providing that no automobile owner shall knowingly permit another to drive automobile unless duly licensed gives no right of action against county for damage to property because of negligent operation of county's ambulance by unlicensed driver, but county's liability in such case is based entirely on statute declaring county responsible for injury to property because of its employees' negligence in operating its motor vehicles. Vehicle Code, §§ 335, 400, St.1935, pp. 142, 152.

◆

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by Roy S. Head against Charles C. Wilson and the County of Orange to recover for damage to property as the result of a collision between defendant county's ambulance and defendant Wilson's automobile. From a judgment for plaintiff against defendant county only, it appeals.

Reversed.

Forgy, Reinhaus & Forgy, of Santa Ana, for appellant.

Head, Wellington & Jacobs, of Santa Ana, for respondent.

BARNARD, Presiding Justice.

This is an action for damages. On June 10, 1937, at about 5:30 o'clock p. m., an ambulance owned by the defendant county collided with an automobile owned and operated by the defendant Wilson at a street intersection. The ambulance careened over and into the grounds of a service station and store owned and operated by the plaintiff. This led to a fire and explosion, as a result of which the plaintiff's store was burned and his property otherwise damaged. The driver of the ambulance, Ernest S. Biggs, who was then acting within the scope of his duties as an employee at the county hospital, was burned to death. The ambulance was then being used in responding to a call to come to a home some few miles from the scene of the accident and pick up two girls, one suffering from scarlet fever and the other from acute appendicitis, and take them to the hospital.

It appears from the evidence that the ambulance did not stop before entering the intersection, although there was a boulevard stop-sign on the street on which it was traveling. One witness estimated the speed of the ambulance at the intersection at from 35 to 40 miles an hour and the other witnesses estimated its speed at from 35 to 60 miles an hour at various points several hundred feet back from the intersection, and testified that it did not slow down. There is evidence that Wilson, the driver of the other car, was traveling between 40 and 45 miles an hour approximately 100 feet from the intersection, that he took his foot from the accelerator but did not apply his brakes, and that he did not know how fast he was going when he entered the intersection. The view of Wilson in the direction from which the ambulance was coming was interfered with by a building on the corner of the intersection, and he testified that he did not see the ambulance or hear the sound of a siren. A sharp conflict appears in the evidence with respect to whether or not the siren was sounded as the ambulance approached and entered the intersection.

The complaint alleged negligence on the part of each defendant. A jury, by a vote of 9 to 3, returned a verdict in favor of the defendant Wilson and against the defendant county, fixing the plaintiff's damages at $6,000. A judgment was entered accordingly and the defendant county has appealed.

[1] This action is based upon section 400 of the Vehicle Code of 1935 (St.1935, p. 94) as in force at the time in question, which made a county responsible for injury to the property of another resulting from negligence on the part of employees in the operation of its motor vehicles. The main question presented is whether or not such negligence has properly been found here in view of the provisions of the Vehicle Code giving certain privileges to authorized emergency vehicles under certain circumstances. Section 44 of that code, as then existing, provided that any publicly owned ambulance was an authorized emergency vehicle when it was being "used in responding to emergency calls". Section 517 provided that the speed laws should not apply to the driver of such an emergency vehicle "when driving in response to an emergency call". It also provided that that provision should not relieve such a driver from the duty to drive with due regard for the safety of other persons using the highway nor protect him from the consequences of an arbitrary exercise of that privilege. Section 554 provided that upon the immediate approach of an authorized emergency vehicle giving an audible signal by siren the drivers of other vehicles should yield the right of way, with the further provisions that this should not relieve the driver of the emergency vehicle from the duty to drive with due regard for the safety of others using the highway, and that no driver of such an emergency vehicle should sound a siren or assume the special privilege given by the section except when such vehicle was being operated "in response to an emergency call". The provision that, in exercising the privilege granted by these sections to the driver of such an emergency vehicle, such driver shall not be relieved of the duty to drive with due regard for the safety of other persons using the highway was interpreted in Lucas v. City of Los Angeles, 10 Cal.2d 476, 75 P.2d 599, as meaning that the driver of such an emergency vehicle should, by a suitable warning, give others an opportunity to yield the right of way. This refers to the giving of an audible signal by siren as provided for in section 554. It will be noted that the test for determining whether a publicly owned ambulance is at a given time an authorized emergency vehicle and entitled to a special privilege as such, within the meaning of these sections of the Vehicle Code as then existing, is not whether an emergency in fact exists at that time but rather whether the vehicle is then being used in responding to an emergency call. The question of negligence presented under the circumstances appearing in the instant case, depends upon whether or not this publicly owned ambulance was then being used in responding to an emergency call and, if it was, whether or not an audible signal by siren was given as it entered and traversed the intersection.

The appellant contends that by rejecting certain evidence, admitting certain other evidence and giving certain instructions, the court permitted or required the jury, in determining whether or not this ambulance was at the time responding to an emergency call, to consider the condition of one of the patients up to the time an operation was later performed, rather than to consider the situation as disclosed by the call as made and as communicated to the driver of the ambulance. In other words, that the court erroneously applied the test of whether an emergency in fact existed, rather than looking to the situation as then presented to the mind of the driver of the ambulance for the purpose of disclosing whether or not he was then using the vehicle in responding to an emergency call.

Dr. Sutherland, the county health officer, testified that about 5 o'clock on the afternoon of this day he called at a home in a Mexican colony 5 miles from Santa Ana and found a girl suffering from scarlet fever and another girl ill with nausea and vomiting and severe abdominal pain, with a temperature, muscle spasm and tenderness. An objection was sustained to a question as to whether he considered the latter an emergency case, but he was allowed to testify that he considered this "a case of acute appendicitis, in other words, an acute abdomen"; that it was a case that should be cared for as soon as possible; and that he then thought there was "a very definite potential danger". He further testified that he went immediately to his office and phoned the county hospital, giving the lady who takes the ambulance calls and who sends the ambulance out the name and address, "and asking her to consider this an emergency call". On motion of the respondent, all of his testimony as to what was said in this telephone conversation was stricken from the evidence on the ground that it was hearsay, leaving only, as stated by the court, "the fact that he directed the ambulance to go".

The lady who received the call at the hospital testified that she received this call from Dr. Sutherland a little after 5 o'clock on June 10, 1937; that it was her duty to notify the ambulance driver and she notified Mr. Biggs in this case; and that she gave him the ambulance call and repeated it when he came for the key. On cross-examination by counsel for the appellant she was asked a number of questions along the line of whether the doctor in making the call had said that this was a case of acute appendicitis, whether he had told her to consider it an emergency call, whether it was their practice to consider an acute abdomen case as an emergency call, and whether it was the practice to give directions to the ambulance driver as to whether or not a particular call was an emergency call or a simple service call. Objections to all these questions were sustained in so far as the respondent was concerned but, as affecting the defendant Wilson, the witness was permitted to answer all of these questions except the last one. She then testified that the doctor told her to "send the ambulance out and pick up an acute abdomen and a contagious"; that the doctor called and asked that an ambulance be sent out, saying it was an acute abdomen case; that the ambulance went out immediately; and that he did not say that he considered it an emergency. With respect to what she told the driver of the ambulance, she testified:

"Q. Now, nothing was said to Mr. Biggs either by you in reference to this being an emergency, was there? A. Only the standing order. When a doctor gives us an order, we are to attend to that at once.

"Q. You told Mr. Biggs it was an acute abdomen, didn't you? A. Yes, sir."

[2] Over the objection of the appellant, evidence was admitted to the effect that the girls arrived at the hospital about 8 o'clock that night; that the girl suffering from the acute abdomen was not operated upon and her appendix removed until about 11 or 11:30 o'clock that night; and that an operation could have been performed about 9 o'clock had this then been deemed essential and if other work and other cases had not prevented. Although the result of the operation confirmed the diagnosis made by Dr. Sutherland, the operating surgeon testifying that the appendix was "a very bad one", the evidence as to what later occurred in this connection, apparently introduced for the purpose of showing that an emergency requiring the utmost haste did not, in fact, exist at the time the ambulance call was received, was entirely immaterial upon the real question involved, which was whether the call was received and acted upon as an emergency call. This question cannot be determined or affected by subsequent developments.

[3] In connection with this phase of the case the court gave the following instruction: "The right of an authorized emergency vehicle to exercise the privileges granted by the Vehicle Code to an authorized emergency vehicle depends and rests upon the question of whether in fact an emergency existed."

In another instruction the jury was told that the driver of an authorized emergency vehicle is not relieved from the consequences of an arbitrary exercise of the privileges granted by the Vehicle Code, and that: "Arbitrary exercise of the privileges given by the Vehicle Code to the driver of an authorized emergency vehicle must rest upon the question of whether an emergency in fact existed. If you find from the evidence in this case that at the time and place of the accident no emergency in fact existed and if you further find that Ernest S. Biggs, the driver of the ambulance belonging to the County of Orange, exercised the privileges granted to an authorized emergency vehicle by the Vehicle Code of the State of California, then I instruct you that in exercising such privileges the said Ernest S. Biggs was arbitrarily exercising the privileges granted to an authorized emergency vehicle by the Vehicle Code of the State of California."

A further instruction was given as follows: "I instruct you that if you find from the evidence in this case that Ernest S. Biggs was not at the time and place of the accident responding to an emergency call, but that he was merely endeavoring to go and get a sick person or persons and take said person or persons to a hospital as quickly as possible, then I instruct you that in driving said ambulance the said Ernest S. Biggs was not entitled to exercise the privileges allowed to an authorized emergency vehicle by the Vehicle Code of California."

It seems clear that by these rulings on the admission of evidence and by these instructions, the court permitted the jury to adopt and act upon the theory that if subsequent events disclosed that no emergency in fact existed at the time in question, which called for and required a high degree of haste in getting these patients to the hospital, the driver of the ambulance was not responding to an emergency call and was not entitled to pass through this stop-sign whether or not he sounded his siren. The question of whether or not a siren was sounded was properly submitted to the jury but the same cannot be said of the issue as to whether the ambulance was then being used in responding to an emergency call.

[4] In determining whether this publicly owned ambulance was at the time in question being used in responding to an emergency call it is not only material, but essential, to consider such facts as disclose the nature of the call which was being answered. This involves both a statement of the substance of the call as it came in to the hospital and the substance or terms of the call as communicated to the driver of the ambulance. The testimony of the doctor with respect to the call he made over the telephone was stricken out on the ground that it was hearsay. The fact sought to be established was that certain words were spoken and not the truth or falsity of those words. It made no difference in this case whether or not the doctor was correct in his diagnosis or whether or not an acute case of appendicitis actually existed which required immediate treatment. The essential thing was the call that was made and acted upon by the appellant's employee. The form in which the call was made was material evidence and not subject to the objection made. Smith v. Whittier, 95 Cal. 279, 30 P. 529. While the lady who received the call at the hospital was finally allowed to testify that she told Mr. Biggs that it was an acute abdomen case she was not allowed, as far as the respondent is concerned, to testify that in asking that an ambulance be sent, Dr. Sutherland had said that it was an acute abdomen case. Most of her testimony was shut out in so far as the respondent was concerned and a part of it was shut out entirely. While the controlling thing is the nature of the call as it was communicated to the driver of the ambulance, this may well have been affected by the nature of the call as received. What was said in making the call may have had a bearing upon whether it was an emergency call, and also upon the question of whether the nature of the call was communicated to the driver of the ambulance. In order to enable it to determine the issue as to whether this vehicle was being used in responding to an emergency call, the jury should have had before it the full facts as to what call was made and how it was communicated to the driver. The testimony of the witness who received the call as to what was said by the doctor who made the call, with respect to the nature of the case for which an ambulance was desired, was ruled out in so far as the respondent was concerned. The exclusion of this evidence, as affecting the respondent, may well have misled the jury. We think the appellant was unduly restricted by the court in bringing out the actual and material facts in connection with the nature of

the call to which a response was being made.

[5] Any error in this connection was emphasized and rendered more prejudicial by receiving in evidence, over the objection of the appellant, a great deal of testimony introduced for the purpose of bringing out the fact that an operation was not actually performed, upon the girl who was suffering from acute appendicitis, until several hours after the accident occurred. This evidence was immaterial upon the question involved, which was as to the situation as presented by the call received and acted upon. This question could not be affected by subsequent developments, and was one which should not have been confused by the injection of evidence of that nature.

[6, 7] These errors were further emphasized by the instructions to which we have referred, by which the jury was told that the driver of this ambulance was not entitled to exercise the privilege granted to an authorized emergency vehicle unless an emergency, in fact, then existed. It cannot be believed that the legislature intended that the character and extent of an emergency must be investigated and determined in advance before the privileges accorded to an authorized emergency vehicle are available to the driver of an ambulance. It may be conceded that a publicly owned ambulance is sometimes used for other purposes than responding to an emergency call. This very fact makes it necessary to determine in a particular case whether it is then being used in responding to such a call. That fact must, and does, depend upon the nature of the call that is received and the situation as then presented to the mind of the driver of the vehicle, and not upon whether an emergency in fact then exists as this may be disclosed by future developments. Moreover, a call for an ambulance for the purpose of taking a sick person to a hospital as quickly as possible may well be an emergency call within the meaning of these provisions of the Vehicle Code. In the last instruction to which we have referred, the jury was in effect told that such a call was not an emergency call. This instruction was both misleading and prejudicial.

The issue as to whether this ambulance was then being used in responding to an emergency call was one which should have been fully and fairly submitted to the jury. In view of the rulings upon the admission of evidence and the instructions to which we have referred, we think this was not done.

[8-12] The appellant further complains of an instruction telling the jury that if it should find that the County of Orange had permitted Biggs to drive this ambulance when he did not have a driver's license, and if such fact was known or should have been known, "then I instruct you that the defendant, County of Orange, was prima facie negligent in permitting the said Ernest S. Biggs to drive said automobile ambulance". Over the objection of the appellant, counsel for the defendant Wilson was permitted to introduce certain evidence in an attempt to show that Biggs did not have a driver's license. The evidence introduced, however, neither shows that fact nor justifies such an inference. While there is no evidence that Biggs did not have a driver's license, it is a misdemeanor to drive a motor vehicle without one. There is a presumption that he obeyed the law in this respect, which is the only material evidence in the record on this subject. There is no evidence, therefore, to justify the giving of this instruction. A further consideration is that the matter was immaterial here in any event. At common law such a political subdivision of the state as a county was not liable for the negligence of its employees in the exercise of its governmental functions. It is well settled that an action can be maintained against such a branch of the government only where a right of action is given by statute. Pittam v. City of Riverside, 128 Cal.App. 57, 16 P.2d 768. Section 335 of the Vehicle Code, providing that no person shall knowingly permit another to drive his automobile unless the latter is duly licensed, gives no right of action against a county. If it be assumed that the appellant was negligent in permitting an unlicensed driver to drive this ambulance (see Owens v. Carmichael's U-Drive Autos, Inc., 116 Cal.App. 348, 2 P.2d 580; Strandt v. Cannon, 29 Cal.App.2d 509, 85 P.2d 160) its liability in this case must be based entirely upon section 400 of the Vehicle Code, and upon "the negligent operation of" this vehicle. The injection of this question as to whether or not Biggs had a license to drive was not only improper but may well have confused the issues, as understood by the jury.

The action should be retried upon the clear-cut issues as to whether this ambulance was then being used in responding to an emergency call, whether the siren was sounded as required by the provisions of the Vehicle Code, and whether privileges were arbitrarily exercised, and with appropriate instructions for the guidance of the jury in determining those issues.

The judgment is reversed.

We concur: MARKS, J.; GRIFFIN, J.

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36 Cal.App.2d 269

DOWNEY v. ALLEN et al.

Civ. 11586.

District Court of Appeal, Second District, Division 1, California.

Dec. 27, 1939.

Hearing Denied Feb. 21, 1940.

1. **Assault and battery 🔑24(1)**
False imprisonment 🔑20(1)
Fraud 🔑41

In action for fraud and deceit, false imprisonment, and assault, complaint alleging that attorney for another defendant who allegedly caused plaintiff to be prosecuted for bribery, did certain things as attorney at request of such other defendant which the latter knew to be false and fraudulent, but not alleging that attorney had knowledge of such fraud or falsity, stated no cause of action against attorney.

2. **District and prosecuting attorneys 🔑10**

A prosecuting officer is a "quasi judicial officer" who is called on to determine on evidence submitted to him whether criminal offense has been committed, and is immune from civil liability for his official acts when he determines that an offense has been committed and when he prosecutes therefor.

3. **District and prosecuting attorneys 🔑10**

In action for fraud and deceit, false imprisonment, and assault, complaint, showing that district attorney and his deputies acted on evidence sufficient to raise probable cause that bribery had been committed in prosecuting plaintiff therefor, and failing to allege that such officials acted maliciously or corruptly, stated no cause of action against such officials.

4. **False imprisonment 🔑7(3)**

A peace officer is not liable for service of warrant which is valid on its face, irrespective of any defects in proceedings leading up to issuance thereof. Pol.Code, § 4168.

5. **False imprisonment 🔑7(3)**

A sheriff and his deputy were not liable for deputy's arrest under warrant which was valid on its face but which was allegedly void because person who swore to complaint committed perjury. Pol.Code, § 4168.

6. **Municipal corporations 🔑182**

A police chief, though charged with duty of selecting members of his force, is not responsible for their acts unless he has directed such acts to be done or has personally cooperated in the offense, since each policeman is, like himself, a public servant.

◆

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Action for fraud and deceit, false imprisonment, and assault, by Frank E. Downey against Ralph T. Allen and others. From a judgment of dismissal as to certain defendants, plaintiff appeals.

Affirmed.

Frank E. Downey, of Long Beach, in pro. per.

George W. Trammel, Jr., City Atty., Harlan V. Boyer, Asst. City Atty., and Wahlfred Jacobson, Deputy City Atty., all of Long Beach, for respondent McClelland.

J. H. O'Connor, County Counsel, and J. F. Moroney, Deputy County Counsel, both of Los Angeles, for the remaining respondents.

YORK, Presiding Justice.

On April 24, 1934, appellant filed an action in the municipal court of the city of Long Beach against the defendant Charles C. Matlock and others, including one Ola E. Matthews. Matlock was served with a copy of the summons and complaint therein and upon his failure to answer, appellant on July 23, 1934, caused his default to be entered. Execution thereafter issued and was returned wholly unsatisfied, and on July 12, 1935, appellant obtained an order for the examination of said defendants in proceedings supplementary to execution and on that day served notice thereof on defendant Matlock.

About July 17, 1935, defendant Matlock attempted to have the default set aside and it is charged in the second amended complaint herein that in connection therewith said Matlock and one Ralph Allen (a special officer appointed by the chief of police of the city of Long Beach, and in the employ of Matlock) together with certain other persons entered into a conspiracy to make it appear by false and perjured testimony that Matlock had not been served with said process. It is further alleged that Allen and Matlock conspired to have appellant accused and convicted of giving a bribe to Allen. This plan called for Allen to lure appellant to his home upon the pretense that appellant would be shown a letter which would prove that Matlock had been served in said action, and then make it appear that appellant had given Allen a bribe in order to induce him to testify falsely on appellant's behalf with respect to the service of said complaint on Matlock. It is alleged that, in furtherance of this conspiracy, Allen went to the respondent William H. Brayton, a deputy district attorney of Los Angeles county, and to the respondent Frank Shoffstall, a deputy sheriff of said county assigned to the duty of investigator in the office of the said district attorney, and falsely represented to said officers that appellant had offered him (Allen) a bribe to testify that Matlock had actually been served with a summons and complaint in the municipal court action. It is further alleged that Brayton, in order to obtain some corroboration of Allen's story, suggested to Allen that he accept said bribe from appellant and that Brayton, having been misled by Allen to believe that appellant had actually paid Allen a bribe of $50, caused a complaint to be prepared charging appellant with bribery, which complaint was sworn to by the defendant Allen. A warrant was issued upon this complaint by the municipal court of Long Beach, and appellant was arrested by the respondent Shoffstall under this warrant. He was then tried for bribery in the superior court where he was prosecuted by the respondent Clifford Crail in his official capacity of deputy district attorney, and was convicted of the crime of bribery. Thereafter a new trial was granted to appellant, he was tried a second time and was acquitted. He then brought the instant action for damages for false imprisonment, malicious prosecution of the civil suit, assault and battery and kidnaping.

General and special demurrers to the complaint were interposed by respondents and were sustained with the right of amendment, whereupon appellant filed his first amended complaint setting forth the same causes of action, to which demurrers were again filed by respondents and sustained with leave to amend. Appellant then filed his second amended complaint setting forth as causes of action, fraud and deceit, false imprisonment and assault. To this second amended complaint a demurrer was filed by Buron Fitts, as district attorney, and by his deputies Brayton, Crail, Keeler and Hunt, and also on behalf of Eugene Warren Biscailuz, as sheriff, and his deputy Frank Shoffstall, as well as on behalf of the National Surety Corporation and the Fidelity and Deposit Company of Maryland (the latter being sued on the official bonds of the said officers), upon the grounds that insufficient facts had been alleged to constitute a cause of action against the said respondents, and that appellant had attempted to join two causes of action without separately stating them. Another demurrer, both general and special in character, was filed on behalf of respondent McClelland, as chief of police of the city of Long Beach, and a third general and special demurrer was filed by respondent Milton Emlein.

All of these said demurrers to appellant's third attempt to state a cause of action were sustained without leave to amend upon the ground that "said Second Amended Complaint does not state facts sufficient to constitute a cause of action against the aforesaid defendants, or any of them", the record showing that no request was thereafter made by appellant for leave to amend.

Thereafter a judgment dismissing the action as to the respondents Milton Emlein, Buron Fitts, William Brayton, Clifford Crail, Harry Keeler, Clarence S. Hunt, Joseph H. McClelland, Eugene Warren Biscailuz, Frank Shoffstall, Fidelity and Deposit Company of Maryland, and National Surety Corporation was duly entered. Appellant Downey prosecutes this appeal from "the judgment in said action, sustaining demurrers to plaintiff's complaint and amendments thereto, and denying to plaintiff the right of further amendment".

Appellant has filed a voluminous brief setting forth at great length many abstract propositions of law and citing literally hundreds of cases, code sections and legal authorities in support thereof, but he has failed to point out therein what allegations of his second amended complaint he deems sufficient to state a cause of action against the respondents, and has made no attempt to analyze his pleadings in an effort to show why the judgment herein should be reversed. However, this court has carefully reviewed the more than three hundred pages which make up the clerk's transcript of the judgment roll, and is of the opinion that no cause of action has been stated against any one of said respondents.

[1] The respondent Milton Emlein was acting as attorney for the defendant Matlock and the second amended complaint alleges that he did certain things as such attorney at the instance and request of defendant Matlock which the latter knew to be false and fraudulent, but there is no allegation in said complaint that the respondent Emlein had knowledge of such fraud or falsity.

[2, 3] With respect to respondent Buron Fitts, as district attorney, and respondents Brayton, Crail, Keeler and Hunt, as deputies district attorney, it is now well-settled law that a prosecuting officer is a quasi-judicial officer who is called upon to determine upon evidence submitted to him whether or not a criminal offense has been committed. It is equally well settled upon principles of public policy that such officer is immune from civil liability for his official acts when he determines that an offense has been committed by a defendant and when he prosecutes such defendant therefor. Pearson v. Reed, 6 Cal.App.2d 277, 44 P.2d 592, and authorities therein cited. As a matter of fact the allegations of the second amended complaint reveal that the alleged conspirators, Matlock and Allen, laid before these officials evidence which was sufficient to raise a probable cause that a crime had been committed. Said pleading does not allege that said respondent officials acted either maliciously or corruptly.

[4, 5] Appellant's principal complaint against respondent Biscailuz and his deputy Shoffstall appears to be that the respondent deputy sheriff arrested appellant upon a warrant issued by a judge of the municipal court of Long Beach, but that said warrant was void because the person who swore to the complaint is alleged to have committed perjury. A peace officer is not liable for the service of a warrant which is valid upon its face, irrespective of any defects in the proceedings leading up to the issuance thereof. Burlingame v. Traeger, 101 Cal.App. 365, 281 P. 1051; sec. 4168, Pol.Code.

[6] With respect to the respondent McClelland, chief of police of Long Beach, it was held in Michel v. Smith, 188 Cal. 199, 201, 205 P. 113, that the chief of a municipal police department, even though he be charged with the duty of selecting members of his force, is not responsible for their acts, unless he has directed such acts to be done or has personally cooperated in the offense, for each policeman is, like himself a public servant. See, also, Bower v. Davis, 13 Cal.App.2d 678, 57 P. 2d 574.

For the reasons stated, the judgment of dismissal as to these respondents is affirmed.

We concur: DORAN, J.; WHITE, J.

36 Cal.App.2d 233

ROGERS v. TRANSAMERICA CORPORATION et al.

Civ. 11883.

District Court of Appeal, Second District, Division 1, California.

Dec. 22, 1939.

Rehearing Denied Jan. 15, 1940.

Hearing Denied Feb. 19, 1940.

1. Assignments 🔑85

As between successive assignees of chose in action, the assignee who first gives notice to debtor establishes a preferential title, even if he is subsequent assignee, providing at time of taking assignment he had no notice of a prior assignment.

2. Assignments 🔑86

A purported notice signed by judgment debtor and his attorney and read at execution sale of debtor's interest in a chose in action, that debtor had assigned his interest in chose in action prior to issuance of execution, but which did not reveal name of assignee, served no purpose as a notice, and did not protect asserted rights of assignee nor defeat rights of purchaser at execution sale thereafter perfected by service of due notice on debtor. Civ.Code, § 19.

3. Trial ⚷395(5)

In determining whether purchaser at execution sale of judgment debtor's chose in action, or one to whom debtor had allegedly made assignment of his interest to issuance of execution, had preferential title, trial court's finding that assignment was supported by sufficient consideration was immaterial.

4. Assignments ⚷86

A purported notice, signed by judgment debtor and his attorney and read at execution sale of debtor's interest in the chose of action, that debtor had assigned his interest in chose in action prior to issuance of execution but which did not reveal name of assignee, would not be recognized as notice of prior assignment, since to do so, would tend to facilitate fraud.

◆

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by R. I. Rogers against the Transamerica Corporation and others for damages which plaintiff allegedly suffered by reason of alleged frauds and misrepresentations made by or on behalf of defendants. H. W. Everts moved to substitute himself as plaintiff in place of R. I. Rogers and to substitute his counsel as counsel for the plaintiff. From order denying motion to substitute, H. W. Everts appeals.

Reversed with directions.

Hearing denied; EDMONDS and GIBSON, JJ., dissenting.

Cullinan, Hickey & Sweigert and Cushing & Cushing, all of San Francisco, for appellant.

Oliver O. Clark, Henry Brown, and David D. Sallee, all of Los Angeles, for respondent.

DORAN, Justice.

On March 29, 1937, there was pending, and for some years prior thereto there had been pending, in the superior court at Los Angeles, an action numbered 359,898, in which R. I. Rogers was plaintiff and Transamerica Corporation, Bank of America National Trust and Savings Association and others were defendants. In that action R. I. Rogers claimed a large amount in damages which he alleged he had suffered by reason of certain frauds and misrepresentations made by or on behalf of the defendants.

On February 15, 1933, judgment was entered against R. I. Rogers in an action pending in the superior court at Los Angeles and numbered 350,894, in which Mortgage Guarantee Company, a corporation, and Security First National Bank of Los Angeles, a corporation, as trustee, were plaintiffs and R. I. Rogers was the defendant. This judgment was for $31,850.37. On March 20, 1937, there was due thereon $19,740.55 principal, together with interest for a long period, attorneys' fees, and costs.

On that date, March 20, 1937, a writ of execution was issued on said judgment and on March 22, 1937, the sheriff levied on all the right, title and interest of R. I. Rogers in and to the claims and demands for damages against Transamerica Corporation, Bank of America National Trust and Savings Association and the others who were defendants in said action No. 359,898 in which Rogers was the plaintiff. On March 29, 1937, the sheriff sold to H. W. Everts all the right, title and interest of R. I. Rogers in and to all of the alleged claims and demands for damages against Transamerica Corporation, Bank of America National Trust and Savings Association and the others who were the defendants in action numbered 359,898.

R. I. Rogers was then, and for a long time had been, a defendant in another action in the superior court at Los Angeles, No. 367,575, in which the Bank of America National Trust and Savings Association was suing R. I. Rogers as defendant therein to recover on certain promissory notes which had been given by R. I. Rogers to the bank for money loaned. In an amended answer and counterclaim filed by R. I. Rogers in that action No. 367,575 and verified by Mr. Rogers on July 7, 1936, R. I. Rogers had pleaded against the bank's suit on the promissory notes the whole cause of action asserted by him in said action No. 359,898, thus asserting by his verified pleading in July, 1936, that he then owned, in his own right, the claims and causes of action which he was asserting in action No. 359,898. Also, in the same action, No. 367,575, Mr. Rogers, in his original answer and counterclaim, verified by him on February 10, 1936, alleged a counterclaim identical with the cause of action which is the subject of said action No. 359,898, so that on February 10, 1936, as well as on July 7, 1936, he had asserted, under oath, a claim inconsistent with the ownership by anyone but himself on those respective dates of the claims and causes of action which are the subject of action No. 359,898.

Prior to the date of the execution sale, no notice of any assignment by R. I. Rogers to his wife or to anyone else had been given to any of the defendants against whom he was asserting his claims in action No. 359,898, nor is it contended that Everts had any knowledge of any such assignment prior to the date of the execution sale. On the day of the execution sale and before the sale, the following matters occurred. As the time and place of the sale, after the sheriff had read the notice of sale and before offering such claims and demands for sale, the sheriff read aloud to the persons there assembled, of which H. W. Everts was one, a notice. The notice was signed by R. I. Rogers and Oliver O. Clark, the attorney for plaintiff in action No. 359,898. Inasmuch as the legal effect of the notice is decisive, it is herewith set forth in full.

"Notice as to Judgment Debtor's Lack of Interest in Subject Matter of Execution Lien Herein.

"To E. W. Biscailuz, Sheriff of the County of Los Angeles, State of California, and to L. M. Leonard, Deputy Sheriff of said County and State, and to the plaintiffs herein, and to any and every assignee and assignees of any plaintiff, or of the plaintiffs herein, and to Cullinan, Hickey & Sweigert, and to Cushing & Cushing, as attorneys for the plaintiff and judgment creditor herein, and to all other persons interested:

"You and each of you, will please take notice that on March 22, 1937, there was served upon R. I. Rogers, judgment debtor herein, by the Sheriff of Los Angeles County, notice in writing that under and by virtue of a writ of execution heretofore issued in the above entitled action an execution levy had been made upon all of the rights, titles, interests and properties of said R. I. Rogers in and to each and every cause of action asserted by said R. I. Rogers against Transamerica Corporation, a corporation, and other defendants in that certain action entitled 'R. I. Rogers, Plaintiff, v. Transamerica Corporation, a corporation, et al., Defendants,' being No. 359,898 now pending in the above entitled court, as well as upon all of the right, title, interest, equity and properties of said R. I. Rogers in and to the subject matter of each of said causes of action, and upon any right of action inhering in said R. I. Rogers upon each and every of said causes of action.

"You will please take notice that at the time of the issuance of said execution and at the time of the levy thereof, and for a long time prior thereto, the said R. I. Rogers was not the owner of any right, title, interest, equity or estate of any kind or nature in or to any of the causes of action set forth in said action No. 359,898 now pending in the above entitled court, and did not have any right, title, interest, equity or estate in or to any right of action upon each or any of said causes of action, and that long prior to the issuance of said writ of execution, and long prior to the levy thereof, said R. I. Rogers by assignments had sold, conveyed, transferred and set over unto others all of his right, title, interest, equity and estate in and to each and every of said causes of action and in and to each and every right of action upon each and every of said causes of action, and in and to all of the subject matter of each and every of said causes of action, and of each and every of said rights of action, and thereby had completely divested himself of any right, title, interest, equity or estate in or to the same.

"You are further notified that by reason of said assignments the lien of any levy under said writ of execution does not attach to any part or portion of any right, title, interest, equity or estate which, excepting for said assignments, said R. I. Rogers would have had in and to said causes of action and said rights of action.

"You will further take notice that by reason of the matters herein set forth any purchaser of any purported or ostensible interest of the said R. I. Rogers in or to any of said causes of action, or in or to any of said rights of action, or in or to any matter which is the subject of said causes of action, or of said rights of action, or of any thereof, will obtain nothing whatsoever by virtue of such purchase.

"Dated March 27th, 1937.

"(Signed) R. I. Rogers.
"(Signed) Oliver O. Clark,
"Attorney for R. I. Rogers.

"Received copy of this answer at 8:45 a.m. March 29, 1937.

"(Signed) E. W. Biscailuz,
"Sheriff,
"(Signed by) J. S. Markey,
"Deputy."

The sale followed, and as heretofore noted, Mr. Everts purchased the property.

It should be emphasized that the above notice is signed by R. I. Rogers and his attorney, Oliver O. Clark. The name of the assignee, to whom the right, title and interest in the cause of action is supposed to have been assigned, is not revealed. Nor is there anything in the notice that asserts or discloses any authority in R. I. Rogers to act in the premises as the agent of the assignee, either actually or ostensibly. Nevertheless, it purports to declare the law that no lien of any levy under such levy would attach, and the threat that any purchaser at the sale would obtain nothing whatsoever by virtue of such purchase.

Immediately upon receiving the sheriff's certificate of sale, H. W. Everts, who it is admitted was at all times acting for and on behalf of Bank of America National Trust and Savings Association, notified all of the defendants in action numbered 359,898, that he had succeeded to the interests of R. I. Rogers in the claims which were the subject of the action. Later, to-wit, on May 1, 1937, Everts served notice of a motion in action No. 359,898, to substitute himself as plaintiff in said action in place and stead of R. I. Rogers, and to substitute his counsel as counsel for the plaintiff. At the hearing, the motion was urged on the ground that Everts had succeeded, by virtue of the sheriff's sale to all of the right, title and interest of R. I. Rogers in and to the claims which R. I. Rogers was asserting in action numbered 359,898. R. I. Rogers opposed the motion on the ground that prior to the levy of the writ of execution issued in action numbered 350,894, he had assigned to his wife, Estella Frances Rogers, all of his interest in those claims and demands, and that Everts had bought them at the sheriff's sale with constructive notice of such assignment. At the hearing on the motion the evidence in support thereof consisted of the affidavit of H. W. Everts, and certain records and files that were relevant and which contained the testimony of R. I. Rogers and his wife, given in supplementary proceedings, to which reference hereinafter will be made. Opposition to the motion was supported by the affidavits of R. I. Rogers, his wife, and their attorney, Oliver O. Clark.

The superior court denied the motion to substitute, from which order the appeal herein is taken.

In addition to the minute entry denying the motion, the trial judge filed a memorandum opinion which in part was as follows:

"As a matter of fact on the day before the execution sale, notice signed by plaintiff and by plaintiff's attorney was served upon the sheriff, and at the time of the execution sale, and before bids were received, the officer conducting the sale read to those present, including Everts, a copy of the notice and the copy was delivered to Everts, which notice recited that prior to the issuance of the execution Rogers had sold to others all of his right, title and interest in and to the cause of action in this case, and that any purchaser would take nothing by his purchase.

"Without reviewing the numerous authorities that have been cited in this case by counsel upon both sides, the Court is of the opinion that the notice given, while not given by the prior assignee and not containing many of the essential facts relating to such assignment, was such that a prudent man would have thereby been put upon inquiry; that by prosecuting such inquiry he might readily have learned all the facts concerning said prior assignment, and that, therefore, he had constructive notice of the fact of such prior assignment (Section 19, Civil Code)."

The trial judge further observed that there was no reason to doubt the "voluntary assignment for a sufficient consideration to Mrs. Rogers" because it was supported by the testimony of the assignor and assignee, and was corroborated by the "testimony of Mr. Rogers' attorney who drew the assignment, an officer of this Court of unquestioned integrity".

The facts are undisputed.

It is submitted by appellant and uncontroverted by respondent that the question before the court on appeal is purely a matter of law: namely, the legal effect of the notice, read by the sheriff at the execution sale, in the light of the undisputed circumstances. In that connection it is contended by appellant that the so-called notice did not give Everts constructive notice of Mrs. Rogers' claim to the chose in action; that Everts was under no duty to postpone the sale or refrain from bidding by reason of the so-called notice; that Rogers' explanation of why he did not name his wife as assignee in the notice is evidently an afterthought and is not even plausible, and is no excuse for Mrs. Rogers' failure to notify the debtor or purchaser at the execution sale of the assignment to her; that Rogers and Mrs. Rogers and their counsel deliberately concealed the fact of the alleged assignment to Mrs. Rogers; and that the so-called notice was insufficient because of its generality and the tendency of such a notice to facilitate fraud.

Respondent contends to the contrary generally and specifically.

Before giving consideration to the merits of the appeal, propriety suggests that some attention be devoted to respondent's brief, which commences as follows: "This appeal is from an order which declares that a scheme, devised by powerful interests to evade the just consequences of their gigantic fraud, has failed." Then follow about three pages of rhetoric calculated in substance, effect, and literally, to abuse appellant personally as well as to belittle the effort of appellant in the adoption and application of a legal remedy, which effort on the part of appellant in the premises was entirely proper. This attack on plaintiff is based upon the assumption that the allegations of the complaint in action No. 359,898, referred to herein, are true, and despite the fact that said action, although filed on July 13, 1933, has never been brought to trial. Purporting, as it does, to be an argument it goes altogether outside of the record and is beside the issue. Its presence in the brief is pernicious, unwarranted and inexcusable, and scarcely is to be expected from one characterized by the trial judge as "an officer of this Court of unquestioned integrity".

The merits of the within appeal, as heretofore noted in substance, pertain to the legal effect to be given to the notice read at the execution sale, the determination of which necessarily involves the rights of assignees of a chose in action. In that connection the pertinent events, in chronological order, occurred as follows: The execution sale took place on March 29, 1937. On the same date, the so-called "notice" was read at the sale, by means of which R. I. Rogers informed prospective purchasers that he, R. I. Rogers, no longer was the owner of the chose in action which was the subject-matter of the sale. Everts disregarded the so-called "notice" and bid the property in for $5,000. Thereafter, and promptly, Everts notified all of the debtors that he, Everts, was the new owner. Thereafter, to-wit, on May 24, 1937, Everts first learned, and it became known for the first time from testimony of R. I. Rogers given in supplementary proceedings, that R. I. Rogers claimed to have assigned the cause of action to his wife, Estella Rogers, on January 20, 1936. It should again be noted at this point that after this last-mentioned date, to-wit, on February 10, 1936, and also on July 7, 1936, R. I. Rogers had declared under oath in a verified answer, his ownership of this same cause of action which he later (on May 24, 1937) declared under oath he had assigned for a valuable consideration to his wife on January 20, 1936. It is noteworthy that Rogers' explanation, also under oath, of this most significant and important circumstance is as follows:

"Q. (By Mr. Cullinan, attorney for appellant): You are testifying about action No. 359,898, in which you are the plaintiff against the bank and in which the cause of action was assigned to your wife, but the action I am calling to your attention is quite a different action. That is the action in which the bank is suing you on the promissory notes, and you have already assigned to your wife your rights without reservation but, nevertheless, you have set up in this suit the bank brought against you on the promissory notes this claim as your own. Now, I am asking you if you can give me any explanation as to why you did that, in view of your previous testimony concerning the reason of the assignment to your wife and the character of it?

* * * * *

"The Witness: Well, the only answer I can give is that the papers in this suit were prepared by my attorney, Mr. Clark, and I read them over at the time, but a layman naturally can't understand all of this, and I accepted his word for it, and they were signed. That is all I can say.

"Q. (By Mr. Cullinan): Mr. Rogers, you have been a bank official for a good many years, have you not? A. I was, but I didn't go into the law.

"Q. And you held a high office in the bank, did you not? A. Yes.

"Q. You were aware when you signed this answer, were you not, that it was an answer to a complaint in which the bank was suing you on promissory notes? A. I probably was.

"Q. Now will you tell me in what respect you were protecting your wife's interests when you set up as a counterclaim to the bank's suit against you on the promissory notes, this cause of action which you have previously assigned to your wife and which was involved in another pending litigation in which you were the plaintiff? A. That would have to be a matter for my attorney, Mr. Clark, to answer. I wouldn't know how to answer it.

* * * * *

"Q. And is that the only explanation you are able to give, as to why, in July, you verified that counterclaim? A. It is."

[1] It appears to be established law that as between successive assignees, the assignee who first gives notice to the debtor establishes a preferential title. As declared by the Supreme Court, "As between successive assignees of a chose in action, he will have the preference who first gives notice to the debtor, even if it be a subsequent assignee, provided at the time of taking it he had no notice of a prior assignment." Widenmann v. Weniger, 164 Cal. 667, 673, 130 P. 421, 424. See, also, Graham Paper Co. v. Pembroke, 124 Cal. 117, 56 P. 627, 44 L.R.A. 632, 71 Am.St. Rep. 26.

[2] Respondent undertakes to apply the expression above quoted, namely, "provided at the time of taking it he had no notice of a prior assignment", to the circumstances here presented, contending that the so-called "notice" read at the sheriff's sale served such a purpose. The law cannot be so distorted. The notice read at the sheriff's sale was by the assignor, not the assignee. Its obvious purpose was to baffle rather than in good faith to enlighten. Appellant appropriately describes the notice as an instrument designed, not to inform a "prospective buyer of the prior rights of an assignee, but rather to intimidate prospective bidders at the sale while concealing the very facts that self-interest would impel an assignee acting in good faith to make known".

Respondent argues, with reference to the notice, that, "Everts deliberately chose to ignore the warning which this notice gave and to forbear any inquiry until after he had completed his purchase", and that "Ordinary prudence on Everts' part * * * required him to ascertain at his peril, before he purchased at the execution sale, to whom the assignment was made". Common sense would dictate no such requirement as the test of prudence, under the circumstances with which Everts was confronted. To the contrary, Everts appears to have adopted the course that "ordinary prudence" would suggest, namely, he avoided an obvious maneuver and proceeded with the sale.

Incidentally, in the circumstances attending the sale, of whom would a prudent man inquire? Rogers' so-called "notice" revealed nothing except the claim that he, Rogers, no longer owned the property. Of whom could a prudent man inquire except Rogers? And in the circumstances, what would any inquiry of Rogers be expected to have produced? Anything in addition to what the so-called "notice" had contained? Idle acts are not required.

Although relying upon the "notice", respondent at the same time argues that, "The motions denied by the order appealed from, rest upon an execution sale at which *nothing* was sold. *Rogers had no title* upon which the writ of execution could operate. * * * Consequently there was *nothing* to which the execution could attach—*nothing* which the sheriff could sell—*nothing* which Everts could buy." (Italics included.) Thus Rogers on the one hand endeavors to dispossess himself of all title in and control over the property and on the other hand endeavors to retain control over the outcome and effect of the sale of the same property by the sheriff.

The record reveals that Mrs. Rogers did nothing at any time to establish and protect her rights under the purported assignment. After the purported assignment, R. I. Rogers had no rights in the property assigned, and any action taken by him neither operated to establish nor did it defeat the respective rights of successive assignees. Obviously, therefore, the so-called "notice" read at the sheriff's sale, coming as it did from a stranger to the proceedings, was of no consequence, served no purpose as a notice or otherwise, actual or constructive, and operated neither to protect the asserted rights of Mrs. Rogers nor to defeat the rights of Mr. Everts thereafter perfected by service of due notice on the debtor.

[3] The determination of the issue involved does not rest and depend upon the conduct of the assignor but upon the conduct of the assignees. In the absence of a conflict between or among assignees the mere assignment may be sufficient. But when, as here, successive assignees are contending, the performance or nonperformance of acts essential to a completion of title becomes the basis of their respective rights. Therefore, the finding by the trial judge that the assignment by Rogers to his wife was supported by a sufficient con-

sideration was beside the issue and immaterial.

[4] Finally, appellant's contention as to the insufficiency of the notice and the tendency of such a notice to facilitate fraud is of especial importance. As was declared in Graham Paper Co. v. Pembroke, supra, 124 Cal. at page 121, 56 P. page 628, 44 L.R.A. 632, 71 Am.St.Rep. 26, "The defendant, Pembroke, is a purchaser, who not only took an assignment of the accounts and other choses in action, but obtained actual possession of them and immediately notified the debtors, and therefore obtained a perfect legal title, without notice of the prior assignment, and with no means of obtaining information of it otherwise than from the fraudulent assignor." As contended by appellant in substance, to justify the maneuver relied upon by respondent would not only facilitate fraud, but moreover would encourage fraud. The attitude of the courts toward fraud and as well toward that which clearly may be regarded as the temptation for fraud is too well established to require citation of authority.

The appellant herein, having proceeded entirely in accordance with the requirements of the law in every respect, as hereinbefore set out, was entitled to the relief sought. The order of the trial court in denying the motion of appellant to be substituted in the action was error.

For the reasons herein stated the order denying the motion of H. W. Everts, appellant, to be substituted, is reversed with directions to grant appellant's motion to be substituted and for the substitution of his attorneys named in the motion, as prayed.

We concur: YORK, P. J.; WHITE, J.

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36 Cal.App.2d 262

CALKINS v. NEWTON et al.

Civ. 6007.

District Court of Appeal, Third District, California.

Dec. 26, 1939.

Hearing Denied Feb. 21, 1940.

1. Appeal and error ⇨917(1)

On appeal by plaintiff from a judgment entered on the sustaining of a demurrer to plaintiff's amended complaint, the allegations were required to be taken as true.

2. Counties ⇨146
States ⇨112

Neither the state nor any governmental agency of the state, such as a county, is liable for the negligence of its agents or employees engaged in the performance of governmental functions, unless such liability is imposed by statute, or unless there is in effect the taking of property for public use without compensation.

3. Paupers ⇨7

The purpose of sections of Welfare and Institutions Code authorizing board of supervisors of each county to care for indigent sick or dependent poor is to empower the board of supervisors to provide for care of county inhabitants who are actually in need of such care. St.1937, pp. 1016, 1017, §§ 200–204.

4. Counties ⇨144

Where there were no private general hospitals in vicinity of county general hospital, it was proper for county to furnish service to paying patients, and in doing so, it was exercising a "governmental function." St. 1937, pp. 1016, 1017, §§ 200–204.

[Ed. Note.—For other definitions of "Governmental Function," see Words & Phrases.]

5. Charities ⇨45(2)

If hospital maintained by county be regarded as charitable in its nature, county was entitled to same exemption from liability for the alleged negligence of its employees as is allowed private hospitals which receive pay patients but are not operated for profit. St.1937, pp. 1016, 1017, §§ 200–204.

6. Counties ⇨146

The imposition of a charge for hospitalization service by a county maintaining a hospital is not inconsistent with the exercise of a "governmental function," so as to render county liable for alleged negligence of its employees. St.1937, pp. 1016, 1017, §§ 200–204.

7. Counties ⇨146

The fact that county general hospital may have been operated at a profit was not controlling in determining whether hospital was liable for alleged negligence of its employees. St.1937, pp. 1016, 1017, §§ 200–204.

8. Hospitals 🔑2

A county is authorized only to furnish hospitalization in its county general hospital to those persons within the county who cannot secure hospitalization elsewhere. St. 1937, pp. 1016, 1017, §§ 200–204.

9. Counties 🔑141

A governmental agency, such as a county, does not incur liability for negligence by doing an act which is ultra vires.

10. Counties 🔑144

If board of supervisors of county exceeded its authority in maintaining county general hospital, remedy was not to impose liability on county for alleged negligence, but to bring a proper proceeding against it. St.1937, pp. 1016, 1017, §§ 200–204.

11. Counties 🔑146

County was not liable for injury caused by alleged negligence of county's employees in a hospital operated by county for profit, where hospital furnished the only hospital facilities available in the community, though injured person was a paying patient. St. 1937, pp. 1016, 1017, §§ 200–204.

Appeal from Superior Court, Siskiyou County; C. A. Paulsen, Judge.

Action by Everett Elden Calkins against Albert E. Newton, Roy F. Schlappi, and the County of Siskiyou to recover damages received by plaintiff by reason of alleged negligence on the part of doctors and nurses in a hospital built and maintained by the County of Siskiyou. From a judgment in favor of the County of Siskiyou on the sustaining of the demurrer of the County of Siskiyou to the amended complaint without leave to amend, the plaintiff appeals.

Judgment affirmed.

Carter, Barrett, Finley & Carlton, of Redding, for appellant.

James Davis, District Attorney, and Tebbe, Tebbe & Correia, all of Yreka, for respondent.

DEIRUP, Justice pro tem., delivered the opinion of the court.

[1] This action was instituted by appellant against certain physicians and nurses and also against the County of Siskiyou to recover damages alleged to have been received by him by reason of negligence on the part of the doctors and nurses. It is alleged in the amended complaint that the respondent County of Siskiyou has built and maintains a general hospital in the city of Yreka; that there is no other general hospital in that vicinity; and that the majority of the patients who enter the hospital are pay patients and that the hospital is operated at a profit. Appellant, upon the advice of his physicians, went to the hospital for the treatment of a minor injury to his leg. In the course of the treatment his leg was placed in a bake oven which was used to apply artificial heat and was left in it so long that it was severely burned and had to be amputated. This injury was due to the negligence of appellant's doctors and also to that of the nurses, who were county employees in the hospital. The respondent county demurred to the amended complaint. Its demurrer was sustained without leave to amend, and the allegations that we have referred to must therefore be taken as being true. The appeal is from the judgment which was entered upon the sustaining of the demurrer.

The question involved upon this appeal is, as stated by appellant:

> "Is a County liable for an injury caused by the negligence of its employees in a hospital operated by the County at a profit, where such County Hospital furnishes the only hospital facilities available in the community and the injured person was a paying patient."

[2] In another form, the question is whether the county acts in a governmental capacity or in a proprietary capacity when it conducts such a hospital under such circumstances, for it is axiomatic that neither the state nor any governmental agency of the state is liable for the negligence of its agents or employees who are engaged in the performance of governmental functions unless such liability is imposed by statute, which is not the case here, or has the effect of taking property for a public use without compensation.

[3] Sections 200–204 of the Welfare and Institutions Code, St.1937, pp. 1016, 1017, authorize the board of supervisors of each county to provide for the care and maintenance of the indigent sick and dependent poor of the county; to appoint a physician; to furnish hospitalization and medical care and treatment at cost in private hospitals and to "establish and maintain a county hospital, prescribe rules for

the government and management thereof, and appoint a county physician and other necessary officers and employees thereof, who shall hold office during the pleasure of the board"; and further provide that any expectant mother who is unable to pay for her necessary care must be admitted to such hospital, the cost of such service being a charge against the county of her residence. The purpose of this statute obviously is to empower the board of supervisors to provide for the care of the inhabitants of the county who are actually in need of such care. Authority to build and operate a hospital for profit is not given expressly nor by implication.

Although nothing is said in the statute about making any charge for hospital services, other than that the county in which an expectant mother resides must pay the cost of her hospitalization, it is the practice in many counties to accept pay patients in their general hospitals. The legality of this practice is fully discussed in the case of Goodall v. Brite, 11 Cal.App.2d 540, 54 P.2d 510, 514. From this decision it appears that, although there were enough private hospitals in Kern county to care for all persons in need of hospitalization who could pay for the service, the county had permitted such persons to enter the county general hospital for treatment at rates that were lower than those charged by private hospitals and less than the actual cost to the county. Action was brought by citizens and taxpayers of the county to enjoin this practice. It was held on appeal "that the admission and treatment of patients in the county hospital who, either themselves or through legally responsible relatives, can provide themselves with equally efficient care and treatment in private institutions does not promote the health and general welfare of the citizens of Kern county and is not a proper exercise of the police power of that county and results in the use of public money for private purposes".

On the other hand, it was held further that it was proper for the county to admit to the hospital emergency cases and also persons who could pay a part of the cost of hospitalization, but, upon investigation, were found to be financially unable to meet the charges made by a private institution, and to collect from them as much as they were able to pay, not exceeding the actual cost to the county, for such persons are indigent in a relative sense. Their lives may depend upon proper hospitalization but they cannot get it because of their limited financial resources. By furnishing it to them at cost, or at less than cost if necessary, the county promotes the health and welfare of its citizens.

[4] We find a different situation in Siskiyou County, as alleged in the amended complaint. There are no private general hospitals in the vicinity of the county general hospital at Yreka. Citizens who need hospitalization may be unable to get it without what might be fatal inconvenience and delay if they are not admitted to the county general hospital, even though they are able to pay full rates. Under such circumstances it is proper for the county to furnish the service to such persons, in so far as its facilities permit, because they are in the same situation as the indigent sick in that they cannot obtain the care they need regardless of their ability to pay for it. But they should be compelled to pay as much of the actual cost of hospitalization as they can. The admission of such patients into the county hospital under such circumstances and upon such terms clearly promotes the health and general welfare of the citizens of the county and is therefore within the police powers of the board of supervisors. Such powers, so exercised, are governmental in their character.

Counsel for appellant contend, however, that Siskiyou County has abandoned its governmental function and entered the field of private business by imposing such charges that it makes a profit and should therefore be held liable for negligence to the same extent as a private institution or a municipality which is engaged in a proprietary venture. They rely chiefly upon the case of Henderson v. Twin Falls County, 56 Idaho 124, 50 P.2d 597, 101 A.L.R. 1151. The facts in that case are very much like those in this case, although the matter of profit is not mentioned in the decision. It was held that the county was liable for injuries received by a pay patient through the negligence of employees of a county general hospital. But the statute which authorized the maintaining of a county hospital was different from the corresponding statute of this state in that it provided specifically that: "Such hospital may suitably provide for, and accept other patients insofar as their facilities will permit and may charge and accept payments from such of their patients as are able to make payments for services rendered and care given." Code Idaho 1932, § 30-3303.

Having concluded that the statute authorized the county to engage in the hospital business as a proprietary activity, the supreme court of Idaho held further that the rule that the sovereign is not liable for torts is not applicable to such a venture and that, therefore, the county may be liable for the negligence of its servants. This and other recent decisions hold that the rule of sovereign nonliability, as such, should be abandoned and that a county should be held to the same degree of liability for tort as a municipality in the exercise of a function that is not governmental, but proprietary. Bell v. City of Pittsburgh, 297 Pa. 185, 146 A. 567, 64 A.L.R. 1542; Willcox v. Erie County, 252 App.Div. 20, 297 N.Y.S. 287; Smith v. Westchester County, 253 App.Div. 725, 300 N.Y.S. 201. In this state an irrigation district, as a governmental agency, is free from liability for the negligence of its agents and employees in the delivery of water to the inhabitants of the district. Whiteman v. Anderson Cottonwood Irrigation District, 60 Cal.App. 234, 212 P. 706; Jackson & Perkins Co. v. Byron-Bethany Irr. Dist., 136 Cal.App. 375, 29 P.2d 217, 30 P.2d 516; Morrison v. Smith Bros., Inc., 211 Cal. 36, 293 P. 53. But when, under authority of statute, it sells electric current to the general public in competition with private utilities it becomes liable for negligence in the exercise of that function. Yolo v. Modesto Irr. Dist., 216 Cal. 274, 13 P.2d 908.

[5] In view of these decisions we are not inclined to hold that liability for negligence might not exist as against a county if the legislature empowered it to engage in the hospital business, or in any other business of a proprietary nature. But we do not find such authority in the laws which relate to county hospitals in this state. Here, the operation of the hospital is governmental. Or if we regard it as being charitable in its nature, the county is entitled to the same exemption from liability as is allowed private hospitals which receive pay patients but are not operated for profit. Hallinan v. Prindle, 17 Cal.App.2d 656, 62 P.2d 1075; Armstrong v. Wallace, 8 Cal.App.2d 429, 47 P.2d 740.

[6-11] The imposition of a charge for service is not inconsistent with the exercise of a governmental function. Kellar v. City of Los Angeles, 179 Cal. 605, 178 P. 505; Manning v. City of Pasadena, 58 Cal.App. 666, 209 P. 253; Dillwood v. Riecks, 42 Cal.App. 602, 184 P. 35. Nor is the fact that the county general hospital was operated at a profit controlling. A county is authorized only to furnish hospitalization to those persons within the county who cannot secure it elsewhere. The county can charge only the cost of the service. The board of supervisors have not the power, merely by disregarding the limitations in the law, to admit patients who are not entitled to the service or to charge the persons who should have the service an excessive fee. A governmental agency does not incur liability for negligence by doing an act which is ultra vires. City of Dallas v. Smith, 130 Tex. 225, 107 S.W.2d 872; Tollefson v. City of Ottawa, 228 Ill. 134, 81 N.E. 823, 11 L.R.A.,N.S., 990; Lund v. Salt Lake County, 58 Utah 546, 200 P. 510. If the board of supervisors has exceeded its authority in any respect the remedy is not to impose liability for negligence, but to bring a proper proceeding against it.

We can see no difference in principle between the situation involved in this case and the one dealt with in the case of Davie v. Board of Regents, 66 Cal.App. 693, 227 P. 243. There a governmental agency—the University of California—made a charge against each student for hospital and medical services, surgical operations being performed at cost. In an action of the same nature as the one now before us it was held that the university was acting within the scope of its governmental functions in maintaining the infirmary and in making the charges against the students and, therefore, was not liable for the negligence of its servants. And in that case, just as here, it was alleged in the complaint and admitted by the demurrer that the university derived a profit from the operation of the infirmary.

The judgment is affirmed.

We concur: TUTTLE, J.; THOMPSON, Acting P. J.

14 Cal.2d 762

SILVA v. PROVIDENCE HOSPITAL OF OAKLAND.

S. F. 16229.

Supreme Court of California.

Dec. 28, 1939.

Rehearing Denied Jan. 25, 1940.

1. Contracts 🔑4

A true "implied contract" consists of obligations arising from a mutual agreement and intent to promise where agreement and promise have not been expressed in words. Civ.Code, § 1621.

[Ed. Note.—For other definitions of "Implied Contract," see Words & Phrases.]

2. Novation 🔑1

Conduct may form basis for "novation" although there is no express writing or agreement.

[Ed. Note.—For other definitions of "Novation," see Words & Phrases.]

3. Assignments 🔑109

The assignee of contract becomes bound to perform its obligations without express agreement when full performance has been received by him.

4. Contracts 🔑4, 28(2)

Before a contract may be "implied" it must be determined, as a question of fact, whether parties acted in such manner as to provide necessary foundation for contract, and evidence can be introduced to rebut inferences and show that there is another explanation for the conduct. Civ.Code, § 1621.

5. Charities 🔑45(2)

The acceptance of services of charitable hospital by patient paying the full amount demanded for such services does not thereby give rise to "implied contract" exempting hospital from responsibility for tortious wrongdoing. Civ.Code, § 1621.

6. Negligence 🔑8

A person is not required to assist a stranger, even though such person can do so by a mere word and without the slightest danger to himself, but person who once undertakes to render assistance must thereafter exercise care toward stranger.

7. Charities 🔑45(2)

A charitable hospital was liable for injuries suffered by pay patient who fell and fractured her hip as result of negligence of hospital nurse in not equipping bed with side board.

SHENK, J., dissenting.

In Bank.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Elizabeth Silva against the Providence Hospital of Oakland, a corporation, for injuries sustained when the plaintiff fell and fractured her hip by reason of negligence of hospital nurse in failing to equip plaintiff's bed with a side board while the plaintiff was a patient in the hospital. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

Prior opinion, 87 P.2d 374.

Weinmann, Quayle & Berry, of Oakland, and Herbert Chamberlin, of San Francisco, for appellant.

Gibson, Dunn & Crutcher, Norman S. Sterry, and Philip C. Sterry, all of Los Angeles, amici curiae.

H. Raymond Hall and Edward J. Silver, both of Oakland, for respondent.

EDMONDS, Justice.

By this appeal, Providence Hospital of Oakland seeks to avoid liability for damages awarded to the plaintiff because of personal injuries suffered by her while under its care, upon the ground that it is a charitable institution.

The facts in the case are practically undisputed. Almost four years ago, while the plaintiff was a patient in the hospital and paying the amounts charged by it for the services rendered to her, she fell and fractured her hip by reason of the negligence of the hospital nurse in failing to equip her bed with a side board. The hospital concedes the sufficiency of the evidence to support the findings on the issues of negligence, but it challenges the findings and conclusions of law upon a special defense of exemption from liability.

In its answer, the hospital alleged that since 1903, when it was incorporated under the laws of this state, it has been, and now is, a nonprofit corporation; that its object and purpose is to erect and maintain one or more hospitals to provide medical and surgical care for sick and disabled persons; that it has no capital stock; that its members and officers derive no pecuniary profit from the operation of the hospital and serve without pay; that poor and needy persons are admitted to the hospital without distinction of class or creed; and that charity patients are afforded the same treatment as patients who pay for services rendered.

Evidence offered in support of this defense established the facts alleged. The appellant also proved that the hospital is one of those owned by the Sisters of Charity of Montreal, Quebec, and is operated and controlled by members of that order. After acquiring land it erected a hospital building with money borrowed from the Roman Catholic Archbishop of San Francisco. Thereafter, solely from the profits of the hospital, it paid off this indebtedness, acquired a new site and commenced the erection of a second hospital. At this time, it had $60,000 in cash in addition to the two properties.

In 1926, when the new building was completed, the assets of the corporation were considered by it to be worth $1,675,000. At the time of the trial it still had those assets subject to an indebtedness of $949,000. In 1936, the year of Mrs. Silva's injury, its income from patients was sufficient to meet all of its operating expenses, taxes and interest and to pay $11,000 on its indebtedness. From the testimony of the treasurer it appears that six per cent of the patients are cared for as a matter of charity, thirty per cent pay the charges of the hospital in part, and the balance, sixty-four per cent, pay their bills in full. It also maintains a clinic on a "straight charity basis".

When Elizabeth Silva, then a woman over seventy years of age, required hospital care, her daughter decided to take her to the respondent's institution. No special rates for pharmaceutical supplies, X-rays or surgery were mentioned. So far as she was informed, the hospital did not agree to furnish any care or treatment "at less than the regular profitable rate".

The appellant contends that it is a charitable organization, and that as there is no claim that it did not use due care in the selection and retention of its employees, it is exempt from liability for tort. This contention presents squarely for decision the question whether a charitable corporation is liable for harm tortiously inflicted by an employee acting within the scope of his employment.

In many states, corporations organized for charitable purposes and operating as such enjoy immunity with respect to liability for wrongs occurring through the negligence of their servants and employees, if those employees have been selected and retained in the exercise of due care. However, there is much inconsistency and confusion among the decisions which follow this rule, due in large measure to the fact that the courts do not all base it upon the same theory. Possibly the one most generally stated is the so-called trust fund doctrine, first announced by an English court in 1848. Heriot's Hospital v. Ross, 12 Clark & F. 507; 8 Eng. Reprint 1508. According to this view the patron deals with the charity upon the condition that the trust assets are not available to him for the payment of damages. Another theory upon which the rule of nonliability has been based is that by implied contract one who accepts the services or care of a corporation organized and operating for charitable purposes waives his right to hold it liable for tort. Other courts have held that such an organization should not be held liable for tort upon the ground of public charity.

The defense here relied upon was raised as early as 1914 in the case of Thomas v. German Gen., etc., Soc., 168 Cal. 183, 141 P. 1186, which arose when an employee of a hospital was injured by falling into an elevator shaft. A judgment for the plaintiff was reversed upon the ground that the injury was caused by the negligence of a fellow servant, which at that time was a bar to recovery in such an action. However, the court mentioned a contention of the hospital that the action would not lie against it because of the rule exempting charitable institutions from liability for torts. In agreeing with that contention it said "that where one accepts the benefit of a public or of a private charity he exempts by implied contract the benefactor from liability for the negligence of the servants in administering the charity, if the benefactor has used due care in the selection of those servants." 168 Cal. page 188, 141 P. page 1188.

This statement was characterized as dictum in the later case of Stewart v. California Medical, etc., Ass'n, 178 Cal. 418, 176 P. 46, decided four years later, where it was pointed out that the Thomas case was decided upon the ground that the defendant was not liable under the rules governing ordinary business corporations.

However, although the court discussed the doctrine which exempts a charitable corporation from liability, it affirmed the judgment in favor of Stewart upon the ground that the evidence showed that the institution was in fact operated for profit. Therefore, all that is stated in the opinion in this second case concerning the various theories of nonliability is also dicta.

On the other hand, in a number of cases the District Courts of Appeal have held that a corporation operating a hospital for charitable purposes is not liable under the doctrine of respondeat superior if it exercises ordinary care in the selection of its servants. Apparently, the question was first raised by the case of Burdell v. St. Luke's Hospital, 37 Cal.App. 310, 173 P. 1008, in which this court denied a hearing the day before it decided the Stewart case. A husband and wife sued for damages on account of injuries suffered while the wife was a patient in the hospital, paying the regular rates for the services rendered to her. Upon a showing similar to that made by the Providence Hospital, the court upheld the action of the superior court in directing a verdict for the defendant, quoting from the Thomas case as authority for the proposition that one who accepts the benefits of a hospital operated for charitable purposes "exempts by implied contract the benefactor from liability". The fact that the plaintiff was a paying patient did not change the rule of nonliability, said the court, because she was to some extent the beneficiary of the charity dispensed by the hospital.

Although indirectly presented, the question was also considered and passed upon in Levy v. Superior Court, 74 Cal.App. 171, 239 P. 1100. An officer of a hospital which had been sued for damages by a former patron was adjudged guilty of contempt for refusing to answer questions asked him when his deposition was taken. On a review of the contempt proceeding, it was contended that the rule of exempting a charitable organization for the negligent acts of its employees had not been adopted in this state, and as the hospital carried insurance indemnifying it against such liability, the reason for the rule failed. In answer to this contention, the court pointed out that charitable organizations have been relieved from liability upon the principle that a trustee may not deplete the trust fund set aside for charity by using it to pay damages caused by the tortious acts of those charged with the administration of the trust, and held that the protection afforded by this rule could not be infringed upon by the acts of a trustee in procuring insurance. As the court also held that no action could be maintained upon the policy which had been issued to the hospital until the plaintiff recovered a judgment against the insured, it may be said that the case was decided upon that point, which was controlling. However, the decision recognizes, even if it does not apply, the rule exempting charitable organizations from liability upon the trust fund doctrine.

In Stonaker v. Big Sisters Hospital, 116 Cal.App. 375, 2 P.2d 520, a judgment based upon a verdict directed in favor of the defendant hospital was affirmed on the authority of the Burdell case. Later, a hospital, in unsuccessfully urging that an order granting defendants' motion for a nonsuit in a suit brought against it be affirmed, contended that it was a charitable institution, but the court said that "this is an affirmative defense, the burden to prove which rests with the defendant". Inderbitzen v. Lane Hospital, 124 Cal.App. 462, 466, 12 P.2d 744, 746, 13 P.2d 905.

Judgments against the Palo Alto Hospital were affirmed in Baker v. Board of Trustees, etc., 133 Cal.App. 243, 23 P.2d 1071, 1072, upon the ground that it "was not formed and maintained for charitable purposes". Some time later the Long Beach Community Hospital was absolved from liability. Citing the Thomas, Burdell and Stonaker cases, the court held that "the character of respondent association as a charitable institution being established, the trial court properly directed a verdict in its favor if it exercised due care in the selection of its servants. * * *" Ritchie v. Long Beach Community Hospital Ass'n, 139 Cal.App. 688, 34 P.2d 771, 772.

The next case, Shane v. Hospital of the Good Samaritan, 2 Cal.App.2d 334, 37 P.2d 1066, is of particular interest because it was brought by a minor to recover damages for injuries alleged to have been sustained on the day of her birth through the negligence of a nurse. On the child's behalf it was urged that although the doctrine exempting charitable institutions from liability for injuries suffered by a patron through the negligence of an employee had been recognized in this state upon the theory of an implied contract, because of the plaintiff's minority the rule could not bar a recovery by her. In answer to this contention the court pointed out that charitable institutions have been held not liable for tort upon four different theories. These, it said, are, first, that of implied contract; second, that funds provided for the maintenance of a charity are contributed for a specific purpose which does not include the payment of claims for damages suffered through negligence; third, the relation of the employee to the patient does not bring the case within the rule of respondeat superior; and, fourth, that it is contrary to public policy to allow funds contributed for the maintenance of a charitable institution to be used for the payment of damage claims.

The reasons advanced for these conclusions, said the court, are irreconcilable. However, relying upon what it declared to be the "direct holding" of the Stewart case "that the Thomas Case is not to be regarded as establishing in California the doctrine of 'implied contract' as the basis for the rule of nonliability", it said there was no necessity "to make a judicial declaration as to the doctrine which should be considered as forming the proper basis for the rule. * * * If it can be successfully urged that a proper determination of the question requires a declaration of the theory or basis upon which the rule may be foundationed, reason and the weight of authority would furnish an adequate basis in the doctrine of public policy, the considerations in support of which would seem to be more convincing and less vulnerable to attack than those advanced in support of any of the other theories which have had judicial sanction." 2 Cal.App.2d pages 339, 340, 37 P.2d page 1068.

Another action brought against a hospital by a patron who paid regular rates is Armstrong v. Wallace, 8 Cal.App.2d 429, 47 P.2d 740. After stating that the plaintiff's right to recover was governed by the rules stated in the Thomas and Burdell cases, the court held that the plaintiff had no right of action. But a judgment for the defendant, given upon granting a motion for a directed verdict, was reversed in the case of England v. Hospital of Good Samaritan, 16 Cal.App.2d 640, 61 P.2d 48, 50. The jury should have been allowed to decide, said the court, whether the hospital was in fact conducted for profit, as charged by the plaintiff, or was operated only for charity. But it also said: "We cannot hold that one who, without knowledge that a hospital claims to be a charitable institution and therefore exempt from liability, applies for admission and is received as a patient, paying the regular rates at which the hospital derives a profit, is without redress for injuries occasioned by negligence on the part of the employees of the hospital on the theory that he is accepting the benefits of charity from a benefactor." This conclusion was based entirely upon the statement in the Stewart case [178 Cal. 418, 176 P. 48] that if the rule of nonliability were followed, "the defendant could hardly claim to be * * * relieved of responsibility, for the reason that the plaintiffs had no knowledge whatever of the charitable character of the organization".

In the last case of this character, Hallinan v. Prindle, 17 Cal.App.2d 656, 62 P.2d 1075, a judgment in favor of the plaintiff, who had been a paying patient, was reversed. However, the decision was limited to the question whether the hospital was conducted as a charity. "It is not disputed," said the court, "that if properly classed as such it cannot be held liable for the negligent acts of its employees if it has used due care in their selection * * *." 17 Cal.App.2d page 669, 62 P.2d page 1081.

Although practically all of the reported cases in California concern the rights of a hospital in a suit brought by a patron to recover damages, other charitable organizations have also claimed exemption from liability. For example, in Young v. Boy Scouts of America, 9 Cal.App.2d 760, 51 P.2d 191, the plaintiff was denied a recovery upon the authority of the Thomas, Stewart and Ritchie cases. Later, a church which operated a boys' club was relieved from liability. Bardinelli v. Church of All Nations, 23 Cal.App.2d 713, 73 P.2d 1264.

The rule of nonliability has also been urged in defense of suits brought against charitable organizations by employees and persons, not patrons, who were injured through the negligence of an employee. In the case of Phoenix Assur. Co. v. Salvation Army, 83 Cal.App. 455, 256 P. 1106, the plaintiff's assignors were injured when an employee of the charity negligently operated an automobile. A judgment for the plaintiff was affirmed notwithstanding the defendants' claim that it was exempt from liability "because of the purposes for which it exists, and because of the trust character of the funds at its disposal." Pointing out that "the cases in the other states of the Union are in hopeless irreconcilability" and "the courts of this state have never espoused either side of the discussion", Presiding Justice Works said: "The courts which have declared for the exemption of a charitable institution from liability for torts of which strangers to the charity are the victims, have shown an unnecessary solicitude for the welfare of such organizations and of their beneficiaries. * * * We think this state should not be added to the list of those whose courts have encouraged—as in some degree they surely have—the agents of charitable institutions to render less than due care for the security of life, limb and property, the very things which it is the sole purpose of such institutions to preserve and protect." 83 Cal.App. pages 461, 462, 256 P. page 1109.

Summarizing these decisions, it is apparent that the District Courts of Appeal have followed the dicta of this court in the Thomas and Stewart cases except in Phoenix Assur. Co. v. Salvation Army, supra, and England v. Hospital of Good Samaritan, supra. In the first case, the doctrine that a charitable organization should have exemption was expressly repudiated so far as strangers to the trust are concerned; in the later one the same court refused to apply it against a paying patient who was not shown to have knowledge of the hospital's asserted charitable character. And although the rule was recognized in the comparatively recent decision of Lewis v. Young Men's Christian Ass'n, 206 Cal. 115, 273 P. 580, the court said, quoting from the Thomas case, that the defendant could not rely upon it in the absence of allegation and proof, as an affirmative defense, that reasonable care was used in selecting the servants whose negligence caused the injuries for which damages were claimed.

Apparently all of the cases, except Levy v. Superior Court, supra, and Shane v. Hospital of the Good Samaritan, supra, decided by the District Courts of Appeal which hold that a charitable organization should not be liable upon the principle of respondeat superior, are based upon the theory of implied contract as stated by this court in the Thomas case. In the Levy case the trust fund doctrine was said to be controlling. Because of the minority of the plaintiff in the Shane case, the court mentioned three other theories, but declined to choose between them other than to say that "reason and weight of authority would furnish an adequate basis in the doctrine of public policy".

Considering these various legal principles, the first, in point of time, was announced about one hundred years ago, when the English courts held that as property donated and held for charitable purposes constitutes a trust fund, it would be inconsistent to allow that property to be used for the payment of tort claims. Heriot's Hosp. v. Ross, 12 Clark & F. 507, 8 Eng. Reprint 1508; Holliday v. Vestry of St. Leonards, 142 Eng. Reprint 769. This doctrine has been followed in the United States (Parks v. Northwestern University, 218 Ill. 381, 75 N.E. 991, 2 L.R.A.,N.S., 556, 4 Ann.Cas. 103; Adams v. Univ. Hosp., 122 Mo.App. 675, 99 S.W. 453; Eads v. Y. W. C. A., 325 Mo. 577, 29 S.W.2d 701; Powers v. Homeopathic Hosp., 1 Cir., 109 F. 294, 65 L. R.A. 372), although the same court which first stated it, later declared that the rule is too unsatisfactory for continued approval. Mersey Docks & Harbor Trustee v. Gibbs, L. R. 1 Eng. & Irish App. Cases 93, 11 H. L. Cases 686, 11 Eng. Reprint 1500. The theory has also been examined and repudiated by a number of American courts. Hospital of St. Vincent v. Thompson, 116 Va. 101, 81 S.E. 13, 51 L.R.A.,N.S., 1025; Henry W. Putnam Memorial Hosp. v. Allen, 2 Cir., 34 F.2d 927; Bruce v. Y. M. C. A., 51 Nev. 372, 277 P. 798; Cohen v. Gen. Hosp., 113 Conn. 188, 154 A. 435; Basabo v. Salvation Army, 35 R.I. 22, 85 A. 120, 42 L.R.A.,N.S., 1144; Kellogg v. Church Charity Foundation, 128 App.Div. 214, 112 N.Y.S. 566. Certainly it is inconsistent with the usual rules concerning trust funds, which have been held liable for tort claims arising because of the negligence of carefully selected servants (In re Raybould, [1900] 1 Ch. 199; In re Hunter, D.C., 151 F. 904; 1 Bogert, Trusts, § 87), although judgment must first be obtained against the trustee. Benett v. Wyndham, 4 De.G.F. & J. 258, Hordern v. Salvation Army, 199 N.Y. 233, 92 N.E. 626, 32 L.R.A.,N.S., 62, 139 Am.St.Rep. 889.

The American Law Institute's Restatement of the Law of Trusts summarizes the decisions upon this subject as follows: "A person receiving benefits under a charitable trust against whom a tort is committed in the course of the administration of the trust cannot reach trust property and apply it to the satisfaction of his claim, unless the trustee was personally at fault." In commenting upon this rule, the Restatement declares: "This is true whether the person who was injured paid for the benefits which he received or not." Sec. 402e.

It is conceded that the foregoing summarizes the conclusions which have been reached in a large majority of the cases upon this question. However, the illustration given by the Institute of the rule's application assumes that "A bequeaths money to B in trust to establish and maintain a hospital." This goes back to the theory upon which the rule was first promulgated in England, that where one endows a hospital for charitable purposes, the money or property of the trust cannot be used to pay damages awarded to one who suffers injuries at the hands of an employee in whose selection due care has been used. But the modern hospital is rarely maintained upon the donation of one charitably disposed individual. It is a business enterprise, which although it may be the recipient of some donations, is able to carry on its work because the aggregate amount received from paying patients is sufficient to meet the expense of ministering to those patients and also to a certain number who are accepted at a reduced rate or without any charge.

The appellant is a typical example of such an organization. Although the Sisters of Charity originally contributed some capital to their enterprise in buying the land upon which the first hospital buildings were erected, they have since acquired property of very substantial value from the institution's operations. It is probably typical of many other hospitals which through good management and the support of a particular group of citizens, have made a financial success. Such institutions are most necessary for human welfare. But the change in their status from that of the hospital founded upon one person's generosity, which was in existence at the time the trust fund doctrine was first announced, to the modern organization which in its economic aspects is nonprofit rather than charitable in character, is unquestionably the reason why some courts no longer follow the doctrine of nonliability. Those which cling to the old rule see only an institution founded, as described in the Restatement, when "A bequeaths money to B in trust to establish and maintain a hospital" and apply that rule without a thorough consideration of fundamental principles which present-day needs require.

However, the most severe criticism of the trust fund theory is that, if logically applied, the property of the charitable organizations must enjoy complete immunity from all claims, regardless of the status of the injured plaintiff. Hospital of St. Vincent v. Thompson, 116 Va. 101, 81 S.E. 13, 51 L.R.A.,N.S., 1025; Thomas v. German Gen., etc., Soc., 168 Cal. 183, 141 P. 1186; Phoenix Assur. Co. v. Salvation Army, 83 Cal.App. 455, 256 P. 1106; Love v. Nashville Agrl. & Normal Institute, 146 Tenn. 550, 243 S.W. 304, 23 A.L.R. 887. If one paying the rates charged by a hospital for care may not recover for negligence because the institution is organized for charitable purposes, the trust fund rule should logically bar a recovery by one who is not a patron of the institution, such as a person injured by an automobile driven by the organization's servant, or an employee injured during the course of his employment. Yet in most jurisdictions all persons except patrons are allowed a right to recover in a tort action. (Actions by third persons—Phoenix Assur. Co. v. Salvation Army, supra; Basabo v. Salvation Army, 35 R.I. 22, 85 A. 120, 42 L.R.A.,N.S., 1144; Murtha v. New York H. M. Col. & Flower Hospital, 228 N.Y. 183, 126 N.E. 722. Actions by servants—Cowans v. North Carolina Baptist Hospitals, 197 N.C. 41, 147 S. E. 672; Geiger v. Simpson M. E. Church, 174 Minn. 389, 219 N.W. 463, 62 A.L.R. 716. Also patrons may recover against the trust fund if the hospital was negligent in selecting its employees (Lewis v. Y. M. C. A., 206 Cal. 115, 117, 273 P. 580; Georgia Baptist Hosp. v. Smith, 37 Ga.App. 92, 139 S.E. 101; Tribble v. Missionary Sisters of S. H., 137 Wash. 326, 242 P. 372), which is likewise inconsistent with the theory that property devoted to a charitable purpose may not be dissipated by the payment of damages for torts.

[1–3] Another theory which has been stated in support of the rule of exemption is that of implied contract. Such a contract, as defined by the Civil Code, "is one, the existence and terms of which are manifested by conduct". Sec. 1621. "In general an implied contract, in no less degree than an express contract, must be founded upon an ascertained agreement of the parties to perform it, the substantial difference between the two being in the mere mode of proof by which they are to be respectively established. The law will imply that a party did make such a stipulation as under the circumstances disclosed, he ought, upon the principles of honesty, justice, and fairness to have made. Of course all the circumstances actually surrounding the parties in the particular transactions are to be carefully considered before this implication of a promise is to be indulged." Smith v. Moynihan, 44 Cal. 53, 62, 63; Jennings v. Bank of California, 79 Cal. 323, 21 P. 852, 5 L.R.A. 233, 12 Am.St.Rep. 145; Sacramento Box & Lumber Co. v. Rosenberg Bros. & Co., 109 Cal.App. 56, 292 P. 146; Addison's Law of Contracts, 11 ed., 447. The true implied contract, then, consists of obligations arising from a mutual agreement and intent to promise where the agreement and promise have not been expressed in words. Dunham, Carrigan & Hayden Co. v. Rubber Co., 84 Cal.App. 669, 258 P. 663; Williston on Contracts, vol. 1, sec. 3. For example, conduct may form the basis for a novation although there is no express writing or agreement (Producers' Fruit Co. v. Goddard, 75 Cal. App. 737, 243 P. 686); the assignee of a contract becomes bound to perform its obligations without express agreement when full performance has been received by him (Weidner v. Zieglar, 218 Cal. 345, 23 P.2d 515; Robinson v. Rispin, 33 Cal.App. 536, 165 P. 979); the assumption of a mortgage debt may be implied. Hopkins v. Warner, 109 Cal. 133, 41 P. 868; White v. Schader, 185 Cal. 606, 198 P. 19, 21 A.L.R. 499. In many other situations, the law will impose certain legal consequences from the conduct of the parties.

[4, 5] However, before a contract may be implied, it must be determined, as a question of fact, whether the parties acted in such a manner as to provide the necessary foundation for it, and evidence may be introduced to rebut the inferences and show that there is another explanation for the conduct. Wojahn v. National Union Bank, 144 Wis. 646, 129 N.W. 1068; Carlson v. City of Marshalltown, 212 Iowa 373, 236 N.W. 421; Sacramento Box & Lumber Co. v. Rosenberg Bros. & Co., 109 Cal. App. 56, 292 P. 146; 33 Harv.L.Rev. 376. But in exempting a charitable organization from liability on the basis of implied contract, courts have required only proof concerning the eleemosynary character of the corporation. Shane v. Hospital of Good Samaritan, 2 Cal.App.2d 334, 37 P.2d 1066; Hallinan v. Prindle, 17 Cal.App.2d 656, 62 P.2d 1075. It is said that by accepting the services of a hospital which is not organized for profit but to benevolently serve the public, one impliedly exempts "the benefactor" from liability, even if he pays the full amount demanded for the services rendered to him. This is fallacious reasoning which can only be justified by ignoring the principles governing implied contract.

To find an implied contract by the patron in the purpose of the charitable organization is to entirely disregard other factors which should be considered in determining whether any such agreement may be inferred from the conduct of the parties. There is no reason for a court to say that admission to a hospital is proof of an intention not to charge it with responsibility for tortious wrongdoing. Indeed, the agreement to pay the rates charged by the hospital for its services would ordinarily be sufficient basis for the opposite inference; certainly it is a strong indication that the patient did not agree that the charity should be exempt if injury resulted from the failure of its servants to act with ordinary care. England v. Hospital of the Good Samaritan, supra. There may be other acts and circumstances which would also tend to show that the patient had no such intentions. Moreover, the fact that the rule of nonliability has been consistently stated as relieving the charity if its servants have been selected with due care, indicates that the implied contract doctrine has been used to rationalize a result and is not based upon the intention of the parties, as legal principle requires.

[6] Some courts have denied recovery against a charitable organization upon the ground that the rule of respondeat superior should not be applied to it because the institution receives no private benefit from the acts of its servants. But no one is obliged by law to assist a stranger, even though he can do so by a mere word, and without the slightest danger to himself. However, once he has undertaken to render assistance the law imposes upon him a duty of care toward the person assisted. Restatement of Law of Torts, sec. 324; McLeod v. Rawson, 215 Mass. 257, 102 N. E. 429, 46 L.R.A.,N.S., 547; Hoyt v. Til-

ton, 81 N.H. 477, 128 A. 688; Owl Drug Co. v. Crandall, Ariz., 80 P.2d 952, 120 A.L.R. 1525.

It has also been said that public policy either allows or requires the exemption of charities from tort liability. Duncan v. Nebraska Sanitarium & Benevolent Ass'n, 92 Neb. 162, 137 N.W. 1120, 41 L.R.A., N.S., 973, Ann.Cas.1913E, 1127; Currier v. Trustees of Dartmouth College, C.C., 105 F. 886; Morrison v. Henke, 165 Wis. 166, 160 N.W. 173. According to this view, the charity must be preserved for the public benefit. However, Professor Harper, in his book "The Law of Torts", points out that "the immunity of charitable corporations in tort is based upon very dubious grounds". Continuing, he concludes: "It would seem that a sound social policy ought, in fact, to require such organizations to make just compensation for harm legally caused by their activities under the same circumstances as individuals before they carry on their charitable activities. The policy of the law requiring individuals to be just before generous seems equally applicable to charitable corporations. To require an injured individual to forego compensation for harm when he is otherwise entitled thereto, because the injury was committed by the servants of a charity, is to require him to make an unreasonable contribution to the charity, against his will, and a rule of law imposing such burdens can not be regarded as socially desirable nor consistent with sound policy." Sec. 294.

[7] No rule of law may be justified if the theories advanced to support it lack a foundation of legal principle, and, as has been shown, the exemption of a charitable organization from liability for injuries suffered by a paying patient through the negligence of an employee would logically require the same exemption from the tort claims of others. That many courts have refused to consistently apply the rule of nonliability is conclusive evidence of the fallacious reasoning which is advanced in its behalf. On the contrary, other courts have declared that the charitable organization must respond in damages to the paying patient whom it injures. Mulliner v. Evangelischer Diakonniessenverein, 144 Minn. 392, 175 N.W. 699; Tucker v. Mobile Infirmary Ass'n, 191 Ala. 572, 68 So. 4, L.R. A.1915D, 1167; City of Shawnee v. Roush, 101 Okl. 60, 223 P. 354; University of Louisville v. Hammock, 127 Ky. 564, 106 S. W. 219, 14 L.R.A.,N.S., 784, 128 Am.St. Rep. 355; Sessions v. Thomas Dee Memorial Hospital Ass'n, 89 Utah 222, 51 P.2d 229; Gilbert v. Corp. of Trinity House, L. R. 17 Q.B.Div. 795. This is not only the modern view but the one required by every principle of common justice. As one court has said: "It is a principle of law, as well as morals, that men must be just before they are generous." Tucker v. Mobile Infirmary Ass'n, supra [191 Ala. 572, 68 So. 12, L.R.A.1915D, 1167].

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; GIBSON, J.; CARTER, J.

I concur in the judgment: HOUSER, J.

SHENK, Justice (dissenting).

I dissent.

I cannot agree with the prevailing opinion for two principal reasons. In the first place, I challenge the test of exemption from liability based on the ability of the patient to pay. A poor man is just as much entitled to good treatment at a hospital as a rich one and is just as much in need of it. Compare Robinson v. Pioche, 5 Cal. 460, 461.

In the second place the reasoning and conclusions of the prevailing opinion are contrary to the declared policy of this state and the overwhelming weight of authority elsewhere on the question of exemption from liability of charitable institutions. If such an important change in state policy, affecting as it does the substantive rights of the parties to this type of litigation, is to be brought about, it should be done by the legislature and not by the courts.

An extensive research has disclosed that the prevailing rule, though based on varying reasons, favors the exemption of charitable institutions from liability to the beneficiaries thereof, either pay or nonpay, for the torts of servants who have been carefully selected. Identity of conclusion reached, though by different reasoning, may be accepted as strong proof of the correctness of the rule. It is reasonably safe to say that less than eight states have held that charitable institutions are liable for the negligence of their employees on the same basis as private profit-making corporations. Among the small number of jurisdictions appearing to so declare are Alabama, Oklahoma, Minnesota, Florida, Georgia and

Rhode Island, the latter apparently having by statute since adopted the majority rule as regards charitable hospitals. Southern Meth. Hosp. v. Wilson, 45 Ariz. 507, 46 P. 2d 118, 121; St. Vincent's Hospital v. Stine, 195 Ind. 350, 144 N.E. 537, 33 A.L.R. 1369, 1370. Practically all of the remaining states, on one ground or another, have granted exemption to charitable hospitals from tort liability for the negligence of their servants at least as regards the beneficiaries of such charity, whether they be nonpaying, true charity patients or patients obtaining the benefit of the charity's facilities though paying all or a part of the rate established by it for those financially able to pay. We are not here concerned with the liability or nonliability of a charitable institution to its employees or to strangers who have not in any way availed themselves of its facilities. It is interesting to note, however, that most of the jurisdictions which grant exemption as to the two classes of beneficiaries just above mentioned, deny such exemption as to employees of and strangers to the charity. Phoenix Assur. Co. v. Salvation Army, 83 Cal.App. 455, 256 P. 1106 (stranger injured on street by defendant's automobile). It is not necessary to consider or determine the propriety of the rule which denies exemption in the case of employees and strangers. That problem is not here involved.

In applying the general doctrine of exemption as regards beneficiaries of a charity practically all jurisdictions do so upon the premise that the charitable institution as a part of its affirmative defense of nonliability has established that it exercised due care in the selection of the servant or employee whose negligence is sought to be imputed to it. In other words, the authorities generally recognize that such an institution is not liable for the negligence of its servants if it has exercised reasonable care in their selection and retention. Lewis v. Y. M. C. A., 206 Cal. 115, 116, 273 P. 580; Roberts v. Ohio Valley Gen. Hosp., 98 W. Va. 476, 127 S.E. 318, 42 A.L.R. 968; Ritchie v. L. B. Com. Hosp., 139 Cal.App. 688, 691, 34 P.2d 771; Old Folks Home v. Roberts, 83 Ind.App. 546, 149 N.E. 188; Carver C. College v. Armstrong, 103 Okl. 123, 229 P. 641; 109 A.L.R. 1202. Upon the trial of the present cause the plaintiff conceded that the defendant hospital had exercised due care in the selection of its nurses.

Research discloses that the cases applying the exemption doctrine fall into several categories. The first group bases the rule on what is known as the "trust fund theory". Parks v. Northwestern University, 218 Ill. 381, 75 N.E. 991, 993, 2 L.R.A.,N.S., 556, 4 Ann.Cas. 103, is typical of the cases basing the rule on this theory and expounds it as follows: "The funds and property thus acquired are held in trust, and cannot be diverted to the purpose of paying damages for injuries caused by the negligent or wrongful acts of its servants and employés to persons who are enjoying the benefit of the charity. An institution of this character, doing charitable work of great benefit to the public without profit, and depending upon gifts, donations, legacies, and bequests made by charitable persons for the successful accomplishment of its beneficial purposes, is not to be hampered in the acquisition of property and funds from those wishing to contribute and assist in the charitable work by any doubt that might arise in the minds of such intending donors as to whether the funds supplied by them will be applied to the purposes for which they intended to devote them, or diverted to the entirely different purpose of satisfying judgments recovered against the donee because of the negligent acts of those employed to carry the beneficent purpose into execution."

Other cases espousing this theory or reason as the basis of the exemption rule are: Adams v. Univ. Hosp., 122 Mo.App. 675, 99 S.W. 453; Gable v. Sisters of St. Francis, 227 Pa. 254, 75 A. 1087, 136 Am. St.Rep. 879; Roosen v. Peter Bent Brigham Hosp., 235 Mass. 66, 126 N.E. 392, 14 A.L.R. 563; Parks v. Northwestern Univ., 218 Ill. 381, 75 N.E. 991, 2 L.R.A.,N.S., 556, 4 Ann.Cas. 103; Cook v. Norton Mem. Infirmary, 180 Ky. 331, 202 S.W. 874, L.R.A.1918E, 647; Jensen v. Maine E. & E. Inf., 107 Me. 408, 78 A. 898, 33 L.R.A., N.S., 141; 10 Am.Jur. 695, sec. 146. It is true, as pointed out in the majority opinion, that the trust fund theory has been criticized in some jurisdictions of late years upon the ground that the early English cases first pronouncing it (Heriot's Hosp. v. Ross, 8 Eng.Reprints 1508; Holliday v. Vestry of St. Leonard's 142 Eng.Reprint 769) have been disapproved in principle (Mersey Docks Trustees v. Gibbs, 11 Eng. Reprint 1500), and upon the further ground that no diversion of trust funds may logically be said to result from payment of damage claims, for the donor reasonably must have contemplated such claims being made against an operating charity. However, in spite of such criticism, the "trust fund theory" of charitable exemption finds definite expression in the American Law Institute's Restatement of the Law of Trusts wherein, after recognizing the exceptions above mentioned as to employees and strangers, it is declared in section 402, subdivision 3, that "A person receiving benefits under a charitable trust against whom a tort is committed in the course of the administration of the trust cannot reach trust property and apply it to the satisfaction of his claim, unless the trustee was personally at fault." (This last qualifying phrase would cover the situation, mentioned above, where there has been a lack of care in the selection of the employee.) In comment "f" thereunder it is stated that "If in the administration of a charitable trust a tort is committed against a person who receives benefits under the trust, he cannot reach trust property and apply it to the satisfaction of his claim if the trustee was not personally at fault. This is true whether the person who was injured paid for the benefits which he received or not. Persons receiving benefits under a charitable trust include such persons as patients in a hospital, pupils in a school, inmates of a home." Among the "illustrations" given under the foregoing comment, is the following: "5. A bequeaths money to B in trust to establish and maintain a hospital. Owing to the negligence of a nurse employed by the hospital, C, a patient, is injured. Whether C is a paying patient or is treated gratuitously, he cannot obtain satisfaction of his claim out of the trust property, if B was not personally at fault." Again, in comment "h" it is pointed out that "A person receiving benefits from the corporation, whether or not he pays for such benefits, cannot maintain an action of tort against the corporation, unless the board of management of the corporation was at fault. * * * Thus, if a charitable corporation is organized to conduct a hospital, a patient in the hospital, whether he is a paying patient or not, cannot maintain an action against the corporation for injuries resulting from negligence, unless the board of management was at fault, as for example, in negligently employing or retaining incompetent employees, or in permitting the premises to be in a dangerous condition, or in failing to make proper rules for the operation of the hospital." In its attempt to minimize the effect of the Restatement, the majority opinion points out that the illustrations given therein have to do solely with endowed charities. Necessarily this is so, for the trust fund theory of charitable exemption from its inception has had particular application to endowed charities. But, as shall presently be shown, there are other theories of exemption applicable alike to all charitable institutions, whether endowed or not. Obviously, charities are not restricted to the endowed type. Regardless of the method of its establishment, the test of whether an institution is charitable is whether it exists to carry out a purpose recognized in law as charitable, or whether it is maintained for gain, profit or private advantage.

Another theory advanced in support of the rule of tort non-liability of charitable organizations is that of "implied waiver". The reasoning underlying this theory is well and succinctly expressed in Powers v. Homeopathic Hospital, 1 Cir., 109 F. 294, 303, 65 L.R.A. 372, wherein it is stated "That a man is sometimes deemed to assume a risk of negligence, so that he cannot sue for damages caused by the negligence, is familiar law. Such * * * are the cases of athletic sports and the like * * *. One who accepts the benefit either of a public or of a private charity enters into a relation which exempts his benefactor from liability for the negligence of his servants in administering the charity; at any rate, if the benefactor has used due care in selecting those servants. To paraphrase the illustration put by the learned judge before whom this case was tried, it would be intolerable that a good Samaritan, who takes to his home a wounded stranger for surgical care, should be held personally liable for the negligence of his servant in caring for that stranger. Were the heart and means of that Samaritan so large that he was able, not only to provide for one wounded man, but to establish a hospital for the care of a thousand, it would be no less intolerable that he should be held personally liable for the negligence of his servant in caring for any one of those thousand wounded men. We cannot perceive that the position of the defendant differs from the case supposed. The persons whose money has established this hospital are good Samaritans perhaps giving less of personal devotion than did he, but, by combining their liberality, thus enabled to deal with suffering on a larger scale. If, in their dealings with their property appropriated to charity, they create a nuisance by themselves or by their servants, if they dig pitfalls in their grounds and the like, there are strong reasons for holding them liable to outsiders, like any other individual or corporation. The purity of their aims may not justify their torts; but, if a suffering man avails himself of their charity, he takes the risks of malpractice, if their charitable agents have been carefully selected." Some of the many other authorities that adopt this theory of "implied waiver" or "implied contract" are: Schloendorff v. Soc. of N.Y. Hosp., 211 N.Y. 125, 105 N.E. 92, 52 L.R.A.,N.S., 505, Ann.Cas.1915C, 581; Jensen v. Maine E. & E. Infirmary, 107 Me. 408, 78 A. 898, 33 L.R.A.,N.S., 141; Hearns v. Waterbury Hosp., 66 Conn. 98, 33 A. 595, 31 L.R.A. 224; McDonald v. Mass. Gen. Hosp., 120 Mass. 432, 21 Am.Rep. 529; Morrison v. Henke, 165 Wis. 166, 160 N.W. 173; Magnuson v. Swedish Hosp., 99 Wash. 399, 169 P. 828; 10 Am.Jur. 694, sec. 145.

In this state most of the authorities that have extended immunity to charitable institutions from tort liability for the acts of their servants have done so upon this theory. In Thomas v. German Gen., etc., Soc., 168 Cal. 183, 188, 141 P. 1186, 1188, though dicta, it was stated by a department of this court that "where one accepts the benefit of a public or of a private charity he exempts by implied contract the benefactor from liability for the negligence of the servants in administering the charity, if the benefactor has used due care in the selection of those servants". This declaration was unnecessary to the decision for the court was of the view that regardless of the rule of exemption the defendant was not liable under the ordinary rules pertaining to corporate liability. Moreover, the rule of exemption from liability was inapplicable in the cited case for the injured plaintiff was an employee of the defendant and, as indicated above, practically all of the authorities deny exemption as to employees of and strangers to the charity. However, the quotation is indicative of this court's leaning toward the well-established rule of charitable exemption.

In the later case of Stewart v. Cal. Med., etc., Ass'n, 178 Cal. 418, 422, 423, 176 P. 46, 48, the court took occasion to refer to the prior ruling and after declaring its status to be that of obiter, stated that it "cannot be considered as having committed this court to any one of the several theories on which the non-liability of charitable corporations is based, or to the doctrine of non-liability", concluding that "It may be noted, however, that if this rule [of exemption based on implied contract] is followed, the defendant could hardly claim to be thereby relieved of responsibility, for the reason that the plaintiffs had no knowledge whatever of the charitable character of the organization." Thus it was indicated that it is improper to imply a contract as against one who is without knowledge of the facts from which the implication arises. It must be conceded that this criticism has been leveled at the "implied contract" theory of exemption by other authorities, particularly those having to do with plaintiffs who were infants or who were brought to the charitable hospital in an unconscious state and therefore in no mental condition to be a party to a contract, implied or otherwise. 10 Am.Jur. 694, sec. 145, and authorities there cited. In answer to this criticism some of the proponents of the "implied contract" theory of exemption have countered with the assertion that the contract is not one implied in fact but in law. Research reveals that no exception was made in favor of minors in the following cases: Weston's Adminx. v. Hosp. of St. Vincent of Paul, 131 Va. 587, 107 S.E. 785, 23 A.L.R. 907; Hogan v. Chicago L. Hosp., 335 Ill. 42, 166 N.E. 461; Parks v. Northwestern Univ., 218 Ill. 381, 75 N.E. 991, 2 L.R.A., N.S., 556, 4 Ann.Cas. 103. In Shane v. Hospital of Good Samaritan, 2 Cal.App.2d 334, 340, 37 P.2d 1066, an order granting a new trial to plaintiff, a minor, was reversed with directions to enter judgment on the verdict for the defendant hospital, there held to be a charitable institution. Regardless of the criticism to which the "implied contract" theory has been subjected it must be held that the discussion and criticism thereof in the Stewart case, supra, was unnecessary for it there definitely appeared, and the trial court had found that the defendant hospital was itself negligent (as distinguished from the negligence of one of its servants) in that it failed to provide the necessary equipment; and further that it had been operated for thirteen years "without having at any time received any charity patients". Obviously, either one of these elements would serve to deprive the hospital there involved of immunity from tort liability for the acts of its servants. The opinion recognized this for it concluded that "It is therefore unnecessary to pass upon the nonliability of public charities for negligence or the reasons therefor."

Since the decisions in the Thomas and Stewart cases, supra, there has accumulated in this state a series of decisions by the District Courts of Appeal (in some of which this court has denied hearings) wherein it is definitely announced that charitable institutions are exempt from tort liability to beneficiaries thereof upon the theory of "implied waiver" or "implied contract". Among the cases so holding, may be cited: Burdell v. St. Luke's Hosp., 37 Cal.App. 310, 173 P. 1008; Stonaker v. Big Sisters Hosp., 116 Cal.App. 375, 379, 2 P.2d 520; Ritchie v. Long Beach Community Hosp., 139 Cal.App. 688, 691, 34 P.2d 771; Armstrong v. Wallace, 8 Cal.App.2d 429, 433, 47 P.2d 740; Bardinelli v. Church of All Nations, 23 Cal.App.2d 713, 715, 73 P.2d 1264. All but the last cited case involved injuries to paying patients in charitable hospitals, as does the present case. The fact that they had paid the established rates was held to be immaterial to the issue of exemption if the institution was charitable in character.

In the citation and discussion of California cases advancing the theory of "implied waiver" or "implied contract" as the reason underlying the doctrine of exemption of charitable institutions, I have purposely refrained from referring to the two decisions in England v. Hosp. of Good Samaritan, appearing in 16 Cal.App.2d 640, 61 P.2d 48, and 22 Cal.App.2d 226, 70 P.2d 692, for that case is now pending in this court and will be disposed of simultaneously with the present case, though by separate opinion. 97 P.2d 813.

A third theory advanced by many of the cases for exempting charitable institutions is based on the asserted inapplicability of the doctrine of respondeat superior. It is well expressed in the case of Hearns v. Waterbury Hosp., 66 Conn. 98, 33 A. 595, 603, 31 L.R.A. 224: "But we think the drift of all the cases clearly indicates a general conviction that an eleemosynary corporation should not be held liable for an injury due only to the neglect of a servant, and not caused by its corporate negligence in the failure to perform a duty imposed on it by law, and we are satisfied that this general conviction rests on sound legal principles. * * * The law which makes one responsible for an act not his own, because the actual wrongdoer is his servant, is based on a rule of public policy. * * * The rule is distinguished as the doctrine of respondeat superior * * * [which] is bottomed on the principle that he who expects to derive the advantage from an act done for him by another must answer for any injury which a third person sustains from it. * * * This defendant does not come within the main reason for the rule of public policy which supports the doctrine of respondeat superior. It derives no benefit from what its servant does, in the sense of that personal and private gain which was the real reason for the rule. Again, so far as the persons injured are concerned, especially if they be patients at the hospital, the defendant does not 'set the whole thing in motion,' in the sense in which that phrase is used as expressing a reason for the rule. Such patient, who may be injured by the wrongful act of a hospital servant, is not a mere third party, a stranger to the transaction. He is rather a participant. The thing about which the servants are employed is the healing of the sick. This is set in motion, not for the benefit of the defendant, but of the public. Surely, those who accept the benefit, contributing also by their payments to the public enterprise, and not to the private pocket of the defendant, assist as truly as the defendant in setting the whole thing in motion. * * * We are now asked to apply this rule, for the first time, to a class of masters distinct from all others, and who do not and cannot come within the reason of the rule. In other words, we are asked to extend the rule, and to declare a new public policy, and say: On the whole, substantial justice is best served by making the owners of a public charity, involving no private profit, responsible, not only for their own wrongful negligence, but also for the wrongful negligence of the servants they employ only for a public use and a public benefit. We think the law does not justify such an extension of the rule of respondeat superior. * * * It is enough that a charitable corporation like the defendant, whatever may be the principle that controls its liability for corporate neglect in the performance of a corporate duty, is not liable, on grounds of public policy, for injuries caused by personal wrongful neglect in the performance of his duty by a servant whom it has selected with due care; but in such case the servant is alone responsible for his own wrong. This result * * * is reached, for one reason or another, by the greater number of courts that have dealt with this particular liability of a corporation for public or charitable purposes."

Research also discloses decisions that advance other and less known theories for exempting charitable institutions. They need not here be mentioned. Regardless of the variant reasons actually expressed in the many cases on the subject, I am convinced that underlying all of them is an expression of public policy, as declared in the last quoted case. In Shane v. Hosp. of Good Samaritan, 2 Cal.App.2d 334, 340, 37 P.2d 1066, 1068, it is said that "reason and the weight of authority would furnish an adequate basis in the doctrine of public policy, the considerations in support of which would seem to be more convincing and less vulnerable to attack than those advanced in support of any of the other theories which have had judicial sanction". See, also, D'Amato v. Orange Mem. Hosp., 101 N.J.L. 61, 127 A. 340; Ettlinger v. R-M. College, 4 Cir., 31 F.2d 869; Bodenheimer v. Confederate M. Ass'n, 4 Cir., 68 F.2d 507.

I am satisfied that the established doctrine of exemption presents a rule of sound public policy which, though it may do an injustice in individual cases, tends to encourage the establishment and maintenance of charitable institutions by advising those financially contributing thereto or exerting their efforts therein that the same will not be diverted from the original purpose of charity to pay for the negligence of the employees of such an institution, provided always that the management thereof uses reasonable care in the selection of its employees. In jurisdictions which grant such exemption from liability, and as shown, and conceded in the majority opinion, they constitute the overwhelming weight of authority, the general rule (almost equally overwhelming) is that the fact that the institution receives pay from some of its beneficiaries detracts nothing from its charitable character and does not change the rule in regard to its exemption from liability, either as to paying or nonpaying patients. Armstrong v. Wallace, 8 Cal.App.2d 429, 433, 47 P.2d 740; Hallinan v. Prindle, 17 Cal.App.2d 656, 669, 62 P.2d 1075; Ritchie v. Long Beach Com. Hosp., 139 Cal.App. 688, 690, 34 P.2d 771; Greatrex v. Evangelical D. Hosp., 261 Mich. 327, 246 N.W. 137, 86 A.L.R. 487; Adams v. University Hosp., 122 Mo.App. 675, 99 S.W. 453; Gable v. Sisters of St. Francis, 227 Pa. 254, 75 A. 1087, 136 Am.St.Rep. 879; Taylor v. Protestant Hosp. Ass'n, 85 Ohio St. 90, 96 N.E. 1089, 39 L.R.A.,N.S., 427; Southern Meth. Hosp. v. Wilson, Ariz., supra; Nicholas v. Deaconess Home, 281 Mo. 182, 219 S.W. 643; Duncan v. Nebraska Sanitarium, 92 Neb. 162, 137 N.W. 1120, 41 L.R.A.,N.S., 973, Ann.Cas.1913E, 1127; St. Vincent's Hosp. v. Stine, 195 Ind. 350, 144 N.E. 537, 33 A.L.R. 1361; 11 C.J. 304; 10 Am.Jur. 700, sec. 151; 109 A.L.R. 1204. Many of the authorities reasonably hold that the availability to pay patients of the elaborate facilities and expert services of a charitable hospital, which were it not for the charity involved in its creation and maintenance would not be available to anyone, makes the pay patient, as well as the true charity patient, a beneficiary thereof, though perhaps in a lesser degree. Weston's Adm'x v. Hosp. of St. Vincent, 131 Va. 587, 107 S.E. 785, 23 A.L.R. 907; Powers v. Homeopathic Hosp., 1 Cir., 109 F. 294, 65 A.L.R. 372; Roberts v. Ohio Valley Gen. Hosp., 98 W.Va. 476, 127 S.E. 318, 42 A.L.R. 968; Powers v. Mass. Homeopathic Hosp., 1 Cir., 109 F. 294, 65 A.L.R. 372. In the Roberts case, supra [98 W.Va. 476, 127 S.E. 320, 42 A.L.R. 968], it is stated that "The fact that one is a paying patient does not alter the rule. Such patient is the recipient of the donors' gratuity only in a lesser degree than one who makes no payment. The hospital building, with its equipment, management, and its great possibilities for the alleviation of suffering, was provided by charity. In using the organization made possible and supported by that charity, a paying patient, to that extent, benefits by the charity."

In line with the great weight of authority, including many prior decisions in this state, supra, I am satisfied that the beneficiaries of such an institution who may have contributed, as did the plaintiff herein, a greater or less sum for the benefits received are not in any different position than those who have received such benefits without charge therefor. The test of the application of the exemption rule is the general nature of the institution and whether it is maintained for the purpose of profit or for that of service, and not the extent or cost of the benefit which the beneficiary has received by availing himself of its privileges. McDonald v. Mass. Gen. Hosp., 120 Mass. 432, 21 Am.Rep. 529; Southern Meth. Hosp. v. Wilson, supra, 46 P.2d 125. Any other test, as pointed out by several of the cases, would tend to the absurd result of setting up two rules of conduct for the institution, one for pay patients to whom it would be answerable for the negligence of its employees, and another for true charity patients to whom it would not be liable. Powers Homeopathic Hosp., 1 Cir., 109 F. 294, 295, 65 A.L.R. 372. In this connection it is stated in the last cited case that "A paying patient in the defendant hospital, as well as a nonpaying patient, seeks and receives the services of a public charity. That such a hospital in its treatment of a rich patient shall be held to a greater degree of care than in its treatment of a pauper is not to be tolerated. Certain luxuries may be given the former which the latter does not get, and this for various reasons; but the degree of protection from unskilled and careless nurses must be the same in both cases."

Of course, the burden is always upon the defendant to establish that it is a charitable institution within the meaning of the authorities granting such exemption. The word "charity" has a well known and acknowledged meaning. In its truest and broadest sense charity redounds to the general public good and is not confined to any one class or group. In Estate of Merchant, 143 Cal. 537, 77 P. 475, 477, charity is defined as a gift "for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government." See, also, Dingwell v. Seymour, 91 Cal.App. 483, 267 P. 327, 333, where it is stated that "A gift to establish and maintain a public institution where the misery and unhappiness of any person of high or low degree, rich or poor, may be considered and sanely dealt with would come within the purview of the definition of a public charity." An act or feeling of benevolence underlies all charity. When charity is to be extended, not sporadically and to a few individuals, but to a large number over a long period of time, it is generally administered by some association, corporation or institution whose principal and distinctive features are that they have no capital stock and no provisions for the distribution of dividends or profits but, on the contrary, hold their assets and operate their facilities in trust for the obligation of the institution. In other words, the test of whether an institution is charitable is whether it exists to carry out a purpose recognized in law as charitable, or whether it is maintained for gain, profit, or private advantage. Hearns v. Waterbury Hosp., 66 Conn. 98, 33 A. 595, 31 L.R.A. 224; Gitzhoffen v. Sisters of Holy Cross, 32 Utah 46, 88 P. 691, 8 L.R.A.,N.S., 1161; McDonald v. Mass. Gen. Hosp., 120 Mass. 432, 21 Am.Rep. 529; Southern Meth. Hosp. v. Wilson, Ariz., supra. In the McDonald case, supra, it is stated that "its affairs are conducted for a great public purpose, that of administering to the comfort of the sick, without any expectation, on the part of those immediately interested in the corporation, of receiving any compensation which will enure to their own benefit, and without any right to receive such compensation. This establishes its character as a public charity."

Substantially the same test has been announced in prior decisions in this state. Armstrong v. Wallace, 8 Cal.App.2d 429, 47 P.2d 740; Hallinan v. Prindle, 17 Cal.App. 2d 656, 666, 62 P.2d 1075; Dingwell v. Seymour, supra. In the Armstrong case, supra, wherein it appeared that the Sisters of St. Joseph of Orange were operating a hospital which received, as here, both pay and charity patients (the plaintiff therein being a pay patient) and wherein, as here, the articles of incorporation referred to the charitable purpose of the corporation and wherein the evidence, as here, disclosed that no one in connection with the corporation received any salary or profits and wherein it appeared that [8 Cal.App.2d 429, 47 P.2d 741] "if there was anything left after the operation of the hospital, it went toward the upkeep of the institution locally and then for the benefit of the order at large", the hospital was held to be charitable in character. In reversing an order granting a new trial to the plaintiff in that case, the Appellate Court declared that "the fact that Mrs. Armstrong paid the regular rates charged by the hospital for paying patients did not take it out of the class of charitable institutions, as the amount paid was not received to build up a profit, but to assist in the carrying on of the general charitable purposes of the order".

In the Hallinan case, supra [17 Cal.App. 2d 656, 62 P.2d 1080], the court held the defendant Mills Memorial Hospital to be a charitable institution on the ground that it was incorporated as a nonprofit corporation and "it has no stock nor stockholders; its directors, managers, and officers charged with the conduct of its affairs serve without pay; poor, needy injured persons, without distinction of class or creed, are admitted to the hospital and treated either without charge or to the extent of part only of the cost of the service rendered. To persons able to pay a moderate charge for their care a rate of $4 a day for a bed in a ward [same as plaintiff herein paid], and a charge of $6 a day for a room, were established. * * * Notwithstanding this the financial statements of the institution's operations have shown annually an excess of expenditures over receipts with the exception of two years—in one of which the so-called profit was used to purchase new equipment."

The charitable character of the institution involved in Stonaker v. Big Sisters Hospital, 116 Cal.App. 375, 378, 379, 2 P.2d 520, 522, was described in the following terms: "It appears without contradiction that the hospital paid no compensation to its constituents for services, and that it paid no dividends; that it was conducted for the good of the community, by a charitable organization known as the Big Sisters League, with the intent and purpose that if there was a surplus over and above the expense of carrying it, such surplus would go to the said league."

The case of Southern Meth. Hosp. v. Wilson, 51 Ariz. 424, 77 P.2d 458, 460, 461, 462, declares that "If the purpose of the institution is one which is recognized in law as charitable, and if it is not maintained for the private gain, profit, or advantage of its organizers, officers, or owners, directly or indirectly, we think the institution is properly characterized as a charitable one, notwithstanding the fact that it charges for most, if not all, of the services which it may render, so long as its receipts are devoted to the necessary maintenance of the institution and the carrying out of the purpose for which it was organized." To the same effect see McDonald v. Mass. Gen. Hosp., supra; City of Dallas v. Smith, 130 Tex. 225, 107 S.W.2d 872, 878; Williams v. Church Home, etc., 223 Ky. 355, 3 S.W.2d 753, 62 A.L.R. 721. In Brattleboro Retreat v. Brattleboro, 106 Vt. 228, 173 A. 209, the fact that none of the patients of a hospital were cared for without charge was said not to deprive it of its charitable character. And, in Re Rust's Estate, 168 Wash. 344, 12 P.2d 396, 398, it was stated that by the great weight of authority "mere profit to the corporation itself, it having no stockholders to share such profit and no one standing in any proprietary relation to it to share in such profit, does not make such corporation other than a charitable corporation". The last two were tax cases.

I am satisfied that the defendant hospital corporation satisfies the requirements set down in the authorities for that of a charitable institution. Its articles of incorporation after stating its purpose to be the establishment of one or more hospitals for the care and treatment of the sick and disabled, declared that it "shall not have any capital stock" and that the members and officers "shall derive no pecuniary profit therefrom", adding that pecuniary profit "never shall be the object of this corporation". The evidence also disclosed that its membership was restricted to the Sisters of Charity of Providence who received no compensation, other than room and board, for their services; that they admit to the hospital any and all patients without question, many of whom are full or part charity patients; that they do other forms of charity in the way of maintaining a clinic and furnishing meals and financial assistance to those applying for the same, the details of which need not here be stated; and that at no time during the seven-year period prior to plaintiff's injuries had they received more than they paid out and that had a profit been realized it would "revert to the institution for buying more accommodations and to expand the facilities of the hospital". Under the evidence, and within the meaning of the authorities, the defendant hospital, in my opinion, should be held to be a charitable institution and exempt from liability to its patients, including pay patients, for the torts of its servants. As stated, the true test is the general nature of the institution and whether it is maintained for the purpose of profit or for that of service, and not the extent or cost of the benefit which the patient or beneficiary has received by availing himself of its privileges. Inasmuch as the evidence indicates that the average cost of maintaining a patient was $7.56 a day, it is doubtful whether the $4 a day rate paid by plaintiff entailed a "profit" as found by the trial court. But even if it did the fact would be immaterial if, as indicated, the "profit" merely served to foster the charitable objective of the institution—its general nature being that of service to the afflicted rather than the accumulation and distribution of profits.

14 Cal.2d 791

ENGLAND v. HOSPITAL OF THE GOOD SAMARITAN.

L. A. 17184.

Supreme Court of California.

Dec. 28, 1939.

Rehearing Denied Jan. 25, 1940.

1. Courts 🔑**99(1)**

The doctrine of the "law of the case" should not be adhered to when application thereof results in manifestly unjust decision.

[Ed. Note.—For other definitions of "Law of the Case," see Words & Phrases.]

2. Appeal and error 🔑**1097(1)**

A court is not absolutely precluded by "law of case" from reconsidering questions decided upon former appeal, and court should decide case without regard to what has gone before where there are exceptional circumstances.

3. Charities 🔑**45(2)**

Charitable organizations are not exempt from liability for wrongs negligently committed by their employees.

4. Charities 🔑**45(2)**

A charitable hospital was liable for burns suffered by pay patient when hospital nurse negligently placed hot water bottle against his body, notwithstanding that rigid adherence to law of case could not permit recovery, where law of California concerning liability of charitable organization for tort was unsatisfactory when previous appeals were heard, and Supreme Court had since decided that charitable organizations were not exempt from liability for wrongs negligently committed by their employees.

SHENK, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Action by A. E. England, special administrator of the estate of Charles E. England, deceased, against the Hospital of the Good Samaritan, a corporation, for injuries when the deceased was burned by a hot water bottle which a nurse placed against his body when he was a patient in the hospital. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

Prior opinion, 88 P.2d 227.

Gibson, Dunn & Crutcher, of Los Angeles (Philip C. Sterry, Ira C. Powers and Frederic Sturdy, all of Los Angeles, of counsel), for appellant.

Weinmann, Quayle & Berry, of Oakland, amici curiae.

Elvon Musick, Howard Burrell, and James E. Bednar, all of Los Angeles, for Association of California Hospitals.

William K. Young, of Los Angeles, for respondent.

EDMONDS, Justice.

In 1935, while a patient in the Hospital of the Good Samaritan, Charles E. England was burned by hot water bottles which a nurse placed against his body, and the present appeal is from a judgment awarding him damages for his injuries. The hospital concedes the sufficiency of the evidence to establish negligence on the part of the nurse, and the only point presented for decision is whether the appellant is a charitable organization and, if so, entitled to exemption from tort liability.

This is the third appeal in the case. After the first trial of the action, the District Court of Appeal reversed a judgment for the hospital rendered upon a directed verdict. England v. Hospital of the Good Samaritan, 16 Cal.App.2d 640, 61 P.2d 48. In a second trial, the jury returned a verdict for the hospital but the trial court granted a motion for a new trial. Upon appeal, the order was affirmed. England v. Hospital of the Good Samaritan, 22 Cal.App.2d 226, 70 P.2d 692. The present appeal is from the judgment which followed a third trial.

Plaintiff introduced evidence tending to show that in September, 1935, he was advised he should undergo a surgical operation, and applied for admittance to the defendant hospital; that at the time he applied for admission to the Hospital of the Good Samaritan and was quoted a rate of $25 per week for hospitalization, which included room, nursing services and board. He made no inquiry and was not informed that the hospital was, or claimed to be, a charitable organization, and he had no knowledge concerning the institution's status in that regard during the time he was a patient in it. Charges were made to him at the rate quoted and he paid the bills rendered.

As a separate defense to the charges of negligence, the hospital alleged that at all times since its organization it has been a non-profit sharing, eleemosynary, charitable institution maintained for the purpose of giving medical care to the sick and unfortunate. Upon the trial evidence was offered in support of these allegations from which the court found that in the years 1931 to 1935, inclusive, the hospital was operated for charitable purposes. Another finding is that the hospital exercised ordinary care in the selection of its employees. However, the court concluded that no charity was requested by nor extended to Mr. England and that the hospital is not entitled to exemption from liability for the injuries inflicted by its nurse.

Although the trial court found that the hospital is a charitable institution, it may reasonably be inferred from the evidence that such a character is attributable to it only because it devotes the income from its apparently very successful business to assist those who cannot pay all or part of the cost of needed medical care. The record shows that during the year in which Mr. England was injured, it had an income of $732,129, received from revenue patients, contributions from churches, returns from an endowment fund, profits from a pharmacy lunch counter and soda fountain, and commissions received for collecting doctors' bills. In that year the net operating profit of the hospital was $62,767; on December 31, 1935, its earned surplus was $65,470 and between 1931 and 1935 it received from operations $843,795, more than it paid out. In five years, so the record shows, it took in $2,822,674, and had $843,795 remaining after paying all expenses.

With this uncontradicted showing taken from the books of the hospital it is difficult to see how the trial court found that the organization is a charitable one. True, the record shows that in 1935 the cost of charitable work done by the hospital was $25,967, but this amount represents only the value of the services at the rates charged paying patients and not money paid out.

However, in view of the decision of this court in Silva v. Providence Hospital, 97 P.2d 798, which was argued by counsel and considered concurrently with the present appeal, the question of primary importance concerns the law of the case. The hospital contends that as the trial court found that it is operated for charitable purposes, the judgment cannot be sustained because of the decisions rendered on the former appeals.

In reversing the judgment in favor of the hospital after the first trial, the District Court of Appeal said: "We cannot hold that one who, without knowledge that a hospital claims to be a charitable institution and therefore exempt from liability, applies for admission and is received as a patient, paying the regular rates at which the hospital derives a profit, is without redress for injuries occasioned by negligence on the part of the employees of the hospital on the theory that he is accepting the benefits of charity from a benefactor. Our conclusion is in line with the decision in the Stewart Case. [Stewart v. California Medical etc. Association, 178 Cal. 418, 176 P. 46]. The trial court erred in refusing to submit to the jury the issue of plaintiff's claim that the hospital was conducted for profit and defendant's claim that it was operated only for charity." England v. Hospital of the Good Samaritan, 16 Cal.App.2d 640, 643, 61 P.2d 48, 50.

When the case next came before the same Appellate Court, the order granting a new trial was affirmed upon several grounds, one of which was that a requested instruction of the plaintiff should have been given to the jury. This instruction was to the effect that the defense of nonliability is unavailing to a charitable organization if the patron had no knowledge concerning its character and paid the regular rates charged by it "from which it derived a profit". England v. Hospital of the Good Samaritan, 22 Cal.App.2d 226, 70 P.2d 692, 693. These two statements concerning the rights of the parties, says the hospital, when construed together, establish the law of the case which requires a reversal of the judgment.

[1, 2] The doctrine of the law of the case is recognized as a harsh one (2 Cal. Jur. 947) and the modern view is that it should not be adhered to when the applica-

tion of it results in a manifestly unjust decision. United Dredging Co. v. Industrial Acc. Comm., 208 Cal. 705, 284 P. 922. However, it is generally followed in this state. But a court is not absolutely precluded by the law of the case from reconsidering questions decided upon a former appeal. Procedure and not jurisdiction is involved. Where there are exceptional circumstances, a court which is looking to a just determination of the rights of the parties to the litigation and not merely to rules of practice, may and should decide the case without regard to what has gone before. Messinger v. Anderson, 225 U.S. 436, 32 S.Ct. 739, 56 L.Ed. 1152; Seagraves v. Wallace, 5 Cir., 69 F.2d 163; McGovern v. Eckhart, 200 Wis. 64, 227 N.W. 300, 67 A.L.R. 1381.

In the present appeal, rigid adherence to the law of the case would compel a most unjust decision. It is conceded that Mr. England was seriously injured while a patient in the hospital. His case has been tried three times with an appeal following each judgment. On the occasions when it was before the District Court of Appeal, the law concerning the liability of a charitable organization for tort, as declared by the courts of California was, to say the least, most unsatisfactory in its statement. Following the dicta of Thomas v. German Gen. etc. Soc., 168 Cal. 183, 141 P. 1186, and Stewart v. California Medical etc. Ass'n, 178 Cal. 418, 176 P. 46, such institutions had been exempted from that liability in suits brought by patrons. On the other hand, the reasoning of Phoenix Assur. Co. v. Salvation Army, 83 Cal.App. 455, 256 P. 1106, would logically compel a contrary conclusion.

[3, 4] The District Court of Appeal in deciding Mr. England's case upon the first appeal took a position somewhat between these two views. It recognized the rule but to a limited extent only, refusing to apply it to the cause of action of a paying patient. This court has now decided that charitable organizations are not exempt from liability for wrongs negligently committed by their employees. Silva v. Providence Hospital, supra. In the meantime Mr. England has passed on. To now say that his cause of action may not be determined upon the principles stated in the Silva case, notwithstanding the fact that it is decisive of all points raised by the hospital with the exception of those relating to the law of the case, would exalt form far above substance.

The judgment is, therefore, affirmed.

We concur: WASTE, C. J.; CURTIS, J.; HOUSER, J.; GIBSON, J.; CARTER, J.

SHENK, Justice (dissenting).

I dissent.

My views on the issue of exemption of charitable institutions from liability to the beneficiaries thereof, either pay or nonpay, for the torts of servants who have been carefully selected are expressed in my dissenting opinion in the case of Silva v. Providence Hospital of Oakland, Cal.Sup., 97 P.2d 798. I cannot accept the majority opinion herein which runs counter to the great weight of authority and to the established rule in this state.

The defendant hospital satisfies the requirements of a charitable institution as defined by the authorities referred to in my dissent in the Silva case, supra. In fact, the hospital here involved was held to be exempt as a charitable institution in the case of Shane v. Hospital of the Good Samaritan, 2 Cal.App.2d 334, 37 P.2d 1066. The evidence in the present case attests the correctness of that conclusion for the defendant's articles of incorporation and by-laws disclose that it was established and is maintained under the auspices of the Protestant Episcopal Church in the Diocese of Los Angeles for the purpose of affording medical and surgical aid to sick and disabled persons and to provide such persons while inmates of the hospital with the ministration of the Gospel, if they so desire. The board of directors consists of the bishop of the diocese, the rector of St. Paul's Episcopal Church and certain parishioners of the diocese. It is also declared therein, and the trial court found, that the defendant was not organized "for the purpose of realizing profits from the operation of its hospital". In addition to the foregoing, the defendant adduced evidence tending to establish, and the trial court found, that it had no stockholders and no method of distributing profits, if any were made, and that no persons other than employees of the hospital received any salary or compensation of any kind from the defendant. It also appears from the evidence, and the trial court found, that the defendant receives and treats three classes of patients, viz., (1) indigent or charity patients who are treated without charge; (2) part charity patients who are able to pay a portion of the cost of the treatment afforded to them; and (3) pay patients financially able to pay the fees charged for their care and treatment and from which the defendant derives a "profit". Defendant also cares for patients sent by the Good Hope Clinic. The evidence also discloses, and the trial court found, that the defendant's income is derived from paying patients, contributions from Episcopal churches and returns from investment of an endowment fund. It likewise receives the proceeds from its operation of a pharmacy and lunch counter. A financial statement put in evidence discloses that the defendant's annual operating deficit for each of the years 1931–1934, inclusive, was $32,240, $65,809, $45,246 and $3,278, respectively. In 1935, the year of plaintiff's accident, this same statement discloses a net surplus of $62,767. However, the record indicates that these figures merely disclose "the sums actually expended by the hospital * * * and do not include the cost of free care." The mere presence of a surplus which ultimately is employed in its general charitable purpose does not alter defendant's character as a charitable institution. Baylor Univ. v. Boyd, Tex.Civ. App., 18 S.W.2d 700, 701. It was also shown herein, and the trial court found, that the average cost of treatment per day per patient was $8.70 in 1931; $8.80 in 1932; $8.09 in 1933; $7.06 in 1934, and $6.49 in 1935; and that the average weekly cost to the defendant in rendering hospitalization, nursing service, room and board to the plaintiff was $45.43—for which he paid, as already stated, $25 a week. It was further shown that indigent persons were admitted without restriction as to race, creed or color and that in 1935 the charitable work of the institution cost $25,967.30. Finally, it was shown that "the profits received from the operation of the hospital, when any are made, are devoted to (1) the care and treatment of indigent patients unable to pay anything; (2) to the care of patients who are able to pay some amount toward their care and treatment but less than the cost thereof, and (3) to a reduction of the mortgage indebtedness and the operation of the hospital".

In addition to the findings already mentioned, the trial court found that the "hospital was operated by the defendant for charitable purposes" but it was also found that plaintiff was unaware of defendant's charitable character and was not the recipient of any charity, but that, on the contrary, and like other pay patients, he had paid the charges imposed by the defendant hospital, from which it was found to have derived a "profit" permitting it to care for its non-pay or charity patients and to reduce its mortgage indebtedness. In the Silva case, supra, I pointed out that these latter elements were false quantities in the determination of whether an institution is charitable in character and entitled to exemption. The general purpose of an institution to render service, rather than to acquire and distribute profits among its members, establishes its charitable character. Here, as in the Silva case, any "profit" derived from pay patients "merely served to foster the charitable objective of the institution—its general nature being that of service to the afflicted rather than the accumulation and distribution of profits".

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36 Cal.App.2d 457

CITY OF ALTURAS v. SUPERIOR COURT IN AND FOR MODOC COUNTY et al.

Civ. 6405.

District Court of Appeal, Third District, California.

Jan. 5. 1940.

Constitutional law 🔑249
Costs 🔑222

The statutory provision for payment of specified attorney's fee to plaintiff on rendition of final judgment against defendant on his appeal to superior court from small claims court is not unconstitutional and void as denying defendant equal protection of law. Code Civ.Proc. § 117j; U.S.C.A.Const. Amend. 14.

Appeal from Superior Court, Modoc County.

Proceeding by the City of Alturas for a writ of certiorari to annul a portion of a judgment of the Superior Court in and for the County of Modoc, awarding M. J. Gloster an attorney's fee on appeal in an action originating in the Small Claims Court of Alturas Township.

Judgment affirmed.

C. S. Baldwin, of Alturas, for petitioner.

J. S. Henderson, of Alturas, for respondent.

Mr. Justice TUTTLE delivered the opinion of the court.

This is a proceeding in certiorari, whereby petitioner seeks to annul that portion of a judgment of the Superior Court which provides for the recovery, by plaintiff, of an attorney fee in the amount of $15, on an appeal in an action originating in the Small Claims Court of Alturas Township.

Respondent seeks to justify the action of the Superior Court by the provisions of section 117j of the Code of Civil Procedure, which relates to appeals from small claims courts, and reads as follows:

"The judgment of said court shall be conclusive upon the plaintiff. If the defendant is dissatisfied, he may, within five days from the entry of said judgment against him, appeal to the superior court of the county in which said court is held. He shall pay, for filing the papers in the superior court, the same fee as is charged and collected on the appeal of a civil action from a justices' court, and if final judgment is rendered against him in such superior court, then he shall pay, in addition to said judgment, an attorney's fee to the plaintiff in the sum of fifteen dollars ($15). Except as otherwise provided in this chapter, such appeal shall be taken as provided in Chapter III of Title XIII of Part II of this Code for appeals from justices' courts."

Petitioner contends that that portion of the quoted section which provides for an attorney fee of $15 is unconstitutional and void, and that therefore the court had no jurisdiction to include such item in its judgment.

Petitioner relies upon the case of Builders' Supply Depot v. O'Connor, 150 Cal. 265, 88 P. 982, 983, 17 L.R.A.,N.S., 909, 119 Am. St.Rep. 193, 11 Ann.Cas. 712. It was there held that a provision in the Mechanics' Lien Law (sec. 1195, Code Civ.Proc.) which authorizes a recovery of an attorney fee upon the part of plaintiff, was unconstitutional. Referring to the statute mentioned above, the court says:

"This provision is, in our opinion, violative both of the federal and the state Constitutions—of the 14th amendment of the former, which guaranties to every person 'the equal protection of the law,' and of the provisions of the state Constitution which provide that general laws shall be uniform, prohibit special laws, and declare the inalienable rights of all men of acquiring, possessing, and protecting property. A statute which gives an attorney's fee to one party in on action and denies it to the other, and allows such fee in one kind of action and not in other kinds of actions where, as in the statute here in question, the distinction is not founded on constitutional or natural differences, is clearly violative of the constitutional provisions above noticed."

Since the pronouncement in the last-named case, the Supreme Court of the United States has definitely decided that the allowance of such an attorney fee to the plaintiff in the action does not violate the provision of the Federal Constitution, 14th Amendment, U.S.C.A., which guarantees to every person "the equal protection of the laws". In the case of Missouri, K. & T. R. Co. of Texas, v. Cade, 233 U.S. 642, 34 S. Ct. 678, 681, 58 L.Ed. 1135, the following statute of the state of Texas was under consideration:

"Hereafter, any person in this state having a valid, bona fide claim against any person or corporation doing business in this state, for personal services rendered or for labor done, or for material furnished, or for overcharges on freight or express, or for any claim for lost or damaged freight, or for stock killed or injured by such person or corporation, its agents or employees, may present the same to such person or corporation or to any duly authorized agent thereof, in any county where suit may be instituted for the same; and if, at the expiration of thirty days after the presentation of such claim, the same has not been paid or satisfied, he may immediately institute suit thereon in the proper court; and if he shall finally establish his claim, and obtain judgment for the full amount thereof, as presented for payment to such person or corporation in such court, he shall be entitled to recover the amount of such claim and all costs of suit, and, in addition thereto, a reasonable amount as attorney's fees; provided, he has an attorney employed in the case, not to exceed twenty dollars, to be determined by the court or jury trying the case. Nothing in this chapter shall be construed to repeal, or in any manner affect, any provision of the law now in force, giving a remedy to persons having claims of the character mentioned in this chapter, but the same shall be considered as cumulative of all other remedies given to such a person or persons." Arts. 2178 and 2179, Tex.Rev.Civ. St.1911, Vernon's Ann.Civ.St.Tex. art. 2226.

An action was brought under the foregoing statute to recover the sum of $10.75 for wages due from defendant railroad, and the plaintiff in the action was allowed an attorney fee of $9. After referring to the theory that the recovery of the attorney fee could be classified as a "penalty", and thus be lawful, the court says:

"But we think it is not correct to consider this statute as imposing a penalty. The allowance is confined to a reasonable attorney's fee, not exceeding $20, where an attorney is actually employed; the amount to be determined by the court or jury trying the case, Manifestly, the purpose is merely to require the defendant to reimburse the plaintiff for a part of his expenses not otherwise recoverable as 'costs of suit.' So far as it goes, it imposes only compensatory damages upon a defendant who, in the judgment of the legislature, unreasonably delays and resists payment of a just demand. The outlay for an attorney's fee is a necessary consequence of the litigation, and since it must fall upon one party or the other, it is reasonable to impose it upon the party whose refusal to pay a just claim renders the litigation necessary. The allowance of ordinary costs of suit to the prevailing party rests upon the same principle. 2 Bacon, Abr. title Costs. Numerous cases in the state courts have sustained similar legislation. Vogel v. Pekoc, 157 Ill. 339, 344, 346, 42 N.E. 386, 30 L.R.A. 491; Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa 312, 340, 48 N.W. 98, 12 L.R.A. 436, 31 Am.St.Rep. 477, 3 Interst. Com. R. 584; Cameron v. Chicago, M. & St. P. R. Co., 63 Minn. 384, 388, 65 N.W. 652, 31 L.R.A. 553; Wortman v. Kleinschmidt, 12 Mont. 316, 330, 30 P. 280. If a reasonable penalty may be imposed for failure to satisfy a demand found to be just, it follows a fortiori that costs and an attorney's fee may be. See Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 105, 19 S.Ct. 609, 43 L.Ed. 909, 913; Farmers' & M. Ins. Co. v. Dobney, 189 U.S. 301, 304, 23 S.Ct. 565, 47 L.Ed. 821, 825. For these reasons, it seems to us that the statute in question is not repugnant to either the 'equal protection' or the 'due process' clauses of the 14th Amendment."

The court further points out that the case which forms the basis for the O'Connor decision, supra—Gulf, C. & S. F. Ry. Co. v. Ellis, 165 U.S. 150, 17 S.Ct. 255, 41 L.Ed. 666—is clearly distinguishable, as it allowed such recovery only in cases where a railroad company was defendant. Such a statute, it is pointed out, is an arbitrary classification, and therefore repugnant to the 14th Amendment of the Federal Constitution, while the statute in the Cade case is general in its application, and it does not appear that the claims which it covers have been "grouped together for the purpose of bearing against any class or classes of citizens or corporations".

The decision in the California case (Builders' Supply Co. v. O'Connor, supra), and the one by the Supreme Court of the United States (Missouri, K. & T. R. Co. v. Cade, supra), can be readily reconciled and distinguished. In the former, the statute allows recovery of an attorney fee in those cases coming under the Mechanics' Lien Law. In other words, only where one class of litigants is involved. On the other hand, the latter permits such a recovery where the statute covers numerous classes of cases. The instant case is even stronger, as it permits recovery in all cases before the small claims court. This distinction is recognized in the California case, where the court points out that the distinction made by the law in that case "is not founded on constitutional or natural differences". In the case before us the statute makes no distinction whatever. All classes of litigants are permitted to recover.

The purpose of the enactment here is salutary in character. Jurisdiction in the small claims court is limited to the amount of $50. The people who resort to it, we may reasonably assume, are of limited means and resources. The attorney fee is only allowed in the event of an appeal, and it was evidently the desire of the legislature to promote the prompt payment of small claims and discourage unnecessary litigation in respect to them.

We are of the opinion that the law is not vulnerable to the attack here made, and that the superior court therefore had jurisdiction to make the award of an attorney fee.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

36 Cal.App.2d 382

CHURCH v. PAYNE et al.

Civ. 12256.

District Court of Appeal, Second District, Division 2, California.

Dec. 30, 1939.

Hearing Denied Feb. 26, 1940.

1. **Appeal and error** 🔑931(1)

On appeal by plaintiff from a judgment in favor of defendants in personal injury action, District Court of Appeal viewed the evidence most favorable to the defendants.

2. **Automobiles** 🔑244(55, 58)

In action by minor bicyclist for injuries sustained when his bicycle was struck from the rear as he attempted to make a left turn into path of automobile, evidence sustained finding that bicyclist was guilty of negligence which was the sole proximate cause of the accident.

3. **Appeal and error** 🔑996

When an inference can be reasonably deduced from the evidence sustaining a finding of the trial jury, the District Court of Appeal is without power to substitute its deductions for those of the trial jury.

4. **Appeal and error** 🔑201(2), 719(1)

Where harmful result of alleged misconduct of trial court could have been obviated by appropriate instructions of the trial court, error could not be predicated in the District Court of Appeal, in absence of assignment of such misconduct as error, and in absence of a request to the trial court to instruct the jury to disregard it.

5. **Appeal and error** 🔑1047(3)

Trial court did not commit prejudicial error, on its own motion, in striking out complex questions which had gone unanswered and which witness had asked counsel to repeat.

6. **Appeal and error** 🔑1048(3)

In action for injuries sustained by bicyclist when his bicycle was struck by automobile, trial court did not commit prejudicial error in ruling that question to defendant whether the accident was a collision between her automobile and the bicyclist, was leading and not proper cross-examination.

7. **Appeal and error** 🔑1056(1)

In action for injuries sustained by bicyclist who was struck by automobile, trial court did not commit prejudicial error in sustaining objections to questions to defendants' witness, whether he had stopped at stop signal near scene of accident.

8. **Appeal and error** 🔑1048(3)

In action for injuries sustained by bicyclist who was struck by automobile, trial court did not commit prejudicial error in sustaining objections to question to bicyclist by his counsel whether bicyclist said that he began gradually to go into the street before attempting to make turn when he was struck by automobile.

9. **Appeal and error** 🔑1048(2)

In personal injury action, trial court did not commit prejudicial error in sustaining objections to question to plaintiff by his counsel whether he could tell the jury his mental condition immediately after the accident, on ground that plaintiff was not a psychiatrist and could tell only what he felt and did.

10. **Appeal and error** 🔑1048(3)

In personal injury action, trial court did not commit prejudicial error in sustaining objections to question to physician whether the fact that physician read X-rays negatively would eliminate any possibility of injury to plaintiff's brain, on ground that the question was asking for a possibility.

11. **Appeal and error** 🔑1048(3)

In personal injury action, trial court did not commit prejudicial error in sustaining defendant's objections to question to physician, whether with his knowledge of plaintiff's case, plaintiff's physical condition, examination of plaintiff, and findings from examination and treatment of plaintiff, physician had an opinion as to the probable consequence that would reasonably ensue from injury sustained in accident.

12. **Appeal and error** 🔑1048(3)

In personal injury action, trial court did not commit prejudicial error in sustaining, on ground that it was indefinite, question to physician whether in his opinion the plaintiff was at the time cured of any conditions which the physician found at the time of the accident.

13. **Appeal and error** 🔑1048(3)

In personal injury action, trial court did not commit prejudicial error in sustaining objections to question which called for from physician an answer involving a mere possibility.

14. Trial 🔑232(3)

In personal injury action, trial court's instruction that the fact that he instructed jury on the measure of damages could not be taken as an intimation that the court either believed or did not believe that the plaintiff was entitled to recover damages, was not erroneous.

15. Automobiles 🔑246(21)

Instruction that when a motorist by sudden emergency is placed in a position of imminent peril to himself or another, he is not held to the same accuracy of judgment as under ordinary circumstances, and is not liable because the course which he may have pursued might have been more judicious, was not erroneous.

16. Automobiles 🔑246(5)

In action by minor bicyclist for injuries sustained when struck by automobile, instruction that if, from all evidence, jury should find that motorist was operating her automobile in an ordinary, prudent, and careful manner, under all circumstances, verdict should be against bicyclist, was not erroneous.

17. Automobiles 🔑246(60)

In action for injuries sustained by minor bicyclist who was struck by automobile, instruction that the mere happening of an accident raises no presumption of negligence, was not erroneous.

18. Automobiles 🔑246(22)

In action for injuries sustained by minor bicyclist when struck by automobile, instruction to jury that as a matter of law no liability attaches where injury results from an unavoidable and inevitable accident, was not erroneous.

19. Automobiles 🔑246(35)

In action by minor bicyclist for injuries sustained when struck by automobile, instruction if jury should find that bicyclist's injuries resulted from his and motorist's negligence, then bicyclist could not recover, was not erroneous.

20. Automobiles 🔑246(5)

In action for injuries sustained by minor bicyclist when struck by automobile, instruction as to the provisions of applicable sections of the Vehicle Code was not erroneous. Vehicle Code, §§ 452, 525(b), 541(b), 544(a, b), 546(a); St.1935, pp. 163, 181, 185, 186.

21. Automobiles 🔑246(5)

An instruction that a person operating a motor vehicle is not bound to anticipate that another person operating a vehicle, such as a bicycle, will violate the law, and that motorist would not be guilty of negligence in assuming that minor bicyclist would not violate the law, was not erroneous.

22. Automobiles 🔑246(5)

An instruction that the section of the Vehicle Code pertaining to the requirements of sounding a horn on a motor vehicle leaves the sounding of a horn in a business or residential district to a motorist's sound judgment, and that therefore motorist's failure to sound horn immediately before striking minor bicyclist did not constitute negligence as a matter of law on the part of the motorist, was not erroneous. Vehicle Code, § 671(b), as amended by St.1937, p. 169.

23. Appeal and error 🔑1068(4)

Trial court did not err in refusing plaintiff's requested instructions concerning damages, where the jury found in favor of the defendant, since, if a jury under proper instructions returns a general verdict for the defendant in negligence action, error may not be predicated on the refusal to give or the giving of erroneous instructions relative to the issue of damages.

24. Trial 🔑260(8)

In action by bicyclist for injuries sustained when struck by automobile, bicyclist's requested instruction defining ordinary care, requested instruction dealing with the duty of those operating motor vehicles on public highways of state, and requested instruction that it is not contributory negligence to fail to look out for danger, if any, where there is no reason to apprehend any, were fully covered by instructions given. Vehicle Code, § 510, St.1935, p. 176.

25. Trial 🔑252(8)

In action by bicyclist for injuries sustained when struck by automobile, bicyclist's requested instructions which assumed that the accident was a rear end collision, were correctly refused, where jury's implied finding, which was supported by substantial evidence, was that there was no rear end collision. Vehicle Code, § 531(a), St.1935, p. 183.

26. Trial 🔑260(1)

Requested instructions were properly refused, where their substance was given to the jury in other instructions.

27. Appeal and error ⚷1032(3)

Trial court's alleged error in refusing to give requested instructions would be disregarded on appeal by the District Court of Appeal, where appellant had failed to point out wherein the failure resulted in prejudice to him. Const. art. 6, § 4½.

28. Trial ⚷260(8)

In action by bicyclist for injuries sustained when struck by automobile, bicyclist's requested instruction that motorist was negligent if she followed bicyclist more closely than was reasonable and prudent, and instructions as to sections of the Vehicle Code dealing with the sounding of a horn by the driver of a motor vehicle, were sufficiently covered by instructions given. Vehicle Code, § 528(b), St.1935, p. 182; § 671(b), as amended by St.1937, p. 169.

◆

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action by Elson Newell Church, a minor, by William L. Stevens, his guardian ad litem, against Marie Payne, the Coffee Products of America, Inc., Limited, and others, to recover for personal injuries received by the plaintiff when the bicycle on which he was riding was struck by an automobile operated by Marie Payne. From a judgment in favor of the defendants, the plaintiff appeals.

Judgment affirmed.

Hearing denied; CARTER, J., dissenting.

A. V. Falcone, of Los Angeles, for appellant.

C. F. Jorz, of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial before a jury in an action to recover damages for personal injuries received by plaintiff when the bicycle upon which he was riding was struck by an automobile being operated by defendant Marie Payne, plaintiff appeals.

[1] Viewing the evidence most favorable to defendants (respondents), the essential facts are:

February 4, 1938, defendant Marie Payne was operating her automobile in a southerly direction on Harvard boulevard in the city of Los Angeles. She was traveling between 20 and 25 miles an hour about twelve feet from the west curb line of the boulevard. Plaintiff was traveling in the same direction, about a block and a half ahead of said defendant and from two to three feet from the west curb of the boulevard. Both parties retained their respective speeds, traveling in a straight line, until said defendant was approximately ten feet behind plaintiff, at which time he suddenly turned to his left in front of the car being operated by defendant Payne, and the left front of the latter's car struck the rear guard of plaintiff's bicycle, causing him to fall to the pavement.

Plaintiff relies for reversal of the judgment on these propositions:

First: There is no substantial evidence to sustain the verdict of the jury and the judgment of the court predicated thereon.

Second: The trial judge committed prejudicial error by his conduct during the trial of the action.

Third: The trial court committed prejudicial error in sustaining objections to evidence offered by plaintiff.

Fourth: The trial court committed prejudicial error in instructing the jury as follows:

1.

"The fact that I instruct you upon the measure of damages which the plaintiff is entitled to recover is not to be taken by you as an intimation that I either believe or do not believe he is entitled to recover damages. It is my duty to instruct you fully upon the law governing every issue in this case. The instructions upon the measure of damages are given you to guide you in fixing the damages which plaintiff is entitled to recover only in the event you believe from the evidence and the instructions I have given you that the plaintiff is entitled to recover. The giving of such instructions is no indication that the court believes or does not believe that the plaintiff is entitled to recover. That is a question for your sole and exclusive determination upon the evidence and the instructions which I have given you."

2.

"Where the operator of a motor vehicle, without negligence on his part is by a sudden emergency placed in a position of imminent peril to himself or to another, without sufficient time in which to determine with certainty the best course to pursue, he is not held to the same accuracy of judgment as is required of him under ordinary circumstances, and is not liable for injuries

caused by his machine if an accident occurs, even though a course of action other than that which he pursues might be more judicious, provided he exercises ordinary care in the stress of circumstances to avoid an accident.

"Therefore, if you find from a preponderance of the evidence that the defendant Marie Payne in operating her motor vehicle was, without negligence on her part, placed by a sudden emergency in a position of imminent danger or peril sufficient time in which to determine with certainty the best course to pursue, she would not be held to the same accuracy of judgment as would be required of her under ordinary circumstances and would not be liable for injuries caused by her machine if an accident occurred, even though a course of action other than that which she actually pursued might have been more judicious provided she exercised ordinary care in the stress of circumstances to avoid an accident."

3.

"If, from all the evidence in this case, you find that the defendant Marie Payne was operating her automobile in an ordinary, prudent and careful manner and as an ordinary prudent person under all the circumstances would have operated it, then, regardless of all other questions, your verdict must be against the plaintiff and in favor of the defendants."

4.

"The mere happening of an accident raises no presumption of negligence and you must not assume nor find, merely because it is undisputed that an accident occurred in which the plaintiff was injured, that the defendants were negligent or that they are legally responsible for the happening of the accident or the result thereof."

5.

"You are instructed that as a matter of law no liability attaches where the injury results from what is termed an unavoidable and inevitable accident. Therefore, negligence can never be predicated upon a purely accidental occurrence of that type. An accident in law is one that happens without the negligence of any one proximately contributing thereto."

6.

"If you find from a preponderance of the evidence in this case that the plaintiff's injuries, if any, resulted from the combined negligence of the plaintiff and the defendant Marie Payne, such combined negligence, if any, both proximately contributing to the happening of the accident, then I charge you the plaintiff cannot recover."

7.

"You are instructed that Division IX Traffic Laws, Chapter 1, Section 452 of the Vehicle Code, which was in full force at the time and place of the accident herein provided as follows:

"'Traffic Laws Apply to Persons Riding Bicycles or Animals.

"'Every person riding a bicycle or riding or driving an animal upon a highway is subject to the provisions of this division applicable to the driver of a vehicle, except those provisions which by their very nature can have no application.'

"Chapter 8. Section 541 (b) 'No vehicle in a residence district shall be turned so as to proceed in the opposite direction when any other vehicle is approaching from either direction within two hundred feet, except at an intersection.'

"Chapter 8. Section 544. When Signal Required. '(a) No person shall turn a vehicle unless and until such movement can be made with reasonable safety and then only after the giving of an appropriate signal in the manner provided herein in the event any other vehicle may be affected by such movement.

"'(b) Any signal of intention to turn right or left shall be given continuously during the last fifty feet traveled by the vehicle before turning.'

"Section 546. Method of giving signals. 'All signals herein required given by hand and arm shall be given from the left side of a vehicle in the following manner and such signals shall indicate as follows:

"'(a) Left turn—hand and arm extended horizontally beyond the side of the vehicle.'

*"Chapter 7. Section 525. 'Upon all roadways of sufficient width a vehicle shall be driven upon the right half of, and as close as practicable to the right-hand curb or edge of, such roadway, except as follows: * * **

"'(b) When placing a vehicle in a lawful position for, and when such vehicle is lawfully making, a left turn.'"

8.

"I charge you that under the law a person operating a motor vehicle is not bound to anticipate that another person operating a vehicle, including a bicycle, will violate

the law, and in this case, I charge you that the defendant Marie Payne was not under the law required to anticipate that the plaintiff in riding his bicycle would violate any law, in the absence of some conduct upon the part of the plaintiff indicating to the defendant Marie Payne, as an ordinary prudent person under all of the surrounding circumstances, that the plaintiff did in fact intend to violate some law. And under such circumstances, the defendant Marie Payne would not be guilty of negligence in assuming that the plaintiff in riding his bicycle would not violate the law unless and until she had actual notice as an ordinary prudent person under all the circumstances that the plaintiff would violate the law."

9.

"You are instructed that Chapter VII, Section 671 (b) of the Vehicle Code which pertains to the requirements of sounding a horn on a motor vehicle, does not require the use of a horn in passing if a vehicle intends to pass another vehicle under any and all circumstances.

"Therefore, the question of sounding the horn is a matter which is left to the sound judgment of the operator of the motor vehicle in the exercise of ordinary care. The Vehicle Code leaves the question of sounding the horn up to the driver and requires the sounding of a horn when reasonably necessary to insure safe operation. The horn shall not otherwise be used in a business or residence district.

"However, there is no evidence in this case establishing the locality of the accident as being in a residence or business district. The rule requiring the sounding of a horn before overtaking another vehicle is applicable only to a motor vehicle driven outside of a business or residence district. Therefore, the failure upon the part of defendant Marie Payne to sound a horn immediately prior to the happening of the accident does not constitute negligence as a matter of law."

Fifth: The trial court committed prejudicial error in refusing at plaintiff's request to instruct the jury as follows:

A.

"You are instructed that the negligence of any person which proximately causes injury to another, gives rise to a cause of action in favor of the injured party and against the negligent person and the injured party is entitled to recover compensation for all the detriment proximately caused by such negligence, whether it could have been anticipated or not, including all such detriment up to the time of the trial of such cause of action as well as including all such detriment reasonably certain to result therefrom in the future."

B.

"You are instructed that in determining the matter of damages, if any, in this case, you may consider the element of plaintiff's fear and apprehension, if any, of future disability caused by the injuries complained of by him herein."

C.

"You are instructed that ordinary care is that degree of care which an ordinarily prudent and reasonable person, under given circumstances, would ordinarily and reasonably exercise for his own rights and safety and the rights and safety of others, and the failure of a person to exercise such care is negligence."

D.

"You are instructed that all persons operating vehicles upon the public highways and streets of this State are under the duty to exercise proper care and must not operate said vehicles thereon in a negligent manner but must operate the same in such manner and at such speed and under such control as would an ordinarily reasonable and prudent person under the same or similar circumstances; the duties of persons operating vehicles upon the public highways and streets of this State are reciprocal and no one has a greater right than another thereon but each and all must exercise the same degree of care as would an ordinarily reasonable and prudent person under the same or similar circumstances."

E.

"You are instructed that all persons operating vehicles upon the public highways and streets of this State must use that degree of care, in so doing, which an ordinarily reasonable and prudent person would have used under the same and similar circumstances; that bicycle riders on the public highways and streets of this State, are not required to look back for vehicles approaching from behind to avoid collisions, or to avoid being run over from behind."

F.

"You are instructed that one to whom a duty of care is owing by another has the right to assume that the person who owes

such duty will perform it; and, in the absence of reasonable ground to think otherwise, it is not negligence on the part of the one to whom the duty is owing to assume that he will not be exposed to a danger which can come to him only through a violation of that duty by the person owing it."

G.

"You are instructed that a party to the record of any civil action or proceeding or a person for whose immediate benefit such action or proceeding is prosecuted or defended, or the directors, officers, superintendent or managing agent of any corporation which is a party to the record, may be examined by the adverse party as if under cross-examination, subject to the rules applicable to the examination of other witnesses. The party calling such adverse witness shall not be bound by his testimony and the testimony given by such witness may be rebutted by the party calling him for such examination by other evidence. Such witness, when so called, may be examined by his own counsel, but only as to the matters testified to on such examination."

H.

"You are instructed that a violation of the law relative to the operation of motor vehicles upon the public highways and streets of the State, other than a violation of the law relative to the prima facie speed of said vehicles thereon, constitutes negligence as a matter of law and if such negligence proximately causes injury, the person violating said laws is liable for damages therefor in a civil action."

I.

"You are instructed that the California Vehicle Code, Section 531(a) thereof, in force and effect at the time of the accident involved in this case, provided:

" 'The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicle and the traffic upon, and the condition of, the roadway.' "

J.

"You are instructed that if you find from the evidence that the defendant Marie Payne was following the plaintiff along South Harvard Boulevard on the day of the accident involved in this case, and you find from the evidence that she was so following him more closely than was reasonable and prudent, having due regard for the speed of the automobile which she was then driving and the traffic upon, and the condition of, said Harvard Boulevard, then you will find that she was negligent in so doing and if you further find from the evidence that said negligence was the proximate cause of the accident involved in this case and of the injuries and damages complained of by plaintiff herein, you will find for the plaintiff and against the defendants Marie Payne and Coffee Products of America, Inc. Ltd., a corporation."

K.

"You are instructed that the California Vehicle Code, Section 528(b) thereof, in force and effect at the time of the accident involved in this case, provided:

" 'The driver of a motor vehicle, when traveling outside of a business or residence district and under other conditions where necessary to insure safety, shall give audible warning before overtaking a vehicle proceeding in the same direction.' "

L.

"You are instructed that the California Vehicle Code, Section 671(b) thereof, in force and effect at the time of the accident involved in this case, provided:

" 'The driver of a motor vehicle, when reasonably necessary to insure safe operation shall give audible warning with his horn. Such horn shall not otherwise be used.' "

M.

"You are instructed that if you find from the evidence that the defendant Marie Payne was overtaking the plaintiff at the time and place involved in this case and further determine from the evidence that it was reasonably necessary in order to insure the safe operation of her automobile for the defendant Marie Payne to have given an audible warning with her horn, in so doing, and you further find from the evidence that she failed to give an audible warning with her horn, then you will find that she was negligent in so doing and if you further find from the evidence that said negligence was the proximate cause of the accident involved in this case and of the damages and injuries complained of by plaintiff herein, you will find for the plaintiff and against the defendants Marie Payne and Coffee Products of America, Inc., Ltd., a corporation."

N.

"You are instructed that it is not contributory negligence to fail to look out for danger, if any, where there is no reason to apprehend any."

O.

"You are instructed that a driver of a motor vehicle upon the public highways and streets of this State, although he may be driving his automobile at a legal speed, is still bound to anticipate that he may meet persons at any point of the highway or street, and he must, in order to avoid a charge of negligence, keep a proper lookout for them and keep his machine under such control as will enable him to avoid a collision with another person using proper care and caution, and if the situation requires, he must slow up and stop."

P.

"You are instructed that in operating an automobile over a public highway, its driver, under ordinary circumstances, cannot run down a vehicle proceeding in the same direction without having been negligent in the operation of his automobile unless it appears that the collision was due to the negligent conduct of the driver of the other vehicle. The mere fact that he does run down a vehicle ahead of him furnishes some evidence that he was either travelling at too high a rate of speed or following too closely."

Q.

"You are instructed that if you find from the evidence that defendant Marie Payne was driving the automobile involved in this case along South Harvard Boulevard, on the date of the accident involved herein, behind the plaintiff and that both of them were travelling in the same direction, and if you further find from the evidence that the defendant Marie Payne struck the plaintiff from the rear and ran down his bicycle, you are instructed that defendant Marie Payne could not have done so without having been negligent in the operation of her automobile, unless you find from the evidence that the collision was the proximate consequence of the contributory negligence of the plaintiff. If you do find from the evidence that the defendant Marie Payne did, under said circumstances, strike the plaintiff from the rear and did run down his bicycle, you are instructed that the mere fact furnishes some evidence that she was either traveling at too high a rate of speed or following plaintiff too closely. You are instructed that if you find that defendant Marie Payne struck the plaintiff from the rear and ran down his bicycle, under the said circumstances, and you find that the said collision was not contributed to proximately by any negligence of plaintiff, and if you find from the evidence that defendant Marie Payne, in so doing was negligent and that such negligence was the proximate cause of the damages and injuries complained of by plaintiff herein, you will find for the plaintiff and against the defendants Marie Payne and Coffee Products of America, Inc., Ltd., a corporation."

R.

"You are instructed that under the law, in a civil action the plaintiff may call the defendant as a witness, and the defendant may call the plaintiff as a witness and the party so called as a witness may be examined by the party calling him as if under cross-examination; however the party calling such witness is not bound by his testimony under such examination; in this case the defendants called only one witness on their behalf, E. P. Ripley; the plaintiff called the defendant Marie Payne as his witness under Section 2055 of the Code of Civil Procedure and examined her thereunder as on cross-examination; she was not called as a witness for the defendants; you are instructed that the testimony of Marie Payne under said examination is not binding upon the plaintiff."

[2] The first proposition is untenable. An examination of the record discloses substantial evidence in connection with the inferences which may be reasonably drawn therefrom to support the facts set forth above and each and every finding of fact upon which the verdict of the jury was necessarily predicated. From the evidence adduced at the trial the jury may have very properly believed that defendant Marie Payne was proceeding in a southerly direction on Harvard boulevard at a speed of from 20 to 25 miles per hour; that she was proceeding on the right-hand side of the street, while plaintiff was likewise proceeding south on the same boulevard, and that suddenly without any warning, between the intersections and without looking to ascertain if he could proceed in safety, he made a left-hand turn into the path of the automobile being operated by said defendant and that

this act constituted negligence on his part which was the sole proximate cause of the accident.

[3] It is too well settled to need the citation of authority that when an inference can be reasonably deduced from the evidence sustaining a finding of the trial jury, this court is without power to substitute its deductions for those of the trial jury. Further discussion of the evidence is unnecessary.

The second proposition is likewise untenable. Plaintiff complains of the following incidents which occurred during the course of the trial:

(1) When the defendant Payne was testifying, under Code of Civil Procedure 2055, called by plaintiff and replying in an inaudible voice, the court advised her, "Don't get nervous. No witness has ever been beaten or kicked in this court so you don't have to be nervous about it."

(2) When said defendant was asked by plaintiff's counsel to reply to a question which went unanswered and which she did not state she misunderstood but asked him to repeat it, the court stated to plaintiff's counsel, "Don't make it complex. Objection is sustained. Stricken out. I said it is complex." No objection had been interposed by defendant's counsel.

(3) When plaintiff's counsel asked defendant Payne, after she had testified that the accident occurred between Pico and Washington on South Harvard and that between the first two streets there was another intersecting street, whether the accident happened between Pico and Venice or Venice and Washington, and defendant's counsel stated that there was no need to take a lot of time to find out where the accident happened, whereupon plaintiff's counsel suggested that it was cross-examination, that it was not only to determine that fact but to test the witness, the court stated, "I know, but it takes a lot of time".

(4) When defendant's counsel stated that there was no issue of where it happened, the court stated, "I don't think so. Let her answer."

(5) When plaintiff's counsel asked the defendant Payne to describe the nature of the accident, whether it was a collision between her automobile and the boy, the court stated, "That is asking a question which, of course, is very, very leading, and not proper cross-examination. If you mean how the accident happened, that is all right."

(6) After defendant Payne testified that she was about a block and a half behind plaintiff when she first saw him plaintiff's counsel asked her how far plaintiff was behind the point of impact when she first saw him, the following colloquy took place:

"Q. In other words, you have testified that you were a certain place when you first saw the boy? A. Yes sir.

"Q. You have testified that he was a certain place when you first saw him? A. Yes.

"Q. I am trying to find out whether that particular place behind the point of impact—

"The Court: She said she saw him first a block and a half away. She said that three times.

"Mr. Falcone: From the point of impact?

"The Court: Yes sir. You asked if she saw him before she crossed Venice boulevard, and she said she did not remember.

"Mr. Falcone: There is confusion in my mind.

"The Court: All right, ask it again. I listen very carefully to the testimony.

"Mr. Falcone: Well, the question is directed to how far the boy was behind the point of impact.

"The Court: How far the boy was behind the point of impact?

"Mr. Falcone: When she first saw him.

"The Court: I don't understand that question myself."

(7) Plaintiff's counsel asked the defendant Payne whether plaintiff was on his bicycle or whether he had fallen clear of the bicycle when she first saw him after the collision. Thereupon the following proceedings occurred:

"Q. Well, anywhere? A. No. He was right near the bicycle.

"Q. He was not on the bicycle? A. Yes, I believe he was. I am not positive.

"The Court: That depends on what you mean by 'on'.

"Q. By Mr. Falcone: Well, were his legs straddling the bicycle; were any portions of his body on the bicycle, touching the bicycle? A. Yes."

(8) On plaintiff's cross-examination of defendants' sole witness, Ripley, the following proceedings took place:

"Q. Where had you started your ride, Mr. Ripley, this morning, the morning that you saw this accident, from your home? A. Yes.

"Q. Where did you live? A. I lived at that time on West Adams boulevard.

"Q. You were coming north on South Harvard, is that right? A. Yes.

"Q. Now, there are stop signals on Washington, are there not. Washington and South Harvard? A. Yes.

"Q. There were on that date? A. Yes.

"Q. And did you stop at any buttons or a stop signal before——

"The Court: The objection is sustained."

(9) During plaintiff's direct examination the following proceedings took place:

"Q. You say you traveled about six feet from the curb line along South Harvard boulevard? A. Yes, sir.

"Q. Then you say you began gradually to go into the street?

"Mr. Jorz: Just a minute.

"The Court: The objection is sustained.

"Mr. Falcone: I am repeating what I thought the witness said.

"The Court: I know you are. It is not necessary. The jury are supposed to be intelligent. I am willing to stipulate that they are.

"Mr. Falcone: It is a little boy, and I am trying to make it easier for him.

"The Court: I don't like this repetition of testimony by counsel."

(10) During the examination just referred to the following proceedings also occurred:

"Q. Can you tell the jury what injury you received, if any, from the impact of the automobile? A. I had a bump on my head and a black eye, some bruises on my arm and leg. I guess that is about all.

"Q. Which eye was bruised? A. This one, here (indicating).

"Q. Indicating the left eye? A. Yes.

"Q. Eldon, can you tell the jury your mental condition immediately after the collision with the automobile?

"The Court: The objection is sustained. He is not a psychiatrist. He can tell what he felt, what he did.

"Q. By Mr. Falcone: Eldon, how did you feel after the accident? A. Well, I got tired and had headaches for a while after.

"Q. Do you remember very clearly, Eldon, what happened the next two or three days? A. No, I don't."

(11) During the direct examination of Dr. Alphonse I. Wray, an expert witness for plaintiff, the following proceedings occurred:

"Q. Did you find any injury to his head other than the black eye? A. I couldn't positively tell, because in cases of that nature where we get—

"The Court: Did you find anything the matter with his head? A. I found that left area surrounding the eye and the head had been considerably swollen, sir, and deep bleeding which we call ecchymosis.

"Q. Did you or did you not, Doctor, find any injury to the brain, any brain condition? A. That I could not determine. I made X-rays in order—

"Mr. Jorz: I don't want to interrupt—

"The Court: You have already answered. You say you do not know. A. My diagnosis was concussion of the brain."

(12) Again, during the examination of Doctor Wray, the following proceedings occurred:

"Q. Would the fact that these X-rays were negative to you, that is you read them negatively eliminate the possibility of any injury to his brain?

"Mr. Jorz: Object to that upon the ground that is asking for a possibility.

"The Court: The objection is sustained.

"Q. By Mr. Falcone: Doctor, would the X-ray reveal all injuries to the brain? A. Not even would it reveal fractures. You can take these X-rays and they very frequently do not reveal even fractures when there is a fracture at the base of the skull.

"Mr. Jorz: Pardon me, if the court please. The doctor testified that his X-rays disclose nothing. I submit to indulge in a lot of speculation is misleading.

"The Court: There is no question about that. That is pure speculation.

"Q. By Mr. Falcone: Doctor, as I understand you, you treated Eldon the first time for something else in December, 1936, is that right? A. I did.

"Q. You had him more or less under your professional care ever since? A. I have.

"Q. You are familiar with his case history? A. I am.

"Q. You are familiar with the type of brain tumor he was operated on for? A. I saw him immediately afterwards.

"Q. Doctor, with your knowledge of Eldon's case, with your knowledge of his physical condition, with your knowledge of the examination you have conducted of Eldon, the findings you made from the examination, and the treatment you have prescribed for him as a result thereof, have you or have you not an opinion as to the probable consequence reasonable to ensue from that traumatic injury that he suffered on February 4th?

"The Court: The objection is sustained.

"Q. By Mr. Falcone: Doctor, did you or did you not form an opinion, based upon your observations of Eldon's condition, February 4, 1938, to-wit: ecchymosis and bruises on his body, injuries to his limb and to his finger, and your diagnosis of brain concussion, and based upon your knowledge of the history of the case, particularly with reference to the brain tumor surgery, as to whether or not the brain tumor condition was aggravated by the conditions you found on February 4, 1938?"

(13) Again, during the same examination, this occurred:

"Q. Doctor, in your opinion is Eldon at the present time cured of any of those conditions which you found on February 4, 1938?

"Mr. Jorz: I object to the form of the question as indefinite.

"The Court: The objection is sustained. He said he had bruises on the arm, leg, ecchymosis to the eye, a bump on the forehead, the eye was closed, and he indicated cold applications. I can tell you what he said then. Do you want to base something else on that?

"Q. By Mr. Falcone. Doctor, how long would it take to determine whether or not the conditions which Eldon suffered from February 4, 1938, and the causes thereof had any effect on his brain, particularly with reference to the brain tumor?

"The Court: He answered that. He said not any. He just answered. He said it would not have any. He said there was no metastasis.

"Mr. Falcone: He answered some time ago that—

"The Court: He has answered. He said no metastasis, which means it was not disturbed, nothing done, just the same as it was before. That is correct. That is what you said, is it not? A. I answered one question for one thing and I did not answer the other question. If I am permitted to answer the question put before me, if Your Honor will permit it, I will be very glad to answer it.

"The Court: I think you have already answered it.

"Mr. Pierce: The doctor's statement was that there had been no metastasis. He did not state that would be the only possible and probable result of this injury.

"Mr. Jorz: I object to any possibility.

"The Court: To the possibility the objection is sustained.

"Mr. Falcone: Well, probabilities.

"The Court: What is your prognosis? I will ask him that one question. A. My prognosis of this case is guarded; as I stated in the early part of the examination, that when a child or any person is subjected to a concussion of the brain, that your results are not determined within a few days or a few hours; that it may extend of a period of time of a year—from a few days to a year or more.

"Mr. Jorz: I ask that that be stricken out.

"The Court: That is stricken out as not responsive to any question, a lecture on the subject, and not answering the question. Now you may ask your question.

"Mr. Falcone: I will ask to repeat Your Honor's question: what his prognosis of the patient was.

"The Court: That is what you are trying to get. I think he is entitled to answer it, if he will.

"Q. By Mr. Falcone: Doctor will you give the court and the jury to the best of your ability what your professional prognosis was of the boy? A. I have stated that was guarded; that I could not say what the results would be from the injury.

"The Court: He says he can't say. That answers your question."

"Redirect Examination.

"By Mr. Falcone: Q. Doctor, is the amount of $125 a reasonable value of the services that you rendered Eldon since February 4, 1938? A. It is not excessive.

"Mr. Falcone: Thank you.

"The Court: He did not ask you that. Would you repeat the question?

"Mr. Falcone: The Court, doctor, stated that your answer was not responsive. A. Yes, repeat the question. (The last question was read by the reporter.) A. Yes."

(14) During the direct examination of Dr. Leo J. Adelstein, an expert witness for plaintiff, the following occurred:

"Q. By Mr. Falcone: Doctor, based upon your knowledge of Eldon's condition, particularly your examination of him, your findings, to wit, that he was sick and vomited, was obliged to and did lie on his back most of the time, your examination of his eye grounds, your diagnosis of the presence of some pressure, some pressure from a tumor of the brain, particularly of the pineal gland; based upon your surgery of that brain condition, and your observation and treatment and care of Eldon was thereafter post-operatively; assume that Eldon was involved in an accident in which he was thrown from a bicycle, and thrown to the pavement, bumped his head against the pavement and suffered a brain concussion in the left frontal area of his head which was discolored, that he had ecchymosis and swelling of the eye, closing of his left eye, what in your opinion would be the effect of those traumatic injuries that he suffered in that accident upon the condition of his brain? A. I would say the likelihood would be that—

"Mr. Jorz: I object to the 'likelihood'.

"The Court: 'Likelihood' does not mean anything.

"A. In my opinion he would suffer an aggravation of the previous condition.

"Q. By Mr. Falcone: Doctor, would that aggravation necessarily manifest itself in a year or six months? A. It usually does within six months to a year.

"Q. Does it ever manifest itself after a year? A. Well, ordinarily not, although that is possible; but it usually manifests itself sooner than that.

"Mr. Jorz: I will ask that that be stricken out and the jury instructed to disregard possibility.

"The Court: Yes. Stricken out."

[4] The errors which plaintiff predicates upon the foregoing incidents will not be considered by this court for the reason that plaintiff did not lay the proper foundation in the trial court for review here. Unless the harmful result of the alleged misconduct of the trial judge cannot be obviated by appropriate instructions of the trial court, error cannot be predicated in this court on such alleged misconduct in the absence of (a) assignment of such misconduct as error, and (b) a request to the trial court to instruct the jury to disregard it. Sitkei v. Ralphs Grocery Co., 25 Cal.App.2d 294, 296, 77 P.2d 311. In the instant case plaintiff did not assign the trial judge's alleged misconduct as error, nor did he request him to instruct the jury to disregard such alleged misconduct, although the harm thereof, if any, might well have been obviated by appropriate instructions.

[5-13] The third proposition is without merit. The court's rulings on objections and on its own motion to questions asked witnesses were proper or in no way prejudicial to plaintiff.

[14-17] The instructions set forth in paragraphs 1, 2, 3, and 4 of plaintiff's fourth proposition are correct statements of the principles of law contained therein.

[18, 19] The instructions contained in paragraphs 5 and 6 of plaintiff's fourth proposition are correct statements of the principles of law contained therein. Zohner v. Sierra Nevada, etc., Co., 114 Cal. App. 85, 90, 299 P. 749; Sitkei v. Ralphs Grocery Store, supra, 25 Cal.App.2d at page 296, 77 P.2d 311.

[20-22] The instructions contained in paragraphs 7, 8, and 9 of plaintiff's fourth proposition are all correct statements of the principles of law incorporated therein.

[23] The trial court did not commit error in refusing plaintiff's instructions A and B, set forth in plaintiff's fifth proposition, for the reason that the law is established in California that if a jury under proper instructions returns a general verdict in favor of the defendant in a negligence action, error may not be predicated upon the refusal to give or the giving of

erroneous instructions relative to the issue of damages. Hurd v. San Francisco, 49 Cal. App. 361, 363, 193 P. 507; De La Torre v. Johnson, 203 Cal. 374, 378, 264 P. 485.

[24] The rules of law in the instructions set forth in paragraphs C, D and N of plaintiff's fifth proposition were fully covered by instructions given to the jury, reading as follows:

"You are instructed that the driver of automobiles have no special right or privilege in the use or enjoyment of the public highways and streets of this state; the law indeed imposes upon them a degree of care commensurate with the peculiar hazard attending the operation of said automobiles.

"You are instructed that negligence is the failure to fulfill a legal duty to exercise the proper degree of care whereby injury accrues to a party to whom the duty is owed; it consists of the omission to do something which an ordinarily prudent and reasonable person would have done under given circumstances, or in doing something which an ordinarily prudent and reasonable person would not have done under given circumstances; it is the failure to exercise ordinary care under given circumstances; it is not absolute or to be measured in all cases in accordance with some precise standard, but always relates to some circumstances of time, place, and person.

"You are instructed that the California Vehicle Code, section 510 thereof, in force and effect at the time of the accident involved in this case, provided: 'No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property.'

"You are instructed that bicycle riders on the public highways and streets of this state have the same rights as automobile drivers to the use of said public highways and streets."

[25] The instructions set forth in paragraphs H, I, M, O, P, and Q of plaintiff's fifth proposition were correctly refused, in view of the fact that they assume that the accident was a rear-end collision, which is contrary to the implied finding of the jury which is supported by substantial evidence.

[26] The instructions set forth in paragraphs E and G of plaintiff's fifth proposition were properly refused, because the substance of the instructions was given to the jury in other instructions read by the court.

[27] Plaintiff has failed to point out wherein the failure to give instructions F and R in his fifth proposition resulted in prejudice to him. Therefore the alleged error predicated upon the refusal to give such instructions must be disregarded by us. Const., art. VI, sec. 4½.

[28] The substance of the law as set forth in the instructions in paragraphs J, K, and L of plaintiff's fifth proposition was given to the jury when the trial court instructed it as follows:

"You are instructed that chapter VII, section 671(b), of the Vehicle Code, which pertains to the requirements of sounding a horn on a motor vehicle, does not require the use of a horn in passing if a vehicle intends to pass another vehicle under any and all circumstances.

"Therefore, the question of sounding the horn is a matter which is left to the sound judgment of the operator of the motor vehicle in the exercise of ordinary care. The Vehicle Code leaves the question of sounding the horn up to the driver and requires the sounding of a horn when reasonably necessary to insure safe operation. The horn shall not otherwise be used in a business or residence district.

"However, there is no evidence in this case establishing the locality of the accident as being in a residence or business district. The rule requiring the sounding of a horn before overtaking another vehicle is applicable only to a motor vehicle driven outside of a business or residence district. Therefore, the failure upon the part of defendant Marie Payne to sound a horn immediately prior to the happening of the accident does not constitute negligence as a matter of law."

For the foregoing reasons the judgment is affirmed.

I concur in the judgment: WOOD, Acting P. J.

33 Cal.App.2d 464

In re WARNOCK'S ESTATE.
WARNOCK et al. v. WARNOCK et al.
Civ. 2467.

District Court of Appeal, Fourth District, California.
Jan. 5, 1940.

1. Descent and distribution 🔑14

An inheritance of corporation stock, sold by heir, who invested proceeds in stock of another corporation, never lost its identity, but retained its ancestral character, though changed in form. Probate Code, § 229.

2. Descent and distribution 🔑14

Intestate's deceased brother's sons are not related to intestate in same degree of consanguinity as his half-brothers and half-sister, so that exception in statute, providing that kindred of half-blood inherit equally with those of whole blood in same degree, unless inheritance came to intestate by descent, devise, or gift of his ancestor, in which case all who are not of such ancestor's blood must be excluded from inheritance, is inapplicable in determining whether such nephews or half-brothers and half-sister inherit estate and it must be distributed in equal shares to intestate's brothers and sisters, including those of half-blood, and descendants of deceased brothers and sisters by right of representation. Probate Code, §§ 225, 229, 253, 254.

◆

Appeal from Superior Court, Inyo County; William D. Dehy, Judge.

In the matter of the estate of Robert Davis Warnock, deceased. From a decree establishing the heirship of Farlow Warnock and others, John B. Warnock and others appeal.

Reversed.

Jess G. Sutliff, of Independence, for appellants.

Glenn E. Tinder, of Bishop, for respondents.

GRIFFIN, Justice.

This is an appeal from a decree establishing heirship. The decedent, Robert Warnock, died leaving him surviving as next of kin the following: four nephews, the children of a deceased brother of decedent, respondents herein, who were of the blood of Margery Jane Farlow, a sister of decedent's mother, and three half brothers and a half sister, whe were not of the blood of the said Margery Jane Farlow. A petition to determine heirship in this matter was duly filed in the trial court and after hearing, the court held that the nephews were entitled to distribution of the decedent's estate. From this decree the half brothers and half sister have appealed.

The stipulated facts are as follows:

"1. That the above named decedent, Robert Davis Warnock, owned, at the time of his death, eleven (11) shares of preferred stock of the Utah Power & Light Company, which he did not dispose of in his last will and testament.

"2. That the question here to be determined is, to whom said shares of stock shall be distributed, that is to say, (a) to his (decedent's) four nephews * * *; or (b) to his (decedent's) three half-brothers and a half sister, * * *

"3. That said shares of stock were acquired by the decedent, Robert Davis Warnock, from his aunt, Margery Jane Farlow, under the terms of her last will and testament. That Margery Jane Farlow was the sister of decedent's mother and bequeathed certain property to the decedent, Robert Davis Warnock, namely, eleven (11) shares of preferred stock of the Schramm-Johnson Drugs Company. That said eleven shares of preferred stock of Schramm-Johnson Drugs Company were sold and the proceeds invested in said eleven shares of stock of the Utah Power & Light Company, which latter mentioned stock is the subject-matter to be distributed.

"4. That the relationship of the decedent to the claimants to said stock is:

"(a) Farlow Warnock, Robert Warnock, Edmund Warnock and John Warnock, nephews of decedent, being the sons of Clarence Warnock, the latter being a deceased brother of decedent; and

"(b) John B. Warnock, Joseph Warnock and Julian Warnock, half-brothers of decedent; and Martha Warnock Biscardi, half-sister of decedent."

Appellants first contend that when the decedent sold the Schramm-Johnson Drugs Company stock which he had inherited from his aunt as aforesaid, the said stock then, at that moment, lost its ancestral character so as not to come within the purview of the exception noted in section 254 of the Probate Code, viz., "Kindred of the half blood inherit equally with those of the whole blood in the same degree, *unless the inheritance came to the intestate by descent, devise, or gift of some one of his ancestors,* in which case all those who are not of the blood of such ancestor must be excluded from such inheritance in favor of those who are."

Appellants contend further, therefore, that since the specific property now held by the estate did not come to the decedent from an ancestor that the brothers and sisters (which includes those of the half blood) are in the second degree of relationship to the decedent and that the nephews are in the third degree of relationship, and that accordingly appellants are entitled to the property. Appellants also argue that under section 254, supra, and section 225 of the Probate Code, the only surviving relatives of the decedent are the three half brothers and a half sister, and the four children of a deceased brother of the decedent; that therefore, by virtue of the language of the first sentence of section 254, to-wit, "Kindred of the half blood inherit equally with those of the whole blood in the same degree * * *" the half brothers and half sister would share in the estate and that by virtue of section 225, "If the decedent leaves neither * * * in equal shares to his brothers and sisters and to the descendants of deceased brothers and sisters by right of representation" the children of the deceased brother of decedent would also share in this estate, citing 18 Cor. Jur., p. 819, notes 46 and 47; 18 Cor. Jur., p. 820, note 64; 16 Am.Jur. p. 845, note 17; In re Smith's Estate, 131 Cal. 433, 63 P. 729, 82 Am.St.Rep. 358; Estate of Lynch, 132 Cal. 214, 64 P. 284.

[1] Notwithstanding the stipulation, appellants have raised the additional point, not raised in the trial court, but presented for the first time to this court in an "amended opening brief", that the property "lost its ancestral character". There is no contention that the proceeds from the sale of the Schramm-Johnson Drugs Company stock were ever at any time mingled with any other property or assets of the deceased. In fact it has been stipulated that the proceeds from the sale of the Schramm-Johnson Drugs Company stock inherited by the deceased were invested in the Utah Power & Light Company stock, and this being true, we would therefore logically conclude that the inheritance, though changed in form, never lost its identity and therefore still retained its ancestral character. This conclusion receives full support in Estate of Putnam, 219 Cal. 608, 28 P.2d 27, 28, wherein the court, in considering section 229 of the Probate Code, in reference to ancestral property, said: "The reason and purpose of section 229 of the Probate Code is, in the absence of testamentary disposition, to turn the property back to the family from which it came, rather than to permit it to descend to the wife's family. * * * But the section never sought to limit the right of the wife to dispose of it by will or conveyance. For which reasons we find the authorities declaring that property so inherited does not lose its character or status as such by a mere change in form or identity, such, for example, as the exchange of inherited parcel A for parcel B. The latter property acquires the status of that formerly possessed by parcel A." (Citing cases.)

[2] Although no authorities are cited in support of the contention, it is respondent's claim that if Clarence Warnock, father of the respondents, were alive, there is no question but that the provisions of section 254 would entitle him to take preference over the brothers and sisters of the half blood, which contention cannot be disputed. They then claim that Clarence Warnock being deceased, his sons, the respondents, stand in his place and stead by right of representation; that they, as a group, stand in the place and stead of Clarence Warnock, full brother of the deceased, and should take to the exclusion of the brothers and sisters of the half blood. In other words, as we view it, it is respondent's contention that the second clause of the section, the portion following the word "unless", applies to *all* cases wherein next of kin of the half blood claim property which has come to a decedent from an ancestor not of the blood of the claimants and that its effect is to exclude such kindred from the inheritance, in favor of those of the whole blood who are of the blood of the ancestor. In other words, the respondents urge that "where the property of the decedent was of ancestral origin, and the relatives of the half blood were not of the blood of the ancestor, those relatives of the half blood should be excluded in favor of relatives of the full blood who were of the blood of the ancestor. This view receives support in some early cases of other states.

Scott v. Terry, 37 Miss. 65; King v. Neely, 14 La.Ann. 165; Hitchcock v. Smith, Ala., 3 Stew. & P. 29.

However, this section was construed adversely to respondents' contention in Estate of Smith, supra, in which the court held that the exception in section 1394 of the Civil Code (now section 254 of the Probate Code) excluded kindred of the half blood in favor of kindred of the whole blood, where the former were not of the blood of the ancestor from whom the estate came by descent, devise, or gift, and applied only where such kindred were "in the same degree" and had no application to any cases where the degrees were not the same.

In Estate of Belshaw, 190 Cal. 278, 212 P. 13, the appellants herein made the same contention as the respondents in the instant case. The court therein fully analyzed the decision in Estate of Smith, supra, and again adopted the same interpretation.

In Estate of Sayles, 215 Cal. 207, 8 P.2d 1009, the court held that under section 254 of the Probate Code, where the property of the decedent was of ancestral origin, half brothers and half sisters of the decedent who were not of the blood of the ancestor inherit the property in preference to a cousin of the decedent who was of the blood of the ancestor. It fully and maturely considered the opinion in Estate of Belshaw, supra, and Estate of Smith, supra, and concluded that the last clause of the quoted code section constituted an exception to the rule announced in the first clause thereof and that the second clause was operative only when there were kindred of the whole blood who were of the blood of the ancestor and "in the same degree" as those of the half blood. In other words, as construed in Estate of Belshaw, supra, kindred of the half blood, under the first clause of the section, inherit equally with those of the whole blood "in the same degree," and under the second or last clause of the section, if the property be of ancestral origin, the kindred of the half blood, not of the ancestor, are excluded only in favor of those of the whole blood "in the same degree", providing, of course, that those of the whole blood are also of the blood of the ancestor.

In the instant case, it must be conceded that the deceased's brothers and sisters of the half blood come within and are related in the second degree of consanguinity. The children of the deceased brother (nephews) are classified as being related in the third degree. Sec. 253, Probate Code. It therefore follows, in view of the above-mentioned decisions, and construction of section 254 of the Probate Code, that the respondents are not "in the same degree" of consanguinity with those of the half sister and half brother. It therefore must follow that the exception provided in that section is not applicable. In re Ingram, 78 Cal. 586, 21 P. 435, 12 Am.St.Rep. 80.

Appellants' contention, then, that the estate must be distributed under section 225 of the Probate Code in equal shares to decedent's brothers and sisters (which includes those of the half blood) and to the descendants of deceased brothers and sisters by right of representation must be sustained.

The judgment of the trial court is reversed. Appellants to recover costs.

We concur: BARNARD, P. J.; MARKS, J.

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36 Cal.App.2d 328

WINTERS v. YAMAGUCHI et al.
DAY v. SAME.

Civ. 12350.

District Court of Appeal, Second District, Division 2, California.

Dec. 29, 1939.

1. Evidence 🔑**14**

It is common knowledge that multiple fractures of the pelvis are not to be lightly considered, and such injuries call for substantial general damages.

2. Damages 🔑**132(15)**

$1,500 was grossly inadequate for fracture of right clavicle and multiple fracture of pelvis, resulting in great pain and suffering, expenditures of $1,561, loss of wages, and possible permanent limp.

3. Damages 🔑**130(4)**

$249.50 was grossly inadequate for injuries to woman who was rendered unconscious, suffered bruises on her head, nose, arm, chest, and hip, was compelled to remain in bed for 3½ weeks, and had expended or been obligated to expend $249.45 for hospital and medical expenses.

4. Appeal and error ⇨706(4)

An order denying plaintiffs' motions for new trial would be affirmed notwithstanding that damages awarded plaintiffs were grossly inadequate, where bill of exceptions set forth evidence as to damages but not as to defendants' negligence, since trial court might have denied new trial on ground that plaintiffs were not entitled to recover any damages.

◆

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Actions by Ruth Winters, and by Bessie L. Day, against S. Yamaguchi and another, for injuries sustained in a collision between an automobile and a truck. From judgments for defendants, plaintiffs appeal.

Affirmed.

Alfred E. Cate and Bernard C. Brennan, both of Los Angeles, for appellants.

Cushman & Harbert and Robert A. Cushman, all of Los Angeles, for respondents.

WOOD, Justice.

Bessie L. Day and Ruth Winters were on July 8, 1938, riding in an automobile being driven by Vala Dotson on Normandie avenue in the city of Los Angeles. Their car collided with a truck operated by defendants and in the collision they were injured. They commenced actions against defendants to recover damages for the injuries and the actions were consolidated for trial. Defendants filed answers denying negligence and alleging contributory negligence on the part of plaintiffs. A jury returned verdicts in favor of plaintiff Day in the sum of $1,500 and in favor of plaintiff Winters in the sum of $249.50. Plaintiff Day has appealed "from that portion of the judgment * * * in so far as said judgment allows judgment only in the sum of $1500, and from no other part of said judgment". A similar notice of appeal was filed by plaintiff Winters. The bill of exceptions contains a statement of the evidence on the subject of the extent of the damages suffered by plaintiffs but it does not contain the evidence on the subject of the alleged negligence of defendants. The bill of exceptions sets forth that plaintiffs "regularly moved that the verdict be set aside and arguing among other things that a new trial be granted on the question of damages, on the ground that the evidence is insufficient to justify the verdict * * *".

[1, 2] Plaintiff Day was severely injured in the collision. The evidence shows without contradiction that she suffered a fracture of the right clavicle and a multiple fracture of the pelvis, that she was compelled to be in a hospital for two weeks and was then removed to her home where she was confined to her bed for over six weeks during which time she was encased in a plaster cast extending from the chest to the knees, causing great pain and suffering. She testified that up to the time of the trial, March 13, 1939, she had been unable to return to her work as a seamstress, in which employment she had earned $18 per week. Her physician testified that her pelvis had been fractured in three places and that she would always suffer pain when seated because of a protrusion of the pelvic bone caused by an offset knitting of the bone and that she would always limp because of the injury. Plaintiff Day presented evidence that she had been compelled to expend or been obligated to expend the sum of $1,561 because of the injuries. Defendants presented the witness Dr. F. E. Brown, who testified that when he examined plaintiff on February 9, 1939, he found that she had recovered and that she could walk in a normal manner and that the normal period of recovery was about three months. He also testified that plaintiff's physician had charged an improper fee for his visits. According to defendants' expert testimony, if the jury credited such witness, the fees for medical services might have been considered by the jury to be excessive to the extent of $200. If the jury had discredited the testimony of plaintiff as to the length of time during which she was unable to work and had acted upon the testimony of Dr. Brown that the normal period of recovery was three months, nevertheless the evidence shows without contradiction that plaintiff's special damages amounted to the sum of at least $900. Considering the nature of plaintiff's injuries it is difficult to believe that the jury could have reached the conclusion that the sum of $1,561 was an unreasonable expenditure. It is also difficult to believe that the jury could have concluded that

plaintiff had permanently and fully recovered and that she would not endure any further suffering because of the injuries. Regardless of these considerations, it is manifest that the award of the jury did little more, if anything, than compensate plaintiff for her special damages. It is a matter of common knowledge that multiple fractures of the pelvis are not to be lightly considered. Such injuries call for substantial general damages. We agree with the contention of plaintiff that the sum awarded is grossly inadequate.

[3] Plaintiff Winters was rendered unconscious by the collision. She suffered bruises on her head, nose, arm, chest and hip and was compelled to remain in bed for three and one-half weeks. She proved that she had expended or had been obligated to expend the sum of $249.45 for hospital and medical expenses. Her proof on the subject of special damages was not contradicted by defendants. Although her injuries were less serious than the injuries of plaintiff Day, nevertheless the verdict in her favor for $249.50 must be considered as grossly inadequate.

[4] Regardless of our view that the evidence on the subject of the extent of the injuries suffered leads to the conclusion that the amount awarded is inadequate, the record before us is such that the order of the trial court denying the motions for a new trial must be affirmed. The action is governed by the decision in Donnatin v. Union Hardware & Metal Co., 38 Cal.App. 8, 175 P. 26, 177 P. 845, where a jury returned a verdict in favor of the plaintiff and awarded him the sum of $1. In that case, as in the case before us, the statement of the evidence settled by the trial court contained the "evidence touching the issue as to damage only, omitting therefrom evidence as to other issues". The reviewing court held that the amount awarded "was so grossly absurd" that it furnished convincing proof that the jury returned a compromise verdict. In affirming an order denying the plaintiff's motion for a new trial the reviewing court said: "Every intendment must be indulged in support of the ruling made by the trial court. If in its opinion the evidence, considered as a whole, was of a character to clearly establish the fact that defendant was not guilty of negligence, and hence not liable for any damage (and in the absence from the record of all evidence touching the question of defendant's negligence, we must so assume), then it constituted no abuse of discretion for the court to deny plaintiff's motion for a new trial, made upon the ground of inadequacy of the amount awarded." We perceive no substantial difference between the Donnatin case and the case now under review. In both cases the amount awarded was grossly inadequate and in both cases the record failed to contain the evidence touching the question of defendants' negligence.

The ruling in the Donnatin case has been approved in Lambert v. Kamp, 101 Cal.App. 388, 281 P. 690, where the verdict was for $300, damages for the death of a child of the age of eight years, the special damages amounting to $235. In that case the evidence on the subject of the negligence of defendant was before the reviewing court. The Donnatin case was also approved in Mosekian v. Ginsberg, 122 Cal.App. 774, 10 P.2d 525, where the jury found for the plaintiffs but allowed no damages whatever. The evidence on the subject of the negligence in that case also was before the reviewing court. In both the Lambert and the Mosekian cases the court made the same quotation from the Donnatin case which we have above set forth. In each case it was pointed out that the real issue to be determined was whether the trial court had abused its discretion in denying the motion for a new trial. In passing upon such motion the trial court was compelled to determine whether the moving party was entitled to recover any sum whatever and in making such determination it was necessary for the trial court to consider the evidence touching upon the negligence of the defendant. If the trial court was justified in concluding that the party asking for a new trial had failed in his proof of negligence, there could be no abuse of discretion if the trial court should deny such party "a second attempt to recover something to which he was not entitled". Lambert v. Kamp, supra [101 Cal.App. 388, 281 P. 691]. The same quotation from the Donnatin case is also made in Bencich v. Market St. Railway Co., 20 Cal.App. 2d 518, 67 P.2d 398, 400, where the verdict was for $5,000 but the special damages proved were so great that the reviewing court in holding the award inadequate said that "it is patent that at the very most the amount awarded by the jury barely, if at all, repays appellant his special damages".

Since the record before us does not contain the evidence touching the question of defendants' negligence, we must hold, in line with the cited decisions, that plaintiffs are not in position to ask the court to rule that the trial court abused its discretion in denying the motion for a new trial.

The judgments are affirmed.

We concur: MOORE, P. J.; McCOMB, J.

36 Cal.App.2d 287

PEOPLE v. DE LA ROI.

Cr. 1708.

District Court of Appeal, Third District, California.

Dec. 28, 1939.

1. **Criminal law 🔑1159(2)**

Reviewing court lacks power to set aside a verdict unless it clearly appears that on no hypothesis is there sufficient substantial evidence to support it.

2. **Criminal law 🔑1141(1)**

After conviction all intendments are in favor of the people.

3. **Homicide 🔑244(1), 253(1)**

Evidence sustained conviction of defendant for first-degree murder as against claim of self-defense and guilt only of manslaughter.

4. **Criminal law 🔑673(2)**

In murder prosecution wherein defendant asserted that assault on deceased resulted from his making slighting remarks about wife and child of defendant, admission of defendant's letter to his wife threatening to return and kill her and other members of her family was not error, where court instructed that letter should be considered solely for purpose of determining state of mind of defendant as to feeling of affection for his wife.

5. **Homicide 🔑308(3)**

An instruction that, if murder was committed in perpetration or attempt to perpetrate mayhem, it was murder of the first degree, was proper under evidence. Pen.Code, §§ 189, 203.

6. **Homicide 🔑18(1)**

A person commits "murder" whenever in doing an act with design of committing a felony the life of another is taken, although such killing may result from an accident.

[Ed. Note.—For other definitions of "Murder," see Words & Phrases.]

7. **Criminal law 🔑1171(6)**

In murder prosecution, reference by district attorney to a deposit book which was allegedly taken by defendant from deceased, but which was later found in deceased's cabin, did not constitute reversible error.

◆

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

Wilson De La Roi was convicted of first-degree murder, and he appeals.

Affirmed.

Harold Simon, of Central Valley, and Stennett Sheppard, of Redding, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Defendant was convicted of murder in the first degree, the jury fixing the punishment at life imprisonment. This is an appeal from the judgment and from an order denying a new trial.

Defendant arrived in Redding on Thursday, June 8, 1939. He made some search for work, but most of his time seems to have been spent attending shows, wrestling matches and around the pool halls. Saturday evening he met a former friend, R. L. Wertz, a man about 58 years of age, who lived by himself in a cabin about three miles northwest of Redding. They had worked together on various construction jobs, and Wertz invited defendant to have dinner with him the following day.

The next morning as defendant was walking toward the cabin of Wertz, he met Wertz coming into Redding in his car. Defendant then accompanied him back into Redding, where Wertz purchased some supplies for the dinner, and also got a jug of wine for a friend named Danielson, who lived about a mile from the Wertz cabin. The two men drank some liquor before starting for the cabin, and defendant claimed Wertz was intoxicated, but the record shows he was able to drive his car. On the way they stopped at the Danielson cabin and delivered to him the gallon of wine, where they had two or three wine glasses of wine. They were friendly upon arriving at the cabin of Danielson, and according to his testimony, were not intoxicated, either when the two men arrived or left his cabin.

Defendant testified he and Wertz were agreeable when they reached the Wertz cabin, and defendant went to the rear of the car to get out the groceries. The deceased then, without provocation, according to defendant, applied to him an insulting epithet, and as defendant walked toward Wertz, Wertz struck at him, which defendant evaded, and he then struck Wertz a staggering blow in the face. Without further conversation deceased walked into the house, followed by defendant. As Wertz entered the cabin, defendant thought he was going for a gun, which was standing in a corner of the cabin, and he then rushed upon him, striking him to the floor with his fists, and beat him over the head with a heavy flashlight, which caused the injury resulting in death. The foregoing is briefly the story as told by defendant.

A study of the entire transcript, however, leaves the conviction that defendant is guilty of a cold-blooded murder of an old man who was in the act of befriending him, and in failing to fix the penalty at death, the jury showed all the mercy to which defendant was entitled.

Defendant who was 21 years of age at the time of the commission of the crime, had been married at the age of 17 to a girl two years younger. They had two children. The marriage had been annulled, and the children were in the custody of the wife's mother in Redding. Under a court order the defendant had been ordered to contribute to their support, but during the two years before his present arrest he had contributed practically nothing. He apparently spent some of his time in jail and some in S. R. A., W. P. A., and on relief jobs, and what he received for his work he spent on his own support and entertainment.

On the Sunday that defendant and deceased were to have dinner together they stopped at the cabin of Danielson, about three-quarters of a mile from the cabin of Wertz. There, according to Danielson, as we have already remarked, there was no indication of quarreling or hostility between the men. They left the Danielson cabin about noon and arrived at the Wertz cabin a few minutes later. Some time between that time and about 3:30 or 4 o'clock, when a witness met the defendant on the road a very short distance from the Wertz cabin, where he had stopped to throw the flashlight away, the assault took place. That evening Danielson went to the cabin of Wertz and found him lying in his bed, dead. The officers, upon their arrival shortly afterward, found his left trouser pocket turned inside out, his belt unbuckled and his shirt open. Two receipts of deceased were later found hidden under a bush outside the cabin near where the broken flashlight was found. As indicative of the fact that defendant knew the habits of deceased and might have searched his pockets and clothing for money, is the following from the record; the district attorney and the attorney for the defendant were discussing the absence of a wallet, when the defendant interrupted and said: "A. I didn't even knew that Mr. Wertz carried a wallet, because when he and I——once in awhile on payday we would cash our checks together, and he always took his money and wadded it up and put it in his pocket."

Following the assault on Wertz, the defendant took the car of deceased and fled the scene of the crime. The evening following he went to the Alameda county courthouse and reported to the night jailer he had had a fight with an old man in Shasta and that he believed the man was hurt and might need medical aid. While he was there the report came in over the police teletype informing the authorities of the finding of the dead body of Wertz, and that defendant was the last person seen with him. Defendant was then detained and afterward taken to Redding for trial.

The first point urged by appellant is that he struck deceased during a fight and in self-defense, and at most was guilty only of manslaughter, and attempted to substantiate this point by quotations from his testimony. However, it is very apparent that the jury, after hearing the evidence, and seeing him upon the stand, did not believe his testimony upon that feature of the case.

[1-3] The rule is well established that this court has no power to set aside a verdict unless it clearly appears that upon no hypothesis whatsoever is there sufficient substantial evidence to support it (People v. Latona, 2 Cal.2d 714, 43 P.2d 260) and an examination of the evidence in this case amply and clearly supports the verdict of the jury. After conviction all intendments are in favor of the People. People v. Shannon, 28 Cal.App.2d 677, 83 P.2d 302.

We find no evidence of a sudden quarrel or any other fact justifying a verdict of manslaughter. Proof that defendant did the killing, standing alone, would constitute murder of the second degree, and here, in addition to the fact of killing, we find a receipt belonging to the deceased near the admitted instrument of death, hidden by defendant, together with the fact the pockets of deceased had been searched, and his automobile taken and driven away, which, if the jury believed were done by the defendant, established the motive of robbery, making the killing that of murder in the first degree. In fact, rather than a reduction of the degree and the penalty, all of the evidence and circumstances would have justified the jury in rendering the death penalty.

[4] Error is claimed by the admission of a letter written by defendant to his wife wherein he threatened to return and kill her and other members of her family. This letter was offered to impeach the statements of defendant that he was a loving husband and father. In fact, the cause of the assault upon deceased, according to the defendant, was because Wertz made a slighting remark about the wife and child of defendant. The court carefully instructed the jury to consider the letter solely for the purpose of determining the state of mind of the defendant as to a feeling of affection for his wife.

[5, 6] Complaint is made that the court instructed the jury that if the murder was committed in the perpetration or attempt to perpetrate mayhem it was murder of the first degree, sec. 189, Penal Code. By section 203 of the Penal Code every person who unlawfully and maliciously slits the lip of another is guilty of mayhem. A doctor who examined the body of the deceased testified there were incised wounds on the upper lip, cutting through to the teeth, which would require a great degree of force to effect. Whenever one, in doing an act with the design of committing a felony, takes the life of another, even accidentally, this is murder. People v. Hubbard, 64 Cal.App. 27, 220 P. 315; People v. Reid, 193 Cal. 491, 225 P. 859.

[7] Other minor objections are urged, as for instance the reference to a deposit book which the district attorney claimed had been taken by defendant, but which was later found in the cabin, but an examination of the evidence discloses that defendant was ably represented by counsel, and that no error was committed in the admission of evidence or instructions to the jury, at least of sufficient importance to result in a miscarriage of justice. As intimated before, the defendant is fortunate that he is not on his way to the death cell, which would be entirely fitting for one guilty of such a brutal killing.

The judgment and order are affirmed.

We concur: TUTTLE, J.; THOMPSON, J.

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36 Cal.App.2d 369

LUMMUS v. CITY OF VERNON et al.

Civ. 12193.

District Court of Appeal, Second District,
Division 2, California.

Dec. 29, 1939.

1. Waters and water courses 🔑195

Evidence that, approximately three years before water company main broke, it had been repaired by "Dayton union," or makeshift joint used in emergencies only, that such repair work was not in accordance with good practice, that city water main did not break until after water from company main had caused pavement to collapse, and that escaping water undermined support for building, with resultant damage, sustained finding that damage to building was caused solely by negligence of water company.

2. Landlord and tenant ⚿54

Under lease providing that it should be terminable if calamity made building unfit for occupancy or, if lease were not terminated or damage did not make building unfit for occupancy, landlord should make repairs with all reasonable speed at landlord's expense, where building was undermined because of break in water main and tenant remained in building and conducted his business as usual, landlord could recover cost of repairs from water company.

3. Landlord and tenant ⚿54

Under lease providing that it should be terminable or that rent should be abated if calamity rendered building wholly or partly unfit for occupancy, but providing that rent should not be abated if tenant was able to carry on his business as usual, where building was undermined because of break in water main, but tenant remained in building and conducted his business as usual, landlord could not recover from water company for amount lost through voluntary reduction of rent during period of repairs.

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Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by William H. Lummus against the City of Vernon and others for negligent maintenance of water mains, wherein a cross-complaint was filed. From adverse judgments, plaintiff and defendant Southern California Water Company appeal.

Modified, and otherwise affirmed.

S. S. Hahn and W. O. Graf, both of Los Angeles, for appellant Wm. H. Lummus.

R. G. Blanchard and Paul Overton, both of Los Angeles, for appellant Southern California Water Co.

Thomas V. Cassidy, City Atty., of Huntington Park, and Young & Kelly and E. L. Searle, all of Los Angeles, for respondents City of Vernon, a municipal corporation; Francis Bates, city engineer of the City of Vernon, and K. E. Wattson, construction superintendent of the City of Vernon.

McCOMB, Justice.

These are appeals by (a) defendant Southern California Water Company from a judgment after trial before the court without a jury awarding plaintiff (1) $4,500 for damages to its building, (2) $989 for loss of rentals, and from a judgment in favor of cross-complainant City of Vernon against said defendant in the sum of $1,750—all predicated upon the negligence of said defendant; and (b) plaintiff from a judgment in favor of defendants, City of Vernon, a municipal corporation; Francis Bates, city engineer, and K. E. Wattson, construction superintendent, of said city.

The essential facts are:

For some months prior to February 6, 1937, the Works Progress Administration (hereinafter designated as the WPA) had been engaged in constructing a sewer drain system within the boundary lines of defendant City of Vernon, said city being the "sponsor" of the project. In the course of the work the WPA had constructed one section of storm drain consisting of reinforced cement concrete sewer pipe having an inside diameter of 39 inches, an outside diameter of 42 inches, and 8 feet in length, at the intersection of Thirty-seventh street and Santa Fe avenue. This section of sewer pipes was 57 feet in length and extended northerly from the southeasterly corner of Thirty-seventh street and Santa Fe avenue along the easterly curb line of said avenue, extending across Thirty-seventh street and northerly of the northeasterly curb of Thirty-seventh street and Santa Fe avenue. The section of pipe was constructed and installed substantially as follows:

The WPA excavated a square pit approximately 10 feet on all sides and 15 to 18 feet in depth at the southeast corner of the intersection. Around the sides of this pit, for the purpose of keeping the sandy soil from caving in, there was constructed a sheeting, being 2 by 12 planking, 15 feet or longer, standing on end, placed edge to edge and braced from top to bottom. The operation of installing the sewer pipe was accomplished by lowering an 8-foot section of the 39-inch reinforced concrete pipe into the pit (hereinafter referred to as the jacking pit), and by attaching to it a semicircular shield or cutting edge made of boiler plate ⅜ths of an inch in thickness, so designed that when attached to the upper half of the northerly end of the section of sewer pipe the shield extended and projected 18 inches ahead of it. It was then set in place by screw jacks having a capacity of exerting a force of 250 tons each. These jacks were placed in the jacking pit around the circumference of the southerly end of the reinforced cement concrete sewer pipe, with appropriate planking around the circumference of the sewer pipe so that the full force generated by the jacks could be exerted upon said pipe, forcing it in a northerly direction into the sand and soil at the northerly side of the jacking pit. The pipe had a sufficient size internally, to allow a man to work at all times in it, at the face or end of the pipe which was being forced northerly into the sandy soil. A breastboard was installed at the northerly end of the pipe, immediately under the ⅜ths-inch shield, in such a way that the upper half of the sewer pipe was closed. As the sewer pipe was jacked in a northerly direction as above outlined the men working inside of the pipe removed the sand as it was displaced by the shield, so that the operation could continue uninterrupted. The pipe was jacked northerly 9 inches at a time, whereupon the jacks were removed, additional rigging placed behind them, and the operation repeated.

As soon as the first 8-foot piece of reinforced cement concrete pipe had been forced its full length into the sandy soil northerly of the jacking pit, a second section of the same dimensions was lowered into the jacking pit, fitted and cemented to the first section, and likewise forced in a northerly direction, thereby pushing the prior section ahead of it. This operation continued until the 16th day of December, 1936, when 57 feet of pipe had been jacked northerly along the easterly curb line of Santa Fe avenue and was in place ready to be joined with sewer pipe to be thereafter jacked in an easterly direction from the westerly curb of Santa Fe avenue.

About the 20th of January, 1937, defendant K. E. Wattson, construction superintendent of defendant City of Vernon, who had been furnished to the WPA for the purpose of supervising the construction of the work, was notified by the superintendent of the work that the WPA would be required to shut down within two days because of lack of funds. Shortly prior thereto there had been installed in the northerly end of the 57-foot section of sewer pipe above referred to a bulkhead constructed of 2x8 planks laid edgeways, each succeeding plank being nailed to the one immediately below it and installed in such a manner that the entire northerly end of the 57-foot section was completely closed.

About 8 a. m., February 6, 1937, defendant Wattson made an inspection of the above work, and although it was raining he observed that the jacking pit was dry and that no water was flowing into it. About 10:30 a. m. the same day he again visited the work and found surface water trickling into the jacking pit. This he stopped by repairing the dike which had been erected about the pit. Shortly after 11 a. m. he found water again flowing into the pit, and caused bags filled with sand to be placed around the dike to prevent surface water from flowing into the jacking pit. Shortly thereafter he heard the noise of flowing water at a point northerly from the jacking pit, and upon inspection found that the 8-inch asphaltic concrete pavement covering the intersection had been undermined for a distance of 20 or 30 feet northerly from the northerly side of the jacking pit, and that the void under the pavement extended from 10 to 20 feet in width throughout its length. Water continued to flow in the undermined portion of the pavement until approximately 1 p. m., when a portion of the pavement on the easterly side of the intersection collapsed. It was then ascertained that the water was not coming from an 8-inch water main maintained at that point by the City of Vernon, but was coming from a 2-inch water main maintained by defendant Southern California Water Company. The water continued to flow from the 2-inch water main without interruption until a further collapse of the pavement broke the 8-inch water main maintained by the city. Thereafter and as a result of the washing away of the subsurface, the southwesterly corner of a building owned by plaintiff, located at the northeasterly corner of the intersection of Thirty-seventh street and Santa Fe avenue, collapsed. The building at the time was under lease by plaintiff to Mr. Hatch for a rental of $390 per month. The lease contained, among others, these provisions:

"If the demised premises, or the building of which said premises may be a part, are damaged by fire, earthquake, or other calamity or other action of the elements, so as to render the said building wholly or in part unfit for occupancy, and if the damages are such that the building cannot be restored with reasonable diligence within forty-five (45) working days (of eight hours each), after the commencement of actual work, and if the Lessor shall elect to wreck and remove the damaged building, then this lease may be terminated. * * * In case of any lesser damage by any of the above causes, or in case this lease be not terminated as aforesaid, the said building shall be restored with all reasonable speed by the Lessor at the latter's own expense, and the Lessee shall pay only a reasonable rent during the period of such restoration for such parts, if any, of the demised premises as shall be fit for occupancy by Lessee. In no event shall Lessee be entitled to any damages for any loss occasioned by the injury to or destruction of said building or of Lessee's property, nor shall any rent be abated if Lessee is able to carry on his business as usual in the demised premises."

Plaintiff at his own expense fully restored the building, it requiring more than three months to make the repairs. During this time the lessee remained in possession of a portion of the building and continued to operate his business as usual. Plaintiff, however, during the period that the building was being repaired, voluntarily reduced the lessee's rent from $390 per month to $300 per month, effecting a saving to the tenant during the period of repairs of $989.

Defendant relies for reversal of the judgment on these propositions:

First: There is not substantial evidence to support the following findings of fact of the trial court:

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"That the collapse of the pavement in front of and adjacent to plaintiff's building and the breaking of the water main maintained and operated by the City of Vernon, a municipal corporation, were, and each of them was directly and proximately caused by the defective condition of the water main maintained and operated by defendant Southern California Water Company, and by the negligent and careless operation and maintenance of said last-mentioned water main by Southern California Water Company, and that it is not true that the collapse of plaintiff's building or any other damage suffered by plaintiff was directly and/or proximately caused by any act or omission of the City of Vernon, a Municipal Corporation, or of the defendants, Francis Bates and K. E. Wattson."

"V

" * * neither the defendant City of Vernon, a municipal corporation, nor Francis Bates, as City Engineer, nor K. E. Wattson, as Construction Superintendent, nor any of said defendants, had any jurisdiction or control over the construction operation or maintenance of said last-mentioned storm drain at any of the times mentioned in plaintiff's second amended complaint or at any of the times between the 18th day of September, 1935, and the 7th day of February, 1937."*

Second: Plaintiff did not suffer any damage as a result of any negligent act of the defendant Southern California Water Company.

Third: The trial court improperly allowed plaintiff to recover for plaintiff's loss of rentals.

[1] The first propostion is untenable. An examination of the record discloses substantial evidence to sustain the facts set forth above and also the trial court's findings of fact. For example, it was conceded by defendant Southern California Water Company that the 2-inch pipe maintained by them and which broke had been repaired in 1934 with a Dayton union. William Merrithew, a witness on behalf of plaintiff, duly qualified as an expert upon the subject, testified that he found, where the break occurred, a piece of the 2-inch pipe with a Dayton union and that one end of the pipe was broken off; that a Dayton union was a makeshift joint used in emergencies only; that he examined the repair work of said defendants and that it was not good construction; also that it was not in accordance with good practice to make a connection in the manner employed by defendants. This testimony of itself was substantial evidence to support an inference by the trial court that defendant company had negligently and carelessly operated and maintained its water main.

Defendant Wattson testified that he saw evidence that water was undermining the intersection at 11 a. m. of February 6, 1937; that when the pavement caved in he saw water coming from the 2-inch line of the defendant Southern California Water Company.

Mr. Biggs testified that he saw water coming from the same 2-inch line at 1 p. m. of the same day. He further testified that the waterline of the defendant City of Vernon did not break until a later time. It is conceded that the escaping water washed away the sand, undermining the pavement of the City of Vernon and the support for plaintiff's building with the resultant damage to it.

The foregoing gives substantial support to the trial court's inference that the sole proximate cause of the damage to plaintiff's store and to defendant City of Vernon's pavement was the break in the 2-inch pipe owned and maintained by the defendant Southern California Water Company. This being true, said defendant was liable to the City of Vernon for the damage which resulted to its property, the amount thereof being $1,750, and for any damage resulting to plaintiff.

Because of our conclusions as set forth above it is unnecessary to consider whether the doctrine of res ipsa loquitur is applicable in this case.

The second proposition is likewise untenable. It is true that the lease between plaintiff and his lessee contained this provision:

"The Lessor shall not be called upon or required to make any repairs, alterations, additions or improvements whatsoever, in, to, or about the demised premises or any part thereof (except as herein otherwise expressly provided), and the Lessee shall save the Lessor free and harmless from any liability on account of the requirement of any such repairs, alterations, additions or improvements."

[2] However, the detriment suffered by the building rendered it "in part unfit for occupancy", which imposed the obligation to repair upon the lessor. While making such repairs, the lessor protected lessee's merchandise against impairment, while the lessee continued to carry on his business in the usual way. The lease provided that if the building or the premises are damaged by fire, earthquake or other calamity, so as to render it wholly or in part unfit for occupancy, "the lease may be terminated within fifteen days after such disaster". It also provides that in case of a damage less than that which might make it unfit for occupancy, or in case the lease be not terminated as aforesaid, "said building shall be restored with all reasonable speed by the lessor at the latter's own expense and the lessee shall pay only a reasonable rent during the period of said restoration for such parts, if any, of the demised premises as shall be fit for occupancy by lessee". The lessee remained in the building and conducted his business. The lessor made the repairs "with all reasonable speed", as the lease provides, at his own expense in the sum of $4,500, which he was entitled to recover against defendant, Southern California Water Company, because of its said negligent acts.

The third proposition is tenable. By the terms of the lease between plaintiff and his tenant it was provided:

"In no event shall Lessee be entitled to any damages for any loss occasioned by the injury to or destruction of said building * * * nor shall any rent be abated if Lessee is able to carry on his business as usual in the demised premises."

[3] In the present case it is uncontradicted that the lessee carried on his business as usual in the demised premises. Therefore, plaintiff could have recovered the full amount of the monthly rental from his tenant, and the adjustment which he made with him was purely voluntary upon his part. As a consequence he suffered no damage for which defendant Southern California Water Company was liable to reimburse him.

For the foregoing reasons (a) the judgment in favor of plaintiff and against defendant Southern California Water Company is modified by striking therefrom the sum of $989 allowed for loss of rentals; otherwise such judgment is affirmed, and the judgment in favor of defendant City of Vernon on its cross-complaint against defendant Southern California Water Company is affirmed; and (b) the judgment in favor of defendants City of Vernon, a municipal corporation, Francis Bates, city engineer and K. C. Wattson, construction superintendent of the City of Vernon, is affirmed.

I concur: MOORE, P. J.

WOOD, Justice (concurring).

I concur in the judgment in all respects except that I think that plaintiff should be allowed to recover for loss of rentals. Under the terms of the lease the lessee was required to "pay only a reasonable rent during the period of such restoration for such parts, if any, of the demised premises as shall be fit for occupancy by the lessee". Evidently, the plaintiff and his tenant agreed upon the proper amount to be paid and the trial court was satisfied that the amount agreed upon was reasonable.

36 Cal.App.2d 186

NILSSON v. STATE PERSONNEL BOARD et al.

Civ. 6253.

District Court of Appeal, Third District, California.

Dec. 21, 1939.

1. Interest ⚿22(1)

The adjudication, in mandamus proceeding, ordering payment to an improperly dismissed state civil service employee of salary during period between dismissal and reinstatement, is not a "money judgment," and therefore is not such a judgment as will bear interest from date of its entry under provisions of state Constitution. Const. art. 20, § 22.

[Ed. Note.—For other definitions of "Money Judgment," see Words & Phrases.]

2. Interest ⚿22(1)

As respects whether an adjudication in mandamus proceedings ordering payment of back salary to an improperly dismissed state civil service employee bears interest from date of its entry, a "writ of mandamus" is issued by a court to an inferior tribunal as an independent proceeding to compel performance of a duty, resulting from an office, trust, or station, or to compel admission of a party to use and enjoyment of right to which he is entitled and from which he has been unlawfully precluded and has none of the characteristics of a civil action for collection of a debt. Code Civ.Proc. § 1085.

[Ed. Note.—For other definitions of "Writ of Mandamus," see Words & Phrases.]

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Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

Mandamus proceeding by J. Leonard Nilsson against State Personnel Board of the State of California and others. From a judgment and order directing issuance of a peremptory writ of mandate, defendants appeal.

Judgment and order reversed.

Earl Warren, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for appellants.

Albert E. Sheets, of Sacramento, for petitioner.

Mr. Presiding Justice PULLEN delivered the opinion of the Court.

Heretofore petitioner, a civil service employee, had been reinstated in the department of agriculture (Nilsson v. State Personnel Board, 25 Cal.App.2d 699, 78 P.2d 467), and in accordance with the judgment therein rendered, had been paid all salary to which he was entitled. Respondents, however, refused to pay to petitioner any interest upon the unpaid back salary, and upon presenting the matter to the superior court, a peremptory writ of mandate was issued requiring and directing the payment of such interest. From that order this appeal is taken.

The sole question for consideration is, therefore, whether or not the adjudication in the mandamus proceeding, ordering payment to an improperly dismissed state civil service employee of salary during the period between dismissal and reinstatement, is such a judgment as will bear interest from the date of its entry under the provisions of section 22, article XX, of the state Constitution.

[1] We are in accord with the claim of appellants that an adjudication in a mandamus proceeding ordering an officer to perform a duty required of him by law, is not a money judgment, and therefore is not such a judgment as will bear interest. This principle has been heretofore announced in the case of Sheehan v. Board of Police Commissioners, 188 Cal. 525, 206 P. 70. In that case the petitioner, after dismissal from the police department of the city and county of San Francisco, sought by writ of mandate to compel his restoration as a disabled retired police officer. The superior court entered judgment annulling the orders dismissing petitioner and adjudging that he have and receive his accrued and accruing pensions as such disabled and retired officer, establishing the aggregate amount of his already accrued pensions up to the time of the rendition of its decision to be $4,600, and directed a writ of mandate to issue against the said board of police commissioners, acting ex-officio as a board of police relief and pension fund commissioners, and ordered said board in that capacity to issue a warrant drawn upon the auditor and treasurer of said municipality for the specified amount.

From this order of the superior court appeals were taken, but the orders were affirmed. Thereafter Sheehan applied to the superior court for an order directing the clerk of that court to issue a peremptory writ of mandate directing said board of police commissioners to issue a warrant to the petitioner for the payment of legal interest on said pension, and an order was made pursuant thereto. Upon appeal (Sheehan v. Board of Police Commissioners, supra) it was held that the adjudication in such proceeding was not such a judgment as would bear interest from the date of its entry, and that the board of police commissioners, whether acting as such commissioners or as members of the pension fund, were merely agents of the municipality for the dispensation of certain of its funds in the custody of its treasurer, and had no separate existence, and was incapable of suing or being sued except as it might be required as an official body by mandamus to perform its official duty.

[2] Respondent contends that interest attaches to money judgments recovered against the state, and it was immaterial that the action was by mandate. There is, however, a clear distinction between a money judgment entered in a civil action and a judgment rendered in a special proceeding in mandate. The writ of mandamus is issued by a court to an inferior tribunal and is an independent proceeding "to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board, or person". Section 1085, Code Civ.Proc. It has none of the characteristics or functions of a civil action for the collection of a debt.

Respondent attacks the value of the Sheehan case, urging that the only authority relied upon in that case on the particular question here involved was that of Howe v. Southrey, 144 Cal. 767, 78 P. 259, which case was, in McPherson v. City of Los Angeles, 8 Cal.2d 748, 68 P.2d 707, overruled. But the case of McPherson v. City of Los Angeles, supra, and also Los Angeles Rock & Gravel Co. v. Los Angeles, 132 Cal.App. 262, 22 P.2d 541, were cases in which the judgments upon which it was held interest must be paid, were not judgments rendered in special proceedings in mandamus, but were judgments rendered in civil actions. So, in overruling Howe v. Southrey, supra, the court, in McPherson v. City of Los Angeles, supra, merely held that in a civil action in which a money judgment had been obtained which bore interest by force of statute, a writ of mandate would lie to compel payment, and in that respect only was Howe v. Southrey, supra, overruled.

We are of the opinion that the trial court erred in directing payment of interest on the judgment heretofore rendered, and the judgment and order of the superior court must be, and is, hereby reversed.

We concur: TUTTLE, J.; THOMPSON, J.

36 Cal.App.2d 66

TICE v. PACIFIC ELECTRIC RY. CO. et al.

HIGGINS et al. v. SAME.

Civ. 12243.

District Court of Appeal, Second District, Division 2, California.

Jan. 5, 1940.

Hearing Denied Feb. 8, 1940.

Courts ⚷104

Appellants were not entitled to have District Court of Appeal set out instructions of which appellants complained, where the setting out of instructions and full consideration of appellants' contentions with respect to the instructions would extend the opinion unduly.

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Appeal from Superior Court, Los Angeles County.

On Petition for Rehearing.

Rehearing denied.

Hearing denied; CURTIS and CARTER, JJ., dissenting.

For prior opinion, see 96 P.2d 1022.

Paul Blackwood and Samuel P. Young, both of Los Angeles, for appellants.

Frank Karr, E. E. Morris, C. W. Cornell, and O. O. Collins, all of Los Angeles, for respondents.

PER CURIAM.

In their petition for rehearing, the plaintiffs urge this court to set forth in haec verba or in substance the instructions of which they complain. To do this fairly would necessitate the inclusion of the instructions as a whole, which comprises 49 pages of the transcript, and to consider their arguments fully would require a discussion of the authorities cited and the contentions made by plaintiffs with respect to the criticized instructions, which contentions cover some 48 pages of their opening brief. This would extend the opinion unduly.

In People v. Groves, 9 Cal.App.2d 317, 321, 49 P.2d 888, 50 P.2d 813, a similar request was made and in its order denying a rehearing this court set forth at length the reasons why the request should be denied. The reasons given in the Groves case are applicable to the present situation.

The petition for a rehearing is denied.

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36 Cal.App.2d 189

HOME OWNERS' LOAN CORPORATION v. GORDON et al.

Civ. 6338.

District Court of Appeal, Third District, California.

Dec. 21, 1939.

1. United States 🔑53

The Federal Home Loan Bank Board is authorized to perform administrative duties only and does not possess any of the attributes of a "corporation." Federal Home Loan Bank Act, 12 U.S.C.A. § 1421 et seq.

[Ed. Note.—For other definitions of "Corporation," see Words & Phrases.]

2. United States 🔑53

Where makers of note secured by mortgage, contracted with Home Owners' Loan Corporation as a corporation and received the benefits of the contract with it, they were estopped to deny, as against it, in an action to enforce the mortgage, that corporation had been legally organized, or to assert in any manner any defect in its organization. Federal Home Loan Bank Act, 12 U.S.C.A. § 1421 et seq.

3. Pleading 🔑14

In action by Home Owners' Loan Corporation to foreclose mortgage, answer attempting to allege, on information and belief, that corporation had not complied with provisions of statutes requiring it to file articles of incorporation with the secretary of state, violated the rule of pleading requiring that matters of record must be alleged positively and not on information and belief. Civ.Code, §§ 278, 405, 406, 408.

4. Pleading 🔑14, 106(1)

The rule of pleading which requires that matters of record must be alleged positively and not on information and belief is particularly applicable to a pleading in abatement which, being dilatory in its nature, is to be strictly construed.

5. Evidence 🔑22(1)

The District Court of Appeal would take judicial notice that the Home Owners' Loan Corporation was incorporated under the Home Owners' Loan Act. Home Owners' Loan Act of 1933, 12 U.S.C.A. § 1461 et seq.

6. Corporations 🔑632

The Home Owners' Loan Corporation, as a corporation created by federal statute, was not required to comply with state laws governing foreign corporations. Home Owners' Loan Act of 1933, 12 U.S.C.A. § 1461 et seq.; Civ.Code, §§ 278, 405, 406, 408.

7. Pleading 🔑254

Trial court did not err in sustaining a demurrer to answer because demurrer was not renewed after defendants had amended the answer by striking out the word "interstate" and inserting in lieu thereof the word "intrastate."

8. Pleading 🔑236(1)

Leave to amend answer rests largely in trial court's discretion.

9. Appeal and error 🔑681

Trial court's refusal to grant leave to amend answer could not be considered an abuse of discretion, in view of lack of showing as to how defendants proposed to change the answer.

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Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by the Home Owners' Loan Corporation against Donald A. Gordon and others to foreclose a mortgage on realty. From a judgment in favor of the plaintiff, the defendants appeal.

Judgment affirmed.

M. J. Gordon and C. S. Mauk, both of Los Angeles, for appellants.

J. V. McDermott and Ewell D. Moore, both of Los Angeles, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

The Home Owners' Loan Corporation, a corporation, filed an action to foreclose a mortgage on real property, making appellants, among others, defendants. Two of these appellants are the original mortgagors, and the other, Morris J. Gordon, as cosigner of the note which was secured by the mortgage.

The answer filed by appellants sought to question the constitutionality of the act of Congress creating the Home Owners' Loan Corporation, to deny the authority of the corporation to accept as security, a cosigner, and to abate the action under the foreign corporation statutes of this state.

To this answer respondent filed a general and special demurrer, which was sustained without leave to amend, and in due time a decree of foreclosure and order of sale was granted. From the judgment this appeal is taken.

Among the specifications of error urged by appellants are that the Federal Home Loan Bank Board is a corporation, and was authorized by Congress to create the Home Owners' Loan Corporation, and by so directing, Congress was attempting to delegate authority to one corporation to create another corporation.

Secondly: That the Home Owners' Loan Corporation cannot sue in this state without complying with the provisions of the Civil Code, particularly sections 405, 406, 408 and 278 thereof, requiring it to file articles of incorporation, with the secretary of state, and having a resident agent therein, as is done by other foreign corporations transacting business in this state.

Thirdly: That the Home Owners' Loan Corporation had no power to accept personal security by the way of suretyship.

Fourthly: That the court permitted appellants to amend its answer, but nevertheless sustained a general demurrer, without leave to amend, interposed to the original answer, and,

Lastly: That the court erred in refusing to permit defendants to amend their answer.

[1,2] An examination of the acts of Congress creating the Federal Home Loan Bank Board (Federal Home Loan Bank Act, chap. 11, secs. 1421 to 1449, inclusive, title 12, Banks and Banking, U.S.C.A., and particularly section 1437, which provides for the creation of the Federal Home Loan Bank Board with its powers and duties), reveals that such board is authorized to perform administrative duties only and does not possess any of the attributes of a corporation. Furthermore, appellants, as makers of the note secured by the mortgage, having contracted with the respondent as a corporation and received the benefits of that contract, are now estopped to deny as against the corporation, in an action to enforce such contract, that it has been legally organized or to assert in any manner any defect or irregularity in such organization. This rule is established by a long line of authorities, among others being Grangers' Business Ass'n of California v. Clark, 67 Cal. 634, 8 P. 445; Bank of Shasta v. Boyd et al., 99 Cal. 604, 34 P. 337; McCann v. Children's Home Soc. of California, 176 Cal. 359, 168 P. 355, 357; Raphael Weill & Co. v. Crittenden, 139 Cal. 488, 73 P. 238; Curtin v. Salomon, 80 Cal.App. 470, 251 P. 237; Gregory v. Hecke, 73 Cal.App. 268, 238 P. 787.

[3,4] The answer further attempts to allege, upon information and belief, that plaintiff has not complied with the provisions of the Civil Code. This violates the rule of pleading, which requires that matters of record must be alleged positively and not upon information and belief. This rule is particularly applicable to a pleading in abatement which, being dilatory in its nature, is to be strictly construed. California Savings & Loan Society v. Harris, 111 Cal. 133, 43 P. 525. In Purexo Products Co. v. Yamate, 98 Cal.App. 65, 276 P. 597, defendant attempted to deny certain allegations on information and belief, and the court held that at least as to matters of record in the office of the secretary of state, such a denial was insufficient. To the same effect are Brinkley-Douglas Fruit Co. v. Silman, 33 Cal.App. 643, 166 P. 371; William Wilson Co. v. Trainor, 27 Cal.App. 43, 148 P. 954; Art Metal Construction Co.

v. A. F. Anderson Co., 182 Cal. 29, 186 P. 776; Smith v. Fidelity & Deposit Co. of Maryland et al., 130 Cal.App. 45, 19 P.2d 1018.

[5] Furthermore, respondent being incorporated under an act of Congress known as Public Act No. 43, 73d Congress title 12, chapter 12, sections 1461–1468, inclusive, U.S.C.A., this court will take judicial notice of such fact. Fletcher on Corporations, volume 8, section 4116, states the rule as follows: "The Federal Corporations chartered by special public act of Congress, and their names, are judicially noticed both in the Federal and State courts."

[6] This doctrine of judicial notice in federal courts is applied in the case of Texas & Pacific Ry. Co. v. Cody, 166 U.S. 606, 17 S.Ct. 703, 41 L.Ed. 1132, and in Hiatt v. United States, 7 Cir., 4 F.2d 374. In Young et al. v. Boy Scouts of America, 9 Cal.App.2d 760, 51 P.2d 191, the courts of California took judicial notice of the fact that the Boy Scouts of America is incorporated under an act of Congress. Therefore, if the courts took judicial notice of Home Owners' Loan Corporation as a corporation created by the federal statute it need not comply with the state laws governing foreign corporations. In Thompson on Corporations, volume 8, third edition, section 6592, the rule is given as an exception to the general rule of unlimited state control over foreign corporations, and corporations engaged in the business of the general government may transact such business in other states without obtaining a license or other permit.

The objection that the Home Owners' Loan Corporation was without authority to take personal security, is not here material for the reason that the property secured by the mortgage was sold for a sum equal to the debt against it and no deficiency judgment was obtained against appellant Morris J. Gordon.

[7] After the demurrer had been interposed to the answer, defendants amended the answer by striking out the word "interstate" and inserting in lieu thereof the word "intrastate". It is now claimed by appellants that the demurrer not having been renewed to the amended complaint, the court erred in sustaining such a demurrer. The amendment by interlineation did not fundamentally change the complaint in any vital respect as far as the demurrer was concerned. Even after the amendment the plea of abatement was still based upon information and belief. Also the demurrer being general, charging a failure in the complaint to state facts constituting a cause of action, could still be applied to the amended answer.

[8, 9] Lastly, the refusal of the court to grant leave to amend rested largely in the discretion of the trial court, and such refusal in view of a lack of showing as to how appellants proposed to change their answer, cannot be considered as an abuse of discretion. Stewart v. Douglass et al., 148 Cal. 511, 83 P. 699; Kleinclaus et al. v. Dutard et al., 147 Cal. 245, 81 P. 516.

The judgment is affirmed.

We concur: TUTTLE, J.; THOMPSON, J.

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36 Cal.App.2d 333

PEOPLE v. HANNA.

Cr. 3237.

District Court of Appeal, Second District, Division 2, California.

Dec. 29, 1939.

Rehearing Denied Jan. 10, 1940.

Hearing Denied Jan. 25, 1940.

1. Robbery 🔑24(1)

Evidence sustained conviction of defendant for attempting to rob motorist who permitted defendant to ride in his automobile.

2. Homicide 🔑256

Evidence sustained conviction of defendant for an attempt to commit murder while attempting to rob motorist.

3. Attorney and client 🔑86

Counsel has right to stipulate relative to any of the steps in a criminal case.

4. Attorney and client 🔑92

Counsel for defendant could waive on behalf of his client right to have a preliminary showing that prosecution had used due diligence to locate an absent witness prior to reading witness' testimony taken at a preliminary examination.

5. Criminal law ⚿543(2)

Trial court properly permitted prosecution to read testimony of complaining witness given at preliminary examination, where defendant through his counsel waived right to have a preliminary showing that prosecution had used due diligence to locate complaining witness prior to reading of his testimony.

6. Criminal law ⚿829(1)

Requested instructions were properly refused where the subject matter thereof was covered by given instructions.

7. Criminal law ⚿785(4)

An instruction, that care must be used in weighing police officers' testimony because of tendency of officers to procure and state evidence against the accused which will justify accused's arrest, was properly refused, since police officers' testimony is to be judged by same standards that apply to other witnesses.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Charles K. Hanna was convicted of attempt to commit robbery, attempt to commit murder, and violation of the Deadly Weapon Act, and he appeals.

Affirmed.

Marin T. Kristovich, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

Defendant was convicted after trial before a jury of (1) attempt to commit murder, (2) attempt to commit robbery, and (3) violation of the Deadly Weapons Act, the jury at the same time finding that defendant had been previously convicted of a felony and served a term therefor in a state prison. He appeals from the judgments of guilty and from the orders denying his motion for a new trial.

Viewing the evidence most favorable to the People (respondent), the essential facts are:

January 3, 1939, Herbert E. Thomas was driving easterly on Wilshire boulevard in the city of Santa Monica at about 7:15 p. m., when he stopped for a traffic signal and was accosted by defendant, who asked him for a ride. Mr. Thomas permitted defendant to enter his car, and while they were proceeding toward Los Angeles defendant suddenly placed a gun in Mr. Thomas's side and said, "This is a stickup, see." Before Mr. Thomas could grab the gun it was discharged and he was shot through the right arm. He then grabbed the barrel of the weapon and while he was endeavoring to obtain possession of the gun defendant again discharged it. The automobile in which the two were riding was then run into the curb and two motorcycle officers placed defendant under arrest.

Defendant relies for reversal of the judgment on these propositions.

First: There is no substantial evidence to sustain the verdict of (a) attempt to commit robbery or (b) attempt to commit murder.

Second: An attorney for a defendant in a criminal prosecution cannot waive a formal showing that the prosecutor has used due diligence to locate an absent witness, in order to lay a foundation for reading the testimony of such witness taken at a preliminary examination.

Third: The trial court committed prejudicial error in permitting the prosecution to read over defendant's objection the testimony of the complaining witness given at the preliminary examination.

Fourth: The trial court committed prejudicial error in refusing at defendant's request to instruct the jury as follows:

(A) "You are instructed that in order for you to find the Defendant Guilty of any of the offenses charged, every element of the particular offense must be proved clearly and conclusively beyond all reasonable doubt."

(B) "You are instructed that, in weighing evidence of the police officers, care must be used because of their natural and unavoidable tendency to procure and state evidence against the accused which will justify their arrest of the accused."

(C) "You are instructed that you are not to disregard the testimony of convict witnesses merely because they are convicts, but you are to consider and weigh their testimony according to the rules of evidence."

(D) "You are instructed that the Defendant should be accorded the benefit of the presumption of innocence until the contrary is proved beyond a reasonable doubt, that such presumption accompanies

Defendant all through the case, and does not cease on the submission of the cause to you, but operates during your deliberations and until the verdict, and that you must examine the evidence by the light of the presumption, and unless you find the evidence sufficiently strong to overcome the presumption, to remove it, and to satisfy you of Defendant's guilt beyond and to the exclusion of a reasonable doubt, he should be acquitted."

(E) "You are instructed that in the decision of a criminal case involving life or liberty, something more than a mere preponderance of evidence is required to convict the Defendant. There must be in the minds of the jury an abiding conviction to a moral certainty of the truth of the charge, derived from a comparison and consideration of the evidence."

(F) "You are instructed that while an intention to take life is not essential to constitute murder, yet, to constitute an attempt to murder, the wrongdoer must specifically intend to take life."

(G) "You are instructed that the wrongdoer must specifically contemplate taking life, and though his act is of such nature that were it successful, it would be murder, if in truth he does not mean to kill, he then does not become guilty of an attempt to commit murder."

(H) "You are instructed that an intent to murder is an essential element of the crime of attempt to murder and it must be proved beyond a reasonable doubt."

[1, 2] Defendant's first proposition is untenable. An examination of the record discloses substantial evidence, together with the inferences which may reasonably be drawn therefrom, to sustain the facts as set forth above and each and every finding of fact upon which the verdicts of guilty were necessarily predicated. In addition to the testimony of the complaining witness, a motorcycle officer testified that when he drove alongside of the car in which defendant and Mr. Thomas were riding he saw them scuffling in the automobile, and that he heard two shots. Another motorcycle officer testified that immediately after the car in which defendant and Mr. Thomas were riding came to rest he took a gun out of defendant's hand, and that two empty shells were in it.

[3, 4] The second proposition is likewise untenable. It is the general rule that counsel in a criminal case has the right to stipulate relative to any of the steps in the action or proceeding. Among the stipulations which may be entered into by counsel in a criminal case is one waiving on behalf of his client the right to have a preliminary showing that the People have used due diligence to locate an absent witness prior to the reading of the testimony of such witness taken at the preliminary examination. People v. Garvey, 93 Cal.App. 497, 503, 269 P. 702; People v. Schoon, 177 Cal. 678, 683, 171 P. 680; People v. Bird, 132 Cal. 261, 264, 64 P. 259.

The third proposition is also untenable. During the course of the trial the following occurred:

"Mr. Crail: [Counsel for the People] Counsel now informs me, if your Honor please, that he is willing to stipulate that the witness Mr. Herbert E. Thomas who appeared and testified at the preliminary examination in this case on the 26th day of January of 1939 in the Santa Monica Hospital at 10:10 o'clock a. m. in the presence of the court of the Honorable Orlando H. Rhodes sitting as committing magistrate, the shorthand reporter and the clerk of that court, together with the Deputy District Attorney Mr. Hugh McIsaac, that the office of the District Attorney has made a diligent effort to locate Mr. Thomas within the County of Los Angeles and that at the present time the witness is not in the County of Los Angeles or in the State of California.

"The Court: So stipulated?

"Mr. Kristovich: I will stipulate that he cannot be found in the State of California since the time of the Preliminary.

"Mr. Crail: Now will you stipulate that our office has made a diligent effort to find that witness within the County of Los Angeles and the State of California?

"Mr. Kristovich: I will stipulate that they have.

"Mr. Crail: We will accept the stipulation and now offer to read in evidence the testimony of this witness."

[5] In view of the foregoing, it is clear that defendant through his counsel waived the right to a preliminary foundation before the testimony of the complaining witness taken at the preliminary examination was read.

[6] The instructions set forth in paragraphs A, C, D, E, F, G, and H of defendant's fourth proposition were properly re-

fused for the reason that the subject-matter thereof was fully, completely, and accurately covered by instructions read to the jury by the trial judge.

[7] The instruction set forth in paragraph B of defendant's fourth proposition was likewise properly refused, as it is not the law that a police officer's testimony is to be judged by any other standard than that which applies to the average witness.

For the foregoing reasons the judgments and orders appealed from are and each is affirmed.

We concur: MOORE, P. J.; WOOD, J.

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36 Cal.App.2d 377

In re LAWRENCE'S ESTATE.

Appeal of CHURCH HOME FOR CHILDREN OF PROTESTANT EPISCOPAL CHURCH IN DIOCESE OF LOS ANGELES et al.

Civ. 12499–S.

District Court of Appeal, Second District, Division 1, California.

Dec. 30, 1939.

Stipulations 🔑**14(12)**

Where, pending appeal from decree of distribution directing distribution of whole estate to deceased's heirs, appellant charitable institution agreed with heirs that, on payment of certain assets of estate, appellant would dismiss its appeal and settlement was conditioned upon an order being made by superior court in accordance with stipulation, motion for distribution in accordance with stipulation for judgment was granted, and matter presented by the appeal of the charitable institution was remanded to the superior court with directions to enter decree directing distribution in accordance with stipulation.

◆

Proceeding in the matter of the estate of Philip E. Lawrence, deceased. Charles Lawrence and others, alleged heirs at law of deceased, filed a petition opposed by the Church Home for Children of the Protestant Episcopal Church in the Diocese of Los Angeles and another, for distribution of the entire estate to the petitioning heirs, and a decree was entered in favor of the heirs and the opposing claimants appeal. On motion by the David and Margaret Home for Children, Incorporated, for dismissal of its appeal and for an order directing the lower court to enter a judgment for partial distribution in accordance with a stipulation signed by the appellant and heirs.

Motion granted.

Waldo & Waldo, of Pasadena, for appellant Church Home for Children of the Protestant Episcopal Church in the Diocese of Los Angeles.

Ticknor & Maxwell, of Pasadena, for appellant David and Margaret Home for Children, Inc.

Thomas W. Cochran and E. D. Yeomans, both of Los Angeles, for petitioning heirs and respondents.

David D. Stuart, of Los Angeles, for executors and respondents.

PER CURIAM.

We are here confronted with a motion made by appellant David and Margaret Home for Children, Inc., for a dismissal of its appeal and for an order directing the lower court to enter a judgment for partial distribution in accordance with a stipulation signed by the aforesaid appellant and respondent heirs.

The case involves the respective claims of two charitable organizations, to-wit, Church Home for Children of the Protestant Episcopal Church in the Diocese of Los Angeles, and David and Margaret Home for Children, Inc., as against the nine heirs at law of the decedent, Philip E. Lawrence.

By his last will, decedent provided that his estate in its entirety should be invested in a life annuity in favor of and payable to his friend, one Walter C. Black, and that such contract of annuity should provide for repayment to the testator's executors of the principal unused in the payment of annuities, in the event of Black's death before all of the money to be used in purchasing the annuity was consumed under the contract, and that in the event that any such refund be made all of such money so refunded should be paid, share and share alike, to the two charitable corporations above named.

The annuitant, Black, predeceased the testator, and, after the will was duly probated and the time for notice to creditors had expired, the *heirs at law* petitioned the superior court sitting in probate for a distribution of the entire estate to the petitioning heirs. The two charitable corporations appeared in opposition to the petition and sought distribution to themselves, each claiming one-half of the estate. It might here be noted that the will in question was executed more than thirty days prior to the testator's death, and at no time does it appear that any question was raised concerning the contingent bequests of more than one-third of the estate to charity. Sec. 41, Prob.Code.

When the aforesaid petition of the heirs, the objections thereto, and the final account and petition for distribution "to persons entitled thereto" filed by the executors came on for hearing in April, 1939, the superior court made and entered its order and decree that neither of the charitable institutions were entitled to any part of the estate, and directed the distribution of the whole estate, with the exception of certain sums set aside for payment of inheritance taxes and other legal obligations, to the heirs at law. From this decree both of the above-mentioned charitable corporations appealed.

On August 8, 1939, and after the appeal had been taken, the appellant with whom we are here concerned, the David and Margaret Home for Children, Inc., entered into a compromise and settlement agreement with the heirs, by the terms of which it was agreed that the sum of $4,500 should be paid out of the assets of the estate to this one appellant, and in consideration thereof said appellant assigned to the heirs the balance of said estate over and above such $4,500 and agreed to dismiss its appeal. By subsequent stipulation this settlement is conditioned upon an order being made prior to January 1, 1940, that the trial court enter an order of distribution in accordance with said prior stipulation. That said appellant may have had in mind the limitation imposed by Probate Code, section 41, appears probable because the amount agreed upon to be paid said appellant organization appears to be less than one-sixth of the value of the estate in its entirety, thereby affording consideration of the possibility that the other appellant charitable organization may be entitled to a like proportion. The final account of the executors shows the value of the estate to be about $31,500 for distribution, of which $18,500 is in cash, with the present amount of cash on hand apparently slightly in excess of $20,000.

After the consummation of the last-named agreement a petition was filed in the superior court seeking approval thereof and praying distribution of said sum of $4,500 to the appellant David and Margaret Home for Children, Inc., in accordance with the settlement. The other appellant, Church Home for Children etc., appeared in opposition to said petition on the ground that a charitable organization has no power to compromise a contested claim. The record indicates that by reason of the attitude assumed by appellant Church Home for Children, and its expressed intention to resort to every possible legal means to defeat the consummation of the compromise agreement, the superior court continued the matter until December 12, 1939, which date was one week after the day fixed for the hearing of the motion now before us, when the matter was before the Supreme Court and prior to its transfer to this court. The matter has since been continued by said superior court to a date on or about January 5, 1940.

While the matter was pending in the Supreme Court appellant David and Margaret Home for Children, Inc., on October 4, 1939, filed in the Supreme Court their stipulation with the heirs, requesting the Supreme Court to enter a judgment decreeing distribution of the said sum of $4,500 to the appellant David and Margaret Home for Children, Inc., in accordance with the above-mentioned agreement, and the sum of $5,500 cash to the heirs, making a sum total of $10,000. The opposing appellant filed an affidavit in opposition to any such order, the substance of which affidavit was that appellant David and Margaret Home etc., being a charitable institution, has no power to compromise and settle its claim against the estate, for the reason that it is merely a trustee for the charitable use of such funds and any power of compromise would rest with the orphans themselves who are the true beneficiaries. On this state of the record there is now before us the notice of motion filed by appellant David and Margaret Home etc., and the respondent heirs, directed to the opposing appellant and to the executors, and praying "for an order directing the superior court * * * to distribute from the estate * * * the sum of $10,000 to the following persons and in the following amounts: The sum of $4,500 in cash to the David and Margaret Home for Children, Inc., and the sum of $5,500 in cash to the respondent heirs * * *", all of which is in accord with the agreement and stipulation heretofore referred to.

From the foregoing we are impressed that as between the appellant David and Margaret Home etc., and the respondent heirs, this case does not differ from any other case in which a judgment on appeal is requested pursuant to stipulation. The mere fact that there are other parties involved in the action cannot change the situation because such other parties are in no way involved in, nor will they be adversely affected by the settlement and distribution petitioned for if the same is made. Assuming that the motion now before us is granted, and the superior court is directed to distribute $10,000 out of the estate, there will still remain sufficient assets, including cash, with which to satisfy any possible legitimate claim of the opposing charitable organization, regardless of what disposition is made of its appeal from the order of the superior court directing distribution to the heirs.

In the event the decree of distribution as ordered by the superior court is finally affirmed, appellant David and Margaret Home etc., under its stipulation, would be enriched $4,500, and in the event of reversal, said appellant would be deprived of any amount to which it might be entitled in excess of $4,500. With the wisdom of such a compromise we are not concerned, for the same is clearly a matter which can affect only the appellant named and the heirs.

Should we deny the present motion, or were we to submit the same, thereby delaying decision thereon subsequent to January 1st, the moving appellant herein would be deprived of the benefit of its compromise.

For the reasons herein stated, it is ordered that the motion of appellant David and Margaret Home for Children, Inc., and of the respondent heirs, for distribution to them in accordance with their stipulation for judgment heretofore referred to and filed in the Supreme Court in this matter October 4, 1939, be and the same is hereby granted, and the matter presented by appeal of said appellant David and Margaret Home for Children, Inc., is hereby remanded to the superior court with directions to that court to forthwith make and enter its decree herein directing distribution of the sum of $10,000 out of the assets of said estate in accordance with said stipulation. Remittitur herein to issue forthwith.

FRENCH et al. v. MORTGAGE GUARANTEE CO. *

Civ. 12365.

District Court of Appeal, Second District, Division 2, California.

Dec. 29, 1939.

Rehearing Denied Jan. 23, 1940.

Hearing Granted Feb. 26, 1940.

1. Usury 🔑77

A contract which in its inception is unaffected by usury cannot be invalidated by a subsequent usurious transaction.

2. Usury 🔑41

Where excessive interest is paid because of occurrence of a contingency, which occurrence is under control of borrower, transaction is not thereby made "usurious."

[Ed. Note.—For other definitions of "Usurious," see Words & Phrases.]

3. Usury 🔑22

A prepayment privilege in a note which, if exercised by borrower, will make amount paid a sum in excess of legal rate of interest, does not render transaction "usurious."

4. Interest 🔑39(6)

Interest is legally collectible upon full amount of a sum agreed to be loaned, whether actually advanced or not, from time sum is actually allocated to borrower's use and lender is legally obligated to deliver full amount agreed to be loaned to borrower.

5. Usury 🔑22

As respects note, where loan was not usurious at its inception, fact that borrower

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*For subsequent opinion see 104 P.2d 655.

paid a sum in excess of legal rate of interest because he received only $22,000 of $27,500 agreed to be loaned, although entire amount was available, and because he exercised prepayment privilege, did not render transaction "usurious."

◆

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Action by J. Rollin French and Effie D. French against the Mortgage Guarantee Company to recover money and a penalty thereon alleged to have been paid in a usurious transaction. From judgment for defendant, the plaintiffs appeal.

Affirmed.

Kraft & Gray and Harold D. Kraft, all of Los Angeles, for appellants.

Fleming & Robbins and C. S. Tinsman, all of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendant after trial before the court without a jury in an action to recover money and a penalty thereon alleged to have been paid in a usurious transaction, plaintiffs appeal.

The essential facts are:

December 11, 1936, plaintiffs executed in favor of defendant company a note reading as follows:

"Installment Note (Principal in Installments—Interest Separately)

"$27,500.00 Los Angeles, California, December 11th, 1936.

"In installments and at the times hereinafter stated, for value received, I promise to pay to Mortgage Guarantee Company, a corporation, or order, at its office in the City of Los Angeles, California, or at such other place, either within or without the State, as the holder of this note may from time to time designate, the principal sum of Twenty-Seven Thousand Five Hundred Dollars, with interest from date on deferred payments until paid at the rate of five per cent per annum, payable March 1st, 1937 and quarterly thereafter. Said principal sum payable in installments of Eight Hundred Twenty-Five Dollars ($825.00) each on the first day of September, 1937, to and including September 1st, 1946. The entire balance of the then unpaid principal and interest shall be due and payable March 1st, 1947.

"Should the interest not be so paid it shall become a part of the principal and thereafter bear like interest as the principal. Should default be made in the payment of any installment of principal or interest when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Principal and interest payable in lawful money of the United States.

"Privilege is hereby reserved of paying this note on March 1st, 1938, or on any interest payment date thereafter prior to March 1st, 1942 maturity, by giving ninety days' written notice to the holder hereof and accompanying said notice with a sum of money equal to 90 days' unearned interest on the then unpaid principal as a bonus for such prepayment privilege.

"In the event that suit be brought hereon, or an attorney be employed or expenses be incurred to compel payment of this note or of any portion of the indebtedness evidenced hereby, the undersigned promises to pay a reasonable sum as attorney's fees.

"The makers, endorsers, guarantors and sureties of this note and each of them hereby waive diligence, demand, presentment for payment, notice of non-payment, protest and notice of protest and specifically consent to and waive notice of any renewals or extensions of this note, whether made to or in favor of the makers or any other person or persons. The pleading of any statute of limitations as a defense to any demand against makers, endorsers, guarantors and sureties, is expressly waived by each and all of said parties.

"This note is secured by a certain Deed of Trust to Title Guarantee and Trust Company, a California corporation.

"Privilege is also reserved of paying this note on March 1st, 1942 or on any interest payment date thereafter prior to maturity by giving 90 days' written notice, plus a sum equal to 1% of the then unpaid principal as a bonus for such privilege.

"Effie D. French
"J. Rollin French."

At the same time plaintiffs filed an application for a building loan from defendant and executed a trust deed to secure payment of the aforesaid note. Defendant immediately allocated $27,500 for the plaintiffs' loan, which at all times was available to plaintiffs on their compliance with the building loan contract executed by them.

Defendant in fact paid out on plaintiffs' order on the dates set opposite each sum the following amounts:

$4,125	February 24, 1937;
5,500	May 21, 1937;
5,500	July 31, 1937;
1,500	September 30, 1937;
4,000	November 30, 1937;
1,375	December 6, 1937.

The balance of the amount of the loan, $5,500, was available to plaintiffs at all times upon their compliance with the terms of their building loan application.

March 1, 1937, plaintiffs received a statement for $305.56, interest at 5 per cent per annum from December 11, 1936, to March 1, 1937, on the full amount of the loan. At this time plaintiffs claimed that they should be charged interest only on the amount of money actually advanced. However, upon it being pointed out to them that it was in accordance with the terms of their building and loan application, they paid on April 1, 1937, the sum to defendant, together with the sum of $4.34 for delinquent fees and office charges. April 9, 1937, as and for three per cent advance interest which was agreed to be prorated over the entire life of the loan, plaintiffs paid defendant the sum of $825. August 31, 1937, plaintiffs paid defendant $687.50 as five per cent interest on the note for the full amount thereof for the period from March 1, 1937, to September 1, 1937. August 31, 1937, plaintiffs paid defendant $825, as required by the note. January 21, 1938, plaintiffs paid defendant $666.88, as five per cent interest for the period from September 1, 1937, to March 1, 1938, as required by the note, this interest being figured on the full amount of the loan less the sum of $825 theretofore paid on account of the principal.

In December of 1937 differences arose between the plaintiffs and defendant. Thereupon plaintiffs requested defendant to permit them to pay and discharge their whole obligation to defendant in accordance with the prepayment option contained in the note. At this time there remained $5,500 which had not been advanced to plaintiffs. Although under the prepayment option contained in the note the option could not be exercised until March 1, 1938, defendant permitted plaintiffs to discharge their obligation January 21, 1938.

This is the sole question necessary to be determined:

Was the foregoing transaction usurious because when plaintiffs on January 21, 1938, paid their obligation to defendant they had received only $22,000 and had paid interest in the sum of $2,336.74?

This question must be answered in the negative and is governed by the following established principles of law:

(1) A contract which in its inception is unaffected by usury can never be invalidated by a subsequent usurious transaction. Goldenzwig v. Shaddock, 31 Cal.App.2d 719, 722, 88 P.2d 933.

[2] (2) Where excessive interest is paid because of the occurrence of a contingency, which occurrence is under the control of the borrower, the transaction is not thereby made usurious. Penziner v. West American Finance Co., 133 Cal.App. 578, 590, 24 P.2d 501.

[3] (3) A prepayment privilege in a note which if exercised by the borrower will make the amount paid a sum in excess of the legal rate of interest, does not render the transaction usurious. Grall v. San Diego Building & Loan Ass'n, 127 Cal.App. 250, 254, 15 P.2d 797.

[4] (4) Interest is legally collectible upon the full amount of a sum agreed to be loaned, whether actually advanced or not, from the time the sum is actually allocated to the borrower's use, and the lender is legally obligated to deliver the full amount agreed to be loaned to the borrower. Hayward Lumber & Investment Co. v. Corbett, 138 Cal.App. 644, 649, 33 P.2d 41.

[5] Applying the foregoing rules of law to the facts of the instant case, it is apparent that the transaction involved was not usurious, for the reason is that at the inception of the transaction there was no usury, that on and after December 11, 1936, there was allocated to plaintiffs' use by defendant the sum of $27,500, which was available to plaintiffs at their option at any and all times thereafter; and that any sums in excess of the legal rate of interest paid by plaintiffs to defendant were paid because of contingencies which occurred by reason of acts under the control of plaintiffs.

For the foregoing reasons the judgment is affirmed.

We concur: MOORE, P. J.; WOOD, J.

36 Cal.App.2d 353

CLINE v. BERGER et al.

Civ. 12299.

District Court of Appeal, Second District, Division 2, California.

Dec. 29, 1939.

Attachment ⚷11

An agreement, pursuant to which purchase-money note was executed, did not constitute mortgage or lien on buyers' personal property, so as to prevent issuance of writ of attachment in action on note, in absence of provision authorizing seller to repossess such property on buyers' failure to pay any purchase-money installment or sum due on note. Code Civ.Proc. § 537, subd. 1.

◆

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action on a note by Charles D. Cline against Herman Berger and another, in which plaintiff obtained a writ of attachment. From an order denying defendants' motion to dissolve the writ, defendants appeal.

Affirmed.

Henry Haves, of Los Angeles, for appellants.

Loyd Wright, Charles E. Millikan, and Arthur Wright, Jr., all of Los Angeles, for respondent.

McCOMB, Justice.

From an order denying defendants' motion to dissolve a writ of attachment upon the ground that the note upon which plaintiff's cause of action was based was secured by a chattel mortgage and a lien upon personal property, defendants appeal.

The essential facts are:

Defendants executed a promissory note in favor of plaintiff reading as follows:

"Promissory Note
"(Non-Negotiable)
"$8750.00 Los Angeles, California,
"September 13, 1938

"In installments as herein stated, for value received, we promise to pay to Chas. D. Cline, at Bank of America, 7th and Figueroa Branch, Los Angeles, California, the sum of Eight Thousand Seven Hundred Fifty ($8750.00) Dollars, with interest from September 1, 1938, on unpaid principal at the rate of seven (7%) per cent per annum, payable monthly with principal payments; principal payable in the following installments:

"$100.00 on the 30th day of September, 1938, and continuing monthly thereafter on the last day of each and every month for the first 12 month period of said note;

"$250.00 per month beginning with the 30th day of September, 1939, and continuing monthly thereafter on the last day of each and every month for the next 6 month period of said note;

"$500.00 per month beginning with the last day of March, 1940, and continuing monthly thereafter on the last day of each and every month for the next 12 month period of said note;

"And any unpaid balance shall be paid on the 1st day of March, 1941.

"Should interest not be so paid it shall thereafter bear like interest as the principal. Should default be made in payment of any installment of principal or interest when due the whole sum of principal and interest shall become immediately due at the option of the holder of this note. Principal and interest payable in lawful money of the United States. If action be instituted on this note, we promise to pay such sum as the Court may fix as attorney's fees. This note is executed pursuant to agreement of the parties hereto of even date herewith, to which agreement reference is hereby made.

"(Signed) Herman Berger
"Harry Selig"

At the same time plaintiff and defendants entered into the following agreement:

"Amended Agreement.

"This Agreement, made and entered into this 13th day of September, 1938, by and between Charles D. Cline, First Party, referred to as 'Seller', and Herman Berger and Harry Selig, Second Parties, referred to as 'Buyers',

"Witnesseth:

"The parties hereto, in contracting, do so with reference to the following facts:

"On July 2nd, 1936, the parties hereto entered into a written contract for the purchase and sale of the Seller's business, known as the French Slipper Shoppe, to which contract reference is hereby made, and same is hereinafter referred to as the 'Original Agreement'. Buyers are now indebted to Bank of America National

Trust and Savings Association, Los Angeles, California, in the sum of Ten Thousand Five Hundred ($10,500.00) Dollars, represented by their promissory note, payment of which note Seller has guaranteed. Demand for payment thereof has now been made by said Bank and buyers are unable to pay and liquidate said note. The parties hereto have entered into certain agreements regarding the loaning of money to liquidate said note and amendments to the original agreement which are as follows:

"1. Seller agrees, upon the execution hereof, to loan to the buyers the sum of $8,750.00, which buyers agree to forthwith apply on the buyers' note for $10,500.00, hereinbefore referred to, and at the same time buyers agree to pay to said Bank the balance owing on said promissory note in order that same may be fully paid.

"2. Buyers agree, upon the execution hereof, to execute to seller their certain nonnegotiable promissory note for $8,750.00, bearing interest from date at the rate of 7% per annum, payable as follows: $100.00 per month plus interest for each and every month of the first twelve months' period of said note; $250.00 per month plus interest for each and every month of the next six months' period of said note; $500.00 per month plus interest for each and every month of the last twelve months' period of said note, any balance unpaid to be paid March 1, 1941.

"3. At the present time buyers are indebted to seller for the unpaid purchase price of said business in the sum of $22,183.98, plus interest from the 1st day of September, 1938, at 7% per annum. Notwithstanding the monthly payments required to be made by said original agreement, the buyers shall pay to seller the following monthly installments beginning with the 30th day of September, 1938, and up to and including the installment due January 31, 1939;

"The sum of $500.00 per month, less the sums which the buyers are required to pay on the promissory note in the particular month as referred to in paragraph 2, supra.

"The net amount of said $500.00 payment shall be then applied first to the interest due, and the remainder to principal on the unpaid balance of said original agreement.

"4. For the period between August 1, 1938, and February 1, 1939, the firm of Ernst & Ernst shall prepare their financial statement of said business as soon after said 1st day of February, 1939, as can be done, and it shall be determined from said statement whether or not said business has been conducted by buyers during said six months' period at a profit or loss.

"(a) For the purposes of determining whether or not a profit or loss has been made by buyers for said six months' period ending February 1, 1939, all merchandise on hand and inventoried on the 1st day of February, 1939, shall be subjected to a depreciation and obsolescence charge of 10% thereof, to be included in the financial statement and to be deducted from the inventory. (Said inventory must be completed by buyers within ten days after the close of the six months' period.)

"(b) Should the financial statement show that the business for the six months' period ending February 1, 1939, was carried on at an operating profit, then this amended agreement shall automatically continue for an extended period of six months from February 1, 1939, and the payments to be made to seller shall be at the same rate provided for the first six months' period as above specified plus an amount equal to the interest on said promissory note for the particular months. The same procedure outlined for determining a profit or loss on February 1, 1939, shall be used by Ernst & Ernst in making the financial statement of said business on August 1, 1939, except that in determining the amount of depreciation, 5% of the merchandise on hand and inventoried shall be used.

"(c) Should an operating profit be made by the buyers for the six months' period ending August 1, 1939, then this agreement shall continue for another period of six months, and thereafter for successive intervals of six months' periods as long as in the prior period an operating profit has been made by the buyers, using the 5% depreciation figure on inventory; provided, however, that the payments to seller shall be the following: From August 1, 1939, to January 31, 1940, $750.00 a month, plus an amount equal to the interest on said promissory note for the particular month, less amounts required to be paid by buyers on the promissory note in said months; from February 1, 1940 to July 31, 1940, and from August 1, 1940 to January 31, 1941, $1,000.00 a month plus an amount equal to the interest on said promissory note for the particular month, less amounts required to be paid by buyers on the promissory note in said months.

"(d) The payments provided herein are, and each of them is, without the grace period mentioned in paragraph XIV of the original agreement.

"(e) After said promissory note is fully paid, the parties shall then be restored to the terms, covenants and conditions of said original agreement, without any further reference to this amended agreement.

"5. Should there be an operating loss by the buyers for the period of August 1, 1938, to January 31, 1939, then the buyers shall have the privilege of paying out of their personal funds, and not out of the business, to the escrow holder, hereinafter referred to, for the account of the seller, within five days after the rendition of said financial statement of Ernst & Ernst, the amount of said operating loss, which shall be applied on the 1st installments due hereunder. If such payment is made, then this amended agreement shall continue for another period of six months, as hereinbefore provided in paragraph 4. The same privilege is accorded the buyers for any subsequent six months' period in which an operating loss is sustained to have this agreement continue by paying said loss to the seller through said escrow.

"6. Should the buyers sustain an operating loss and fail to pay same for the period of August 1, 1938, to January 31, 1939, or at the end of an extended six months' period thereafter, then the seller, without resorting to any litigation, shall have the right to repossess himself of said business, and all of the buyers' right, title and interest therein and to the same, and the seller shall thereupon become the sole and exclusive owner of said business, free from any claims of the buyers thereto. For the purposes of accomplishing this, the buyers, concurrently herewith, will execute and deliver into an escrow, mutually agreed upon between the parties, a bill of sale of said business, assignments of the leases on the two locations, and assignments of the insurance policies covering said business, with instructions to deliver same to the seller upon their failure to comply with the provisions of paragraph 5.

"In the event that the seller exercises the right of repossession of said business, as herein provided, and the seller should require certain documents from the buyers in order to perfect his title to said business, the buyers agree, upon demand, to execute any and all other documents necessary or proper to convey their right, title and interest in and to said business.

"The seller concurrently agrees to deposit in said escrow a release whereby the buyers are released from all liability under the original agreement, this amended agreement, and said promissory note, and any other note signed by buyers and guaranteed by seller, which release shall be delivered to the buyers upon the delivery to the seller of the bill of sale and other papers covering said business. The seller in such event agrees to deliver to the buyers the notes marked 'Cancelled.'

"In the event the seller repossesses himself of said business, the seller does hereby agree to hold the buyers free and harmless of and from all liability incurred by them to merchandise creditors of said business and to the lessors on said leases, and to banks for moneys borrowed by the buyers in connection with the operation of said business; provided, that the seller has theretofore approved or guaranteed the purchase of said merchandise, and has approved or guaranteed the obligations to said bank.

"7. During the six months' period ending January 31, 1939, or any extended six months' period while this amended agreement is in force, buyers agree that they will not place any orders or re-orders for merchandise without the seller's consent first had and obtained, excepting herefrom special orders; and provided that the seller agrees that he will not unreasonably withhold his consent to such orders and re-orders.

"8. The buyers may, at or prior to the expiration of any six months' period herein specified, surrender and deliver up to the seller the aforesaid business by giving notice in writing to said escrow holder to deliver said bill of sale and other title papers to the seller forthwith. The escrow holder shall be authorized to comply with the said notice from the buyers by delivering the bill of sale and other title papers to the seller and by delivering to the buyers the release. This privilege to surrender the business accorded the buyers shall be a joint one, and can only be exercised by the buyers jointly.

"In the event that one of the buyers withdraws from the operation of said business during the existence of this amended agreement, then the seller shall have the immediate right of repossession, and written notice to the escrow holder by the seller that one of said buyers has withdrawn from the business shall be sufficient authority for said escrow holder to immediately deliver to the seller the bill of sale and other papers covering said business, and to deliver to the buyers the releases hereinbefore referred to.

"9. Each of the parties hereto shall pay his own attorney's fees, and buyers shall not pay their attorney from said business.

"10. Except as hereinabove modified, all of the terms and conditions of the original agreement shall remain and be in full force and effect, including the seller's right to withdraw cash surplus from said business.

"11. Sarah Berger, wife of Herman Berger, and Mabel Selig, wife of Harry Selig, join in the execution hereof for the purpose of consenting to the provisions hereof and binding whatever interests they have in buyers' business under the Community Property Laws of the State of California, and Eunice D. Cline joins in the execution hereof for the purpose of consenting to the provisions hereof.

"In Witness Whereof, the parties hereto have hereunto set their hands the day and year hereinabove first set forth.

"Chas. D. Cline
"First Party.
"Herman Berger
"Harry Selig
"Second Parties.
"Sarah Berger
"Mabel Selig
"Eunice Cline."

Thereafter on March 3, 1939, plaintiff brought an action against defendants alleging that defendants were in default in the payments due on the aforesaid promissory note, and obtained a writ of attachment which was levied upon property of the defendants in Los Angeles county. April 5, 1939, defendants' motion to dissolve the attachment, on the ground that the note was secured by a mortgage and lien upon property of the defendants, in virtue of the agreement hereinabove set forth, was denied.

This is the sole question to be determined:

Did the agreement above set forth constitute a mortgage or lien upon personal property of defendants within the purview of section 537, subdivision 1, of the Code of Civil Procedure, so as to prevent the issuance of a writ of attachment?

This question must be answered in the negative. A reading of the agreement fails to disclose any provision providing that upon defendants' failure to pay any installment or to pay the sum due on the promissory note plaintiff would have any right under the terms of the contract to repossess himself of the property referred to in the agreement. Paragraph 6 of the agreement contains the only condition upon which the plaintiff would have the right to repossess himself of the properties described in the agreement, that condition being that, should defendants operate the business at a loss, then plaintiff might take possession of the properties. The agreement in no way provides a security or lien for the enforcement of the promissory note set forth above.

For the foregoing reasons the order appealed from is affirmed.

We concur: MOORE, P. J.; WOOD, J.

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36 Cal.App.2d 448

BENSON v. BURK.

Civ. 10974.

District Court of Appeal, First District,

Division 2, California.

Jan. 5, 1940.

Automobiles 🔑244(7)

Evidence sustained judgment for 4-year-old child for injuries sustained when child was struck by automobile while child was crossing street, on ground that motorist whose view was unobstructed failed to keep proper lookout and to observe child until it was too late to avoid the accident.

◆

Appeal from Superior Court, Santa Clara County; R. R. Syer, Judge.

Action by Robert Elmer Benson, a minor, by his guardian ad litem, Elmer F. O. Benson, against L. C. Burk, for injuries sustained by the plaintiff when he was struck by an automobile which was operated by the defendant. From an adverse judgment, defendant appeals.

Affirmed.

John J. Jones, of San Jose, for appellant.

Eugene B. Grattan, of San Jose, for respondent.

SPENCE, Justice.

Plaintiff was a minor of the age of four years at the time he sustained injuries when struck by an automobile driven by defendant Burk. He brought this action for damages, and, upon a trial by the court sitting without a jury, he had judgment against defendant Burk. Said defendant appeals from said judgment.

The sole point raised by said defendant on this appeal is that the evidence was insufficient to sustain the judgment. We are of the opinion that said contention cannot be sustained.

The accident happened in the daytime in a residence district on a street known as Willow Glen Way in the city of Willow Glen. Defendant was driving his automobile in a westerly direction along the northerly side of said street. There were no other vehicles in the vicinity and there was nothing to prevent defendant from having an unobstructed view of the street, the sidewalks and the territory immediately adjacent thereto. According to his testimony the child was hit while running from the south side of the street toward the north side of the street but he admitted that he did not see the child until the automobile was about 15 feet from said child. The testimony of defendant further showed that just before the accident occurred defendant had seen a friend standing on the lawn in front of her home on the north side of said street and that said parties had nodded to one another. Defendant was traveling between 20 and 25 miles at the time. From the foregoing evidence the court was justified in concluding that defendant was negligent in failing to keep a proper lookout as he proceeded down the street and that as a result of such negligence, he found himself in a position where he could not prevent the accident after he did see the child, if he did see the child at all before the accident. This conclusion finds further justification in the testimony showing that defendant had stated after the accident that "he had not seen the boy before the accident"; that "he did not know what he had hit"; that "he did not know what had happened until it was over; he couldn't imagine what was done".

We deem it unnecessary to discuss various authorities cited by the parties. It may be stated, however, in the words of the court in Hoy v. Tornich, 199 Cal. 545, 547, at page 551, 250 P. 565, at page 568, that, "This is not a case of a child darting suddenly in front of a moving vehicle from a hidden place, but of running into a child on an open highway." We believe it is apparent that there was ample evidence to sustain the findings relating to defendant's negligence.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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36 Cal.App.2d 441

COPELAND v. RAUB, County Treasurer, et al.

Civ. 6292.

District Court of Appeal, Third District, California.

Jan. 3, 1940.

As Modified on Denial of Rehearing Feb. 2, 1940.

Hearing Denied Feb. 29, 1940.

1. Statutes 🔑190

The court will consider the benefits or evils which will result from enforcement of the law only when the statute is ambiguous. Code Civ.Proc. § 1858.

2. Statutes 🔑190

Where the language of a statute is unambiguous, there is no room for construction, and courts are not permitted to search for its meaning beyond statute itself.

3. Statutes 🔑220

The statutory amendment providing that bonds of reclamation district, matured or to mature within 90 days from date of payment of installment, may be applied in payment of such an installment, indicates a recognition that, previous to amendment, right existed to apply to an unpaid assessment, either matured or unmatured bonds and coupons and that amendment was enacted to limit application of bonds and coupons on delinquent assessments to matured bonds or such as would mature within 90 days from date of call. Pol.Code, § 3480, as amended by St.1933, p. 1226.

4. Waters and water courses ⚷216

The right of owner of land in reclamation district to have his bonds and coupons credited at their face value on call in satisfaction of unpaid assessments against his land was governed by the statute in effect at the time the bonds were issued, since statute became a part of the contract in the bonds.

5. Waters and water courses ⚷231

Under the statute, in effect at time bonds of reclamation district were issued to landowner providing that a landowner could remove the lien of any assessment on which bonds had been or may be issued by delivery to county treasurer for cancellation of any bonds payable out of the assessment, a landowner was entitled to pay its assessment on refunding bonds with matured and unmatured bonds and interest coupons. Pol. Code, § 3480, as amended by St.1923, p. 608.

6. Waters and water courses ⚷231

Where landowner of reclamation district was entitled under the statute to apply interest coupons in payment of an assessment, fact that county treasurer might erroneously credit, on assessment, interest on coupons presented which had not accrued at time of tender, did not preclude landowner from applying coupons on assessment. Pol.Code, § 3480, as amended by St.1923, p. 608.

◆

Appeal from Superior Court, Sutter County; R. M. Rankin, Judge.

Mandamus proceeding by A. B. Copeland against Gerald F. Raub, as County Treasurer of the County of Sutter, State of California, and as Trustee of the Bond Fund of Reclamation District No. 1500, and others wherein it was ordered that the Sutter Basin Corporation, a Delaware corporation, and Sutter Basin Mutual Water Company, a California corporation, be made parties to the proceeding. From a judgment for defendants, petitioner appeals. Affirmed.

A. A. Tiscornia, of San Francisco, for appellant.

Hewitt & McBride, of Yuba City, and Huston, Huston & Huston, of Woodland, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

A. B. Copeland has appealed from a judgment which was rendered against him pursuant to an order sustaining separate demurrers to his petition for a writ of mandamus to compel the sale of land in a reclamation district for alleged delinquent assessments, as required by section 3480 of the Political Code. The demurrers were sustained without leave to amend the pleading.

The chief contention of the appellant is that the demurrers were erroneously sustained for the reason that the petition states a good cause of action on the theory that the treasurer's call number 39 to pay assessments for interest due upon bonds of the district which were issued prior to the amendment in 1933 of section 3480 of the Political Code would be paid in cash only and not with *unmatured* bonds or coupons; that since the treasurer received from Sutter Basin Corporation, a landowner of the district, only bonds and interest-bearing coupons, a portion of which were unmatured, in payment of the call for assessments against it, such assessments became delinquent and it is, therefore, the duty of the treasurer to impose the penalties provided by law and sell the land in the manner required by said section of the code. This appeal is dependent upon the construction of the last paragraph of section 3480 of the Political Code as amended in 1923 (Stats.1923, at p. 608), since all of the bonds involved in this proceeding were issued during the time the 1923 amendment was in force. That amendment, as it then existed, read:

"Any land owner of the district who shall desire at any time to lessen or remove the lien upon his land of any assessment on which bonds have been or hereafter may be issued may deliver to the county treasurer for cancellation any bonds payable out of said assessment, and the treasurer shall credit against the assessment on his land the principal and accrued interest of said bonds."

It is further asserted that in no event may *refunding bonds* or their interest coupons be credited on the payment of such assessments.

The petition alleges that Reclamation District Number 1500 was duly organized in 1913, pursuant to law, and that, by an election held November 12, 1919, the trustees were authorized to and did issue bonds pursuant to the provisions of section 3480 of the Political Code in the aggregate sum of $4,952,986.78, which were sold March 12, 1930; that the petitioner, A. B. Copeland purchased and now owns sixteen bonds of the denomination of $1,000 each, and fifteen other bonds of the denomination of $500 each, together with their interest-bearing coupons; that all bonds issued by the reclamation district were subsequently refunded, validated and approved by the electors of the district as provided by law; that the Treasurer of Sutter County is charged with the collection and disbursement of the funds of the reclamation district; that an assessment was duly levied against the property in that district; that issued bonds in the aggregate sum of $100,000 were not exchanged, but still remain outstanding and unpaid; that on April 1, 1939, the treasurer made formal call number 39 for payment of interest due July 1, 1939, on refunded bonds, aggregating the sum of $98,034.41, no part of which has been paid *in cash;* that Sutter Basin Corporation, which owns 85 per cent of the farm lands of the district, held bonds and coupons maturing prior to July 1, 1939, of the aggregate face value of $70,094.60, which were tendered and accepted by the treasurer in payment of the assessment and call number 39 levied against its lands, which the treasurer threatens to credit at full face value, in lieu of cash, pursuant to the last paragraph of the 1923 amendment of section 3480 of the Political Code; that the petitioner has protested against the treasurer accepting said bonds in lieu of cash, and has demanded of him that he declare said assessments against the lands of the Sutter Basin Corporation delinquent and proceed to sell the lands in the manner provided by law, which he refuses to do. The petition then prays for an order directing the treasurer to accept only cash in payment of call number 39; that he be required to reject the bonds and coupons tendered by the Sutter Basin Corporation and proceed to sell the lands for delinquent assessments as required by section 3480 of the Political Code. To this petition the treasurer and the trustees filed separate demurrers on the grounds that the petition fails to state a good cause of action, and that there is a fatal nonjoinder of parties. The demurrers were sustained without leave to amend. Judgment was accordingly rendered against the petitioner. From that judgment this appeal was perfected.

[1] We are of the opinion the petitioner fails to state a cause justifying the issuance of the mandate prayed for, and that the demurrers were therefore properly sustained without leave to amend the pleading. The chief issue depends upon the construction of the last paragraph of section 3480 of the Political Code as amended in 1923. The language of that paragraph seems clear and explicit. It does not appear to be uncertain or ambiguous. There is no occasion to employ the well-known rules applicable only to the construction of a statute when its language is uncertain or ambiguous. Much space is consumed in appellant's briefs suggesting possible detriment which may result from construing the statute so as to permit the treasurer to accept and credit bonds and coupons in satisfaction of an assessment against lands in the district. In view of the clear language of the statute that argument seems to be futile. A multitude of authorities supports the emphatic declaration that the rules of construction of statutes, among which is a consideration of the benefits or evils which would result from the enforcement of the law, are applicable only when the statute is ambiguous and uncertain in its meaning. Sec. 1858, Code Civ.Proc.; In re Mitchell, 120 Cal. 384, 52 P. 799; 25 R.C.L. 957, § 213.

[2] In the authority last cited it is said in that regard: "A statute is not to be read as if open to construction as a matter of course. It is only in the case of ambiguous statutes of uncertain meaning that the rules of construction can have any application. Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself. When the meaning of a law is evident, to go elsewhere in search of conjecture in order to restrict or extend the act would be an attempt to elude it, a method which, if once admitted, would be exceedingly dangerous, for there would be no law, however definite and precise in its language, which might not by interpretation be rendered useless. In such a case arguments from the reason, spirit, or purpose of the legislation, from the mischief it was intended to remedy, from history or analogy for the purpose of searching out and justifying the interpolation into the statute of new terms, and for the accomplishment of purposes which the law-

making power did not express, are worse than futile. They serve only to raise doubt and uncertainty where none exist, to confuse and mislead the judgment, and to pervert the statute."

[3] If we were permitted to resort to the rules of construction in the present case to aid us in determining the intention of the legislature with respect to the chief contention of the petitioner that the provision referred to merely authorized the treasurer to credit against the assessment on lands the owner's *matured* bonds and coupons, and not the unmatured ones, the amendment of that provision in 1933 (Stats. 1933, p. 1219, at the bottom of page 1226) indicates a recognition of the previous right to apply to an unpaid assessment either matured or unmatured bonds and coupons. Pierce v. Riley, 21 Cal.App.2d 513, 520, 70 P.2d 206. It is provided that after the bonds have been issued, all unpaid assessments on the land affected thereby shall bear 7 per cent interest, which interest may be called independently of the payment of the installments on the bonds, and that the treasurer is required to estimate the amount necessary to pay principal and interest at their maturity, and that after notice he must then proceed to sell the land in the manner provided by the act to satisfy the delinquent assessments, together with accrued interest and an added penalty of 15 per cent thereof. The amendment of 1933 provides: "Said installment may be paid either in cash or in bonds of said district, or their interest coupons, issued upon said assessment, *then matured or to mature within ninety days* from the date of the calling of such installment, taken at their face value, or part in cash and part in such bonds and/or coupons. Any bond or coupon so received in payment shall be by the treasurer forthwith canceled and filed in his office."

Prior to the amendment of 1933 the act contained no such limitation of the right to apply only matured bonds or coupons to the decreasing or satisfaction of unpaid assessments. If we may resort to the rules of construction to ascertain the intention of the legislature, we must presume the preceding amendment of 1933 was enacted to limit the application of bonds and coupons on delinquent assessments to *matured bonds* or such as would become matured within ninety days from the date of the call. The last paragraph of section 3480 of the Political Code, as it existed prior to 1933, contained no such limitation. It authorized the delivery to the treasurer of *"any bonds* payable out of said assessment", to be credited at face value, together with *"accrued* interest" against the assessments on the lands of the owner thereof.

[4] The right of the land owner to have his bonds and coupons credited at their face value on the call in satisfaction of the unpaid assessments against his lands is governed by the statute in effect at the time the bonds were issued. Hershey v. Cole, 130 Cal.App. 683, 20 P.2d 972; Shouse v. Quinley, 3 Cal.2d 357, 45 P.2d 701; Islais Co., Ltd., v. Matheson, 3 Cal.2d 657, 45 P.2d 326; County of San Diego v. Childs, 217 Cal. 109, 17 P.2d 734. It is uniformly held that the statute in force when the bonds are issued becomes an inseparable part of the contract created by the terms thereof. The statute including the provisions of the last paragraph of section 3480 of the Political Code, according to the amendment of 1923, was in effect when the respondents' bonds, which are involved in this proceeding, were issued. That amendment of 1923 is therefore determinative of the issues of this case. The language of that paragraph did not then limit the right to "lessen or remove the lien upon his land" to the application of *matured bonds* only. It applied to "any bonds payable out of said assessment".

[5] Nor did the statute, as it then existed, limit the application of such bonds and coupons to the payment of assessments on original bonds to the exclusion of *refunding bonds.* The act as it then existed contemplated an identical procedure for estimating the amount of principal and interest due for the purpose of a call to both original and refunding bonds. It provided in that regard: "At least ninety days before any interest date of the bonds, *including refunding bonds,* the county treasurer of the main county shall estimate the amount of money necessary to pay interest and principal maturing", etc., and after notice of delinquency thereof shall proceed to sell the land to satisfy the lien created thereby.

[6] There is no merit in the contention that the treasurer may erroneously credit on the assessment due, interest on the coupons presented which had not accrued at the time they were tendered for payment.

The treasurer is not charged with a threat to do so. The respondents do not contend they are entitled to credit for any interest which had not actually accrued when the bonds and their coupons were presented to the treasurer.

We are persuaded the respondents were entitled under the last paragraph of section 3480 of the Political Code, as it existed in 1923, to credit on its assessment the face value of the bonds and coupons presented, and that the demurrers to the petition for a writ of mandamus were properly sustained without leave to amend the pleading.

An amendment to the petition was previously filed, joining as parties to the action, pursuant to section 382 of the Code of Civil Procedure, all other bondholders and interested parties, without naming them, on the theory that they were too numerous to personally bring before the court. In view of what we have previously said regarding the merits of this proceeding it is not necessary for us to determine whether there is still a fatal nonjoinder of parties, and we therefore refrain from doing so.

The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

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36 Cal.App.2d 433

SMITH v. WESTERN PACIFIC R. CO. et al.

Civ. 10949.

District Court of Appeal, First District, Division 2, California.

Jan. 3, 1940.

Rehearing Denied Feb. 2, 1940.

Hearing Denied Feb. 29, 1940.

1. Railroads 🔑275(1)

Where switchmen knew or should have known of presence in railroad car during switching operations, of plaintiff who had been engaged in unloading lumber from the car and who was not a railroad employee, railroad and switchmen owed duty to the plaintiff to conduct their activities with reasonable care. Civ.Code, § 2114.

2. Trial 🔑143

Jury had duty to ascertain which of conflicting statements of witnesses was the most nearly correct.

3. Railroads 🔑282(9)

In action for injuries sustained by plaintiff who had been engaged in unloading lumber from freight car, when he fell from the car during switching operations, whether train crew should have moved the car because of condition of the lumber at the time and whether train crew exercised due care in making switching operations were questions for jury. Civ.Code, § 2114.

4. Railroads 🔑282(9)

In action for injuries sustained by plaintiff who had been unloading lumber from freight car, when plaintiff fell from car during switching operations, after plaintiff had been given notice that car would be moved, contributory negligence of plaintiff in failing to leave car, failing to support the lumber which was left in car, and failing to take position of safety in end of car which was vacant. was for jury.

5. Railroads 🔑282(14)

In action for injuries sustained by plaintiff who had been unloading lumber from freight car when plaintiff fell from car during switching operations, after plaintiff had been given notice that car would be moved, instruction on last clear chance doctrine was authorized by evidence.

6. Trial 🔑192

Instruction concerning duty of switchmen to warn engineer orally of condition existing at time of switching operations during which plaintiff was injured, was not erroneous even if it assumed as fact that ground crew did not orally warn engineer, where evidence was without conflict that no oral warning was communicated by ground crew.

7. Railroads 🔑282(1, 2)

In action for injuries sustained by plaintiff who had been unloading lumber from freight car when plaintiff fell from car during switching operations, after plaintiff had been given notice that car would be moved, complaint pleading negligence generally was sufficient and entitled plaintiff to produce evidence concerning signals given by switchman, whether signals were made by swinging arm or by oral statements.

8. Trial ⟹296(3)

Technical error in instruction defining a licensee and an invitee did not require reversal where trial court gave another instruction fully covering the subject, and record disclosed that the instruction complained of when read in connection with other instructions was not prejudicial.

9. Railroads ⟹275(1)

Railroad switchmen were bound to conduct their activities with reasonable care for safety of plaintiff who was engaged in unloading lumber from freight car only after switchmen knew or from facts within their knowledge should have known of plaintiff's presence. Civ.Code, § 2114.

Appeal from Superior Court, Santa Clara county; J. J. Trabucco, Judge.

Action by Harrison Smith against the Western Pacific Railroad Company and others for injury sustained when the plaintiff fell or was thrown from a freight car. From an adverse judgment, defendants appeal.

Affirmed.

Hearing denied; EDMONDS, J., dissenting.

Ernest I. Spiegl, of San Francisco, for appellants.

Richard I. McCarthy, Frank V. Campbell, and Walter E. Rankin, all of San Jose, (Robert E. Hayes, of San Jose, of counsel), for respondent.

STURTEVANT, Justice.

The plaintiff commenced an action against the defendants to recover damages for injuries sustained when he fell or was thrown from a freight car. After a trial before the trial court sitting with a jury, the latter returned a verdict in favor of the plaintiff. From that judgment the defendants have appealed.

At San Jose the defendants maintain a freight yard. It is in the form of a crescent. The portion of the freight yard involved in the case at bar extends in a general direction from north to south. On the western side a spur track has been inserted which serves certain industries, among others the General Box Distributors. That company has warehouses and a lumber yard on the western side and immediately adjacent to the spur track. The spur track has a compound curve. By reason of the curve the easterly rail at the point where the accident occurred is approximately three and a quarter inches higher than the westerly rail. Prior to July 2, 1937, there had been placed on the spur track adjacent to the warehouse of the box company three different cars. WP Car No. 17,045, hereinafter called the car, had been received with a load of lumber and was the most southerly car and stood opposite the lumber yard. Its load had consisted of boards 1⅜ inches thick, 10 inches wide, and varying in length from 12 to 16 feet. The boards were piled lengthwise in the car and the top of the load reached 7½ or 8 feet above the floor of the car. The plaintiff and an assistant, Tex Warren, had been engaged in unloading the car. To gain access to the car they placed a board resting on the ground on the western side and resting on a truss rod of the car. The plaintiff climbed from that up to and into the car. They nailed a board horizontally across the west door about five feet above the floor of the car, then for the purpose of unloading the boards they placed a metal roller in such a position that the west end extended over a barbed-wire fence into the lumber yard and the east end rested on the board so nailed to the door. The load consisted of practically two piles, one in the extreme north end of the car and the other immediately adjacent to the south. As so arranged that left a vacant space in the extreme south end of the car. The plaintiff and his associate had proceeded with the unloading to such an extent that most of the lumber in the southern pile had been removed down to within three feet of the floor of the car. However, one tier of boards still stood along the eastern wall from the floor to the ceiling. The plaintiff was working on the inside of the car, picking up the boards, placing them on the roller, rolling them out to Warren, and he in turn took them off of the roller and stacked them in the lumber yard of the box company. While they were so engaged in their work the agents of the defendants appeared with a switch engine. J. S. Henry, the switch foreman and yardmaster, appeared at the west door of the car and informed the plaintiff that the car was to be switched. Accompanying Henry was L. Stockdale, a switchman. A few feet south of the door and on the westerly side stood T. Cottle, another switchman. I. V. Finley, the fireman, was acting as engineer. A. W. Ellis, the engineer, was seated on the side ordinarily occupied by the fireman. Having spoken to the plaintiff as above mentioned, Henry passed to the north near the next car and left Stockdale to give the signals. In reply to Henry's statement the plaintiff remarked, "If you are going to handle this car now you handle it carefully, this lumber is in a hell of a shape." That statement was heard by Stockdale. Henry was so near by that he should have heard it but he testified he did not hear it. Immediately before the car was moved as recited above the plaintiff stood on a pile of lumber three feet above the floor of the car. The door-sill, the width of the car and six inches wide, was clear. From the floor of the car to the rail was a distance of about four feet. The rail was approximately one foot higher than the ground. Some one of those who were on the ground removed the board or platform used to enter the car, the plaintiff pulled the roller into the car, and stood near the tier on the east side with his hand resting thereon. In a second or two Stockdale gave a signal and the switching commenced. The engine was coupled to that car, the latter was coupled to the next, and it in turn was coupled to the next, and the train as so made up moved south over the switch a distance of approximately 200 feet. At that point there is a maximum differential in elevation of the east rail over the west rail. The engine came to a stop. After about a minute and a half a signal was given and the train commenced to back. It had not moved but a short distance when the tier of lumber fell from the east toward the west and the plaintiff fell or was knocked out of the west door onto the ground. Other facts will be recited as it becomes necessary.

[1, 2] The defendants contend they were not negligent. They first claim that plaintiff, after he pulled in the roller, was a licensee and that they owed him no duty except not to act wilfully or wantonly. But both Henry and Stockdale knew, or from facts within their knowledge should have known, of the plaintiff's presence in the car. Therefore the defendants owed to him the duty to conduct their activities with reasonable care. Hamakawa v. Crescent Wharf etc. Co., 4 Cal.2d 499, 501, 50 P.2d 803. As shown above both Henry and Stockdale, the agents of the defendants on the ground, knew the conditions and circumstances existing in the car. Nevertheless Henry ordered it switched. Stockdale gave the signal. What signal he gave is controverted. But no accident happened. Later there were more signals to couple two more cars, a signal to back across the switch, and then one to go back onto the switch of the box company. Before the last movement was made the ordinary signal was given. That movement was fraught with danger to the load in the car because of the embankment at that point. In making the last movement the accident happened. The fireman was operating the engine and he testified that, except as to the first signal, every one was the ordinary signal to "go ahead". As to what signals ordinary train crews have or use was testified to by the agents of the defendants. That testimony is hopelessly conflicting. Ellis, the engineer, testified that when operating on a commercial track (an industrial spur) an ordinary signal means very easy; just about as easy as can be made; it would be impossible to go any other way. But his fireman, Finley, testified the first signal he received was "Go ahead, take it easy," and later he received nothing but ordinary signals. Those statements conflict. It was for the jury to ascertain which was most nearly correct.

[3] The evidence also presented a question of fact as to whether under all of the circumstances then existing the train crew should have moved the car at all. The above-mentioned statement of Ellis at least tends to show he was aware it was the duty of those switching cars on commercial spurs and side tracks to use extra care. Manifestly, the first thing to note was the condition of the load, if any. It is statutory that defendants were bound to use at least ordinary care, Civ.Code, sec. 2114, but the question still remained what was ordinary care. Henry, the switch foreman, was on the ground, went to the car, told the plaintiff the car was to be moved, passed on to the next car, and was within a few feet of the door of the car when it was moved. He testified he did not know the plaintiff was in the car when it was moved. Did he close his eyes? As he passed he observed the condition of the load. He testified he saw no danger. Did he close his eyes to a patent danger? Or, if his judgment that the car was in condition was correct, then does it not follow that the car was so carelessly handled a stable load was caused to topple over? Clearly all of these questions were for the jury.

The agents of the defendants testified it was impossible for them to switch the cars and use less force than they did. If so, they knew that fact before they acted. They knew the condition of the car and all of the circumstances. They were in control. If the car was not in a condition that it could be moved without injury to plaintiff or the contents of the car, the defendants had the right to refuse to act until the car was conditioned—the freight stabilized and all persons ejected if necessary. Whether they negligently failed to exercise that power was a question for the jury. If the car as it stood in defendants' switch yard, by the exercise of due care, could have been moved without injury, the question whether at the time of the accident the defendants exercised due care was also a question for the jury.

[4] The defendants claim the plaintiff was, as a matter of law, guilty of contributory negligence, because (1) he did not get out of the car, (2) he did not support the lumber, and (3) he did not take a position of safety in the south end of the car which was vacant. No one of those specifications is convincing. In Seller v. Market-Street R. Co., 139 Cal. 268, at page 271, 72 P. 1006, the court said: "It has often been said by this court that it is very rare that a set of circumstances is presented which enables a court to say, as a matter of law, that negligence has been shown. As a general rule, it is a question of fact for the jury, an inference to be deduced from the circumstances of each particular case, and it is only where the deduction to be drawn is inevitably that of negligence that the court is authorized to withdraw the question from the jury. This is true, even where there is no conflict in the evidence, if different conclusions upon the subject can be rationally drawn therefrom. If the conceded facts are such that reasonable minds might differ upon the question as to whether or not one was negligent, the question is one of fact for the jury. These rules are so well settled as to render it unnecessary to here do more than state them. [Citing authorities.]" Stoutimore v. Atchison, T. & S. F. Ry. Co., 338 Mo. 463, 92 S.W.2d 658, involved the claims of a consignor for damages for injuries sustained while he was engaged in loading his freight. There, as here, it was claimed he was guilty of contributory negligence as a matter of law. On page 665 of 92 S.W.2d the supreme court of Missouri said: "Neither can we sustain defendant's contention that plaintiff was guilty of contributory negligence as a matter of law. Plaintiff was not an experienced railroad man. He was working in the dark with the instrumentalities furnished to him by defendant. Under such circumstances, he could only be held guilty of contributory negligence as a matter of law if the danger of doing so is so obvious and glaring that no reasonably prudent person in the exercise of ordinary care would undertake to do so. [Citing authorities.]" Many other authorities involved injuries to the person engaged in loading and unloading cars. Without an exception the same conclusion was adopted and followed for the same reasons. Pinconning Tp. v. Detroit & M. R. Co., 238 Mich. 100, 213 N.W. 156; Chadderdon v. Michigan Cent. R. Co., 100 Mich. 293, 58 N.W. 998; Chesapeake & O. R. Co. v. Hudson, 169 Ky. 580, 184 S.W. 884; Illinois C. R. Co. v. Anderson, 81 Ill.App. 137. It follows that the trial court did not err in submitting to the jury the question regarding the contributory negligence of the plaintiff.

[5] The next contention made by the defendants is that the trial court erred in giving an instruction on the doctrine of the "last clear chance". They concede the instruction was properly worded. However, they contend it was inapplicable to the facts. In that connection they set forth five different elements as being comprised within the instruction. We think the evidence hereinabove set forth justified the court in giving the instruction on the assumption there was some evidence to sustain each element so set forth. Chesapeake & O. R. Co. v. Hudson, 169 Ky. 580, 184 S.W. 884, 886, 887.

[6, 7] Again it is contended that the court erred in giving certain instructions at the request of plaintiff upon the duty of the agents of the defendants to orally warn the engineer. It is asserted that one of the instructions assumed as a fact that the ground crew did not orally warn the engineer. We think the criticism of the instruction as assuming a fact is not well founded. However, if it did assume the fact there was no error because the evidence was without conflict that no oral warning was communicated by the ground crew. In this connection it is further contended the question of whether an oral warning was given or was not given was not presented by the pleadings. We think it was. The plaintiff in his amended complaint pleaded the negligence of the de-

fendants generally. That pleading was sufficient. Stein v. United Railroads, 159 Cal. 368, 113 P. 663. Under that allegation, among other things, the plaintiff was entitled to produce evidence as to the signals given, whether they were signals made by swinging the arm or by oral statements.

[8, 9] The defendants copied the last sentence of the third paragraph in 13 California Law Review, page 72, and requested the trial court to give it as an instruction. As will be noted said sentence purports to define a trespasser, a licensee, and an invitee. The trial court struck out the first clause and gave the remainder as an instruction. In striking out the first clause the trial court doubtlessly aimed to omit all regarding a trespasser. However, it included the verb contained in the sentence. The portion as given consisted of words without making a complete sense. The defendants call these matters to our attention and claim the trial court erred. That there was a technical error will be conceded. However, the trial court gave another instruction which fully covered the subject. The defendants contend it did not because, as they claim, admitting plaintiff was an invitee while unloading the lumber, he became a licensee while the cars were being switched. Admitting, solely for the purposes of this opinion, such to be the fact, as we have shown above the defendants were bound to "* * * conduct its activities with reasonable care for his safety only after it knew or from facts within its knowledge should have known of the plaintiff's presence". Hamakawa v. Crescent Wharf etc. Co., supra [4 Cal.2d 499, 50 P.2d 804]. The record discloses that the instruction complained of, when read in connection with the other instructions that were given, was not prejudicial to the rights of the defendants.

The defendants further contend that the trial court erred in allowing the jury to speculate and guess in regard to certain issues of fact. They assert there was no evidence to show whether the lumber fell by reason of the acts of the train crew or by force of gravity. It is sufficient to state there is not a particle of evidence that the tier of lumber on the east side of the car was, prior to the movements of the car, so unstable as to fall merely by reason of the force of gravity. In this same connection the defendants also contend the jury must have found the plaintiff was unable to leave the freight car before it was moved. As shown hereinabove, there is nothing to show that the jury so found nor that it was in duty bound to find such fact before it might return a verdict in favor of the plaintiff.

The defendants make numerous additional points and contentions. We have carefully examined the entire cause, including the evidence, and are of the opinion that no error complained of has resulted in a miscarriage of justice.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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36 Cal.App.2d 361

PEOPLE v. SMITH.

Cr. 3248.

District Court of Appeal, Second District, Division 2, California.

Dec. 29, 1939.

Hearing Denied Jan. 25, 1940.

1. Criminal law 🔑1023(9, 10)

Order granting defendant's application for probation and suspending further proceedings, without pronouncing judgment and sentence, was not an "appealable order."

[Ed. Note.—For other definitions of "Appealable Order," see Words & Phrases.]

2. Criminal law 🔑1081

A defendant has a reasonable time after denial of his motion for new trial within which to give notice of appeal there being no fixed time within which such notice must be given. Pen.Code, § 1237, subd. 2; § 1239.

3. Constitutional law 🔑70(1)

The District Court of Appeal could not deprive defendant of right of review of denial of motion for new trial conferred upon him by the Legislature. Pen.Code, § 1237, subd. 2.

4. Criminal law 🔑982, 1023(10, 13)

A defendant may make motion for new trial, and if motion is denied he may apply for probation, and if the application is denied judgment and sentence will be imposed and defendant may appeal from judgment, but, if application for probation is granted, defendant may have review of proceedings leading to his conviction by appealing from the previous order denying motion for new trial. Pen.Code, § 1237, subd. 2.

5. Criminal law ⚷1081

Where defendant, who was convicted of causing personal injury while driving vehicle while he was intoxicated, gave notice of appeal from order denying motion for new trial as soon as defendant's application for probation was granted, the notice of appeal was made within reasonable time, and appeal from the order was not subject to dismissal. Vehicle Code, § 501, St.1935, p. 174; Pen.Code, § 1237, subd. 2.

◆

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Charles L. Smith was convicted of causing personal injury while driving a vehicle while he was intoxicated, and, from an order granting probation and an order denying motion for new trial, defendant appeals. On motion to dismiss appeal.

Motion to dismiss appeal from order placing defendant on probation granted, and motion to dismiss appeal from order denying motion for new trial denied.

Martin S. Ryan and Llewellyn J. Moses, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

This is a motion to dismiss an appeal from (1) an order granting probation, and (2) an order denying a motion for a new trial.

These are the essential facts:

May 3, 1939, defendant was found guilty of violating section 501 of the Vehicle Code (St.1935, p. 174). May 9, 1939, defendant made a motion for a new trial, which was denied but he was permitted to file an application for probation and the time for the hearing on his application for probation and for pronouncing judgment and sentence was set as May 19, 1939. Thereafter the matters were regularly continued for hearing to and including June 2, 1939, on which date, without pronouncing judgment and sentence, the trial judge granted defendant's application for probation and suspended further proceedings. Defendant gave notice of appeal from the order placing him on probation and also from the previous order of the trial court denying his motion for a new trial.

These are the questions to be determined:

First: Is an order granting probation without the imposition of judgment and sentence an appealable order?

Second: Is there a time limit within which a defendant must give notice of appeal from an order denying his motion for a new trial in a criminal case?

[1] The first question must be answered in the negative. The law is established in California that an order granting probation and suspending the pronouncement of judgment and sentence is not an appealable order. People v. Noone, 132 Cal.App. 89, 92, 22 P.2d 284; Hale v. Superior Court, 133 Cal.App. 333, 23 P.2d 1074; People v. Hartman, 23 Cal.App. 72, 74, 137 P. 611.

[2–4] As to the second question, it is our view that a defendant has a reasonable time after denial of his motion for a new trial within which to give notice of appeal therefrom, and that there is no fixed time within which the notice of appeal must be given. Section 1237, subdivision 2, of the Penal Code confers upon a defendant the right to appeal from an order denying his motion for a new trial in a criminal case. However, neither section 1239 nor any other section of the Penal Code fixes a definite time within which a defendant must give notice of an appeal from an order denying his motion for new trial. Therefore, since we may not deprive defendant of a right of review conferred upon him by the legislature, we must apply the rule that is generally applicable when an act may be performed but no time is specified within which it is to be done, to-wit, that the act may be performed within a reasonable time. Under this rule a defendant may make a motion for new trial and if denied may apply for probation. Should his application for probation be denied, then judgment and sentence will be imposed and he may appeal from the judgment and have a review of the proceedings resulting in his conviction. On the other hand, should his application for probation be granted the defendant still may have been wrongfully convicted, and by giving notice of appeal from the previous order denying his motion for a new trial he may in the proper appellate tribunal have a review of the proceedings leading to his conviction. This view finds support in the following cases: People v. Hartman, supra, 23 Cal.App. page 74, 137 P. 611; Smith v. McCallum, 36 Cal. App. 143, 146, 172 P. 408.

[5] Applying the rule just stated to the facts of the instant case, the record discloses that defendant gave notice of appeal from the order denying his motion for a new trial within a reasonable time after the order was made, to-wit, as soon as his application for probation was granted.

For the foregoing reasons the motion to dismiss the appeal from (1) the order placing defendant on probation is granted, and (2) the order denying his motion for a new trial is denied.

We concur: MOORE, P. J.; WOOD, J.

Cal.App.2d 282

TUTT v. VAN VOAST.

Civ. 6219.

District Court of Appeal, Third District, California.

Dec. 28, 1939.

Hearing Denied Feb. 26, 1940.

1. Action 🔑**1, 16**

There is a difference between a "right" and a "remedy," since one may have a legal right but still be unable to obtain relief because of equitable reasons.

[Ed. Note.—For other definitions of "Remedy" and "Right; Rights," see Words & Phrases.]

2. Equity 🔑**65(1), 66**

He who seeks equity must do equity, and must come into court with clean hands.

3. Partition 🔑**12(4)**

Where mortgagee commenced foreclosure proceedings by joining original mortgagors and failed to join holder of sheriff's deed to undivided interest of one of the mortgagors, after foreclosure sale at which mortgagee purchased property for sum due on note and mortgage, together with costs, holder of sheriff's deed, under equitable maxims of clean hands and necessity of doing equity, was not entitled as against mortgagee who was in peaceable possession of property to an accounting and partition of property, unless mortgage was discharged by payment or tender of payment.

Appeal from Superior Court, Mendocino County; Benjamin C. Jones, Judge.

Action to secure partition of realty and for an accounting, by W. S. Tutt against Carrie Van Voast. From a judgment, plaintiff appeals.

Affirmed.

Hearing denied; EDMONDS, J., dissenting.

W. H. Brunner, of Ukiah, for appellant.

H. L. Preston and Lilburn Gibson, both of Ukiah, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Antonio Barra and Marie Barra were the owners of real property upon which they executed a mortgage to Carrie Van Voast to secure the repayment of a $3,000 promissory note. Thereafter Antonio Barra and Marie Barra were divorced, and in the divorce decree an undivided 55 per cent in the property was set aside to Marie Barra and 45 per cent therein to Antonio Barra. Subsequently an action was brought by Marie Barra against her former husband, Antonio Barra, to collect certain moneys due her, and a writ of execution was levied upon the undivided 45 per cent interest of Barra; upon the sale thereof Mrs. Barra became the purchaser and received a sheriff's certificate to this undivided interest in the land. This certificate Mrs. Barra assigned to Keith C. Eversole, who, in due time, received a sheriff's deed to the 45 per cent interest. In the meantime after the assignment by Mrs. Barra to Eversole, but before the period of redemption had expired, Carrie Van Voast, the mortgagee, commenced an action to foreclose her mortgage, naming as parties defendant only Antonio Barra and Marie Barra, the original mortgagors.

The action was prosecuted to judgment and a decree of foreclosure was entered and the property sold to Carrie Van Voast, who bid the sum due on the note and mortgage as found by the judgment, together with costs of sale. A certificate of sale was then issued to the purchaser of the property. Thereafter, the time for redemption having expired in the action of Marie Barra v. Antonio Barra, a deed was issued to Keith C. Eversole for an undivided 45 per cent of the property, and still later, no redemption having been made in the foreclosure sale, a deed was issued to Carrie Van Voast. Eversole then conveyed his interest in the property to plaintiff herein, and this action was brought to partition the real property and for an accounting.

Upon the trial an interlocutory decree was entered in favor of plaintiff, that he have a decree partitioning the property as prayed for, provided that within a specified period he pay to defendant a sum equal to 45 per cent of the principal and interest upon defendant's mortgage, and that in default of such payment the action be dismissed. From this interlocutory judgment plaintiff prosecutes this appeal.

It is the contention of appellant that when respondent commenced her foreclosure proceedings without naming appellant's predecessor a party and prosecuting the same to sale, and becoming the purchaser of the property for the full amount due under the mortgage, that the lien of the mortgage was then extinguished, only to be revived by some proceeding in the original action, and the undivided interest of Tutt was left unaffected by the decree and foreclosure sale, claiming that if respondent's lien was satisfied, and appellant's interest unaffected by the foreclosure, appellant was then the owner of his 45 per cent interest free and clear of any mortgage whatever, and entitled to a partition of the property as any joint owner of real property.

Appellant claims this right by the rule found in Goodenow v. Ewer, 16 Cal. 461, 76 Am.Dec. 540, while respondent relies upon Burns v. Hiatt, 149 Cal. 617, 87 P. 196, 117 Am.St.Rep. 157, to sustain the judgment.

In the Goodenow case, Downer and Morris were the owners of a piece of improved real property in the city of Oroville, each owning an undivided one-half interest therein. Downer executed a mortgage upon his undivided one-half interest to Goodenow to secure repayment of a note for $2,000. Thereafter Downer and Morris conveyed an undivided one-third interest in the property to Ewer, whereby Downer, Morris and Ewer each became the owner of an undivided one-third interest, with one-sixth of the Ewer interest subject to the prior mortgage given by Downer to Goodenow, as well as the two-sixths interest retained by Downer.

In time, the note maturing and remaining unpaid, Goodenow, the mortgagee, foreclosed, making Downer the sole defendant. Thereafter a sale was had under the foreclosure and Goodenow became the purchaser, paying therefor the full amount of the judgment, and in due time received a sheriff's deed therefor. In the meantime and subsequent to the entry of the foreclosure decree Ewer became the purchaser of the interest of Downer and Morris, thereby becoming the owner of the entire property, subject only to whatever lien of the mortgage and the judgment in the foreclosure suit might remain, and entered into possession of the property.

In an action for partition and accounting by Goodenow against Ewer, the court held that Ewer, the grantee of a one-sixth interest from Downer, not having been made a party in the foreclosure proceedings, was not affected by the foreclosure, and plaintiffs having bid the full amount of the mortgage, thus satisfying the judgment, it operated to discharge the one-sixth interest held by Ewer from the lien of the mortgage, and also that the court not having acquired jurisdiction to any other property than the interest held by Downer at the institution of the foreclosure proceedings, did not acquire jurisdiction as to any outstanding interest, and the plaintiff, as purchaser, acquired only the two-sixths interest of the defendant Downer, which he held at the institution of the action.

In Burns v. Hiatt, 149 Cal. 617, 87 P. 196, 117 Am.St.Rep. 157, plaintiff brought an action to quiet title to a lot in Woodland. The trial court held that plaintiff owned the property in fee, subject to the rights of the defendant Hiatt under a certain mortgage by George H. Jackson to the said G. W. Hiatt, and that Hiatt had no right or title in said premises, except such right as might be derived by Hiatt under a certain mortgage, and that the foreclosure of such mortgage instituted by Hiatt were, in so far as plaintiff was concerned, null and void.

The findings reveal that Jackson, while the owner of the property, borrowed from Hiatt the sum of $1,000, and as security for the payment thereof, gave to Hiatt a mortgage. Prior to foreclosure Jackson executed to Burns a deed to the property. Thereafter Hiatt foreclosed on the property, naming Jackson only as defendant and became the purchaser at the sheriff's sale for an amount less than the total sum due, leaving a small deficiency judgment, and in time received a deed therefor, and entered into actual and peaceful possession, claiming to own the whole thereof.

The court held that Burns not having been made a party to the foreclosure proceedings, his title to the mortgaged property was not affected, but nevertheless he was not entitled to a decree quieting title against the mortgagee, as he had purchased the property from the mortgagor and stood therefore in the shoes of the mortgagor, and a proceeding in a foreclosure action to which he was not a party could not have the effect of divesting him of the mortgage lien nor investing him with any additional rights in the property.

If there is an irreconcilable conflict between the rule expressed in Goodenow v. Ewer, supra, and in Burns v. Hiatt, supra, we are inclined to follow Burns v. Hiatt, supra, not only because it is the later in time, but because the reasoning expressed is more convincing. We also find the rule in the Burns case followed in Hurt v. Pico Investment Co., 127 Cal.App. 106, 15 P.2d 203, and Bradbury v. Thomas, 135 Cal.App. 435, 27 P.2d 402.

Appellant attempts to distinguish the two cases, pointing out that in the Goodenow case the defendant Ewer was the owner of the property, whereas in Burns v. Hiatt, supra, the foreclosure proceedings were against the original mortgagor, and Burns, his successor, was never made a party, and therefore no valid sale could have been made. It is also pointed out that in the case at bar there was a deficiency judgment entered, whereas in Goodenow v. Ewer, supra, the full amount under the mortgage was bid. We do not believe, however, that under the reasoning of the case of Burns v. Hiatt, supra, either fact is material.

[1-3] The present case may perhaps be distinguished from that of Goodenow v. Ewer, supra, in that in the latter case Goodenow, the mortgagee purchaser, was plaintiff, whereas in the instant case Mr. Tutt, who acquired his interest from the mortgagor, is plaintiff, asking that the court grant him affirmative relief. There is undoubtedly a difference between a right and a remedy, and one may have a legal right but still be unable to obtain relief because of equitable reasons. One of the requirements in an action in equity is that he who seeks equity must do equity, and must come into court with clean hands. As to Mr. Tutt, he is at least not offering to do equity. He has not paid the mortgage and it is still outstanding against his property, and until that mortgage has been discharged by payment or tender of payment he has no standing in a court of equity. Brandt v. Thompson, 91 Cal. 458, 27 P. 763; Booth v. Hoskins, 75 Cal. 271, 276, 17 P. 225; Spect v. Spect, 88 Cal. 437, 26 P. 203, 13 L.R.A. 137, 22 Am.St.Rep. 314.

It is also important that here Mrs. Van Voast is in the quiet and peaceable possession of the property in question, and cannot now be dispossessed until payment of the mortgage debt. Burns v. Hiatt, supra, 149 Cal. at page 624, 87 P. 196, 117 Am.St.Rep. 157; American Trust Co. v. England etc., 9 Cir., 84 F.2d 352, 354.

Under the facts and the equitable principles applicable thereto, appellant is entitled to no affirmative relief.

The judgment is affirmed.

We concur: THOMPSON, J.; TUTTLE, J.

ROMERO et al. v. DEPARTMENT OF PUBLIC WORKS et al.*

Civ. 12315.

District Court of Appeal, Second District, Division 2, California.

Dec. 29, 1939.

Rehearing Denied Jan. 23, 1940.

Hearing Granted Feb. 27, 1940.

1. Deeds 🔑162

Where property is conveyed upon condition that it be used for a certain purpose and, in event it is not so used, title is to revert to grantor, there is not a breach of condition if the property is used for purpose designated for a reasonable period and thereafter is not used for the designated purpose.

2. Railroads 🔑82(3)

Where deed provided that grantee should use property for railroad purposes and that, if grantee should fail so to use property, property should revert to grantor, and grantee used land for railroad purposes for more than 40 years and thereafter discontinued use for railroad purposes, grantee did not fail to use land for "railroad purposes," so as to permit reversion to heirs of grantor.

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* For subsequent opinion, see 109 P.2d 662.

[Ed. Note.—For other definitions of "Railroad Purposes," see Words & Phrases.]

3. Railroads ⚷82(3)

Where deed providing that grantee should use granted property for railroad purposes and that, if grantee should fail to so use conveyed land, property should revert to grantor, was made in consideration of one dollar and benefit to be derived from construction of railroad, and deed provided that it should be void if the railroad was not located on the land, and grantee ceased to use property for railroad purposes after 40 years, there was no failure of consideration.

◆

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Hortensia M. Romero and others against the Department of Public Works of the State of California and others, to compel defendants to complete condemnation proceedings, or to pay for land alleged to have been unlawfully taken by them. From a judgment for the defendants, plaintiffs appeal.

Affirmed.

Tanner, Odell & Taft, of Los Angeles, for appellants.

C. C. Carleton, Chief Counsel, Department of Public Works, Frank B. Durkee, C. R. Montgomery, and Robert E. Reed, Attys., Department of Public Works, all of Sacramento, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants predicated upon the sustaining of a general demurrer to their complaint in an action to compel defendants to complete condemnation proceedings or to pay for land alleged to have been unlawfully taken by them, plaintiffs appeal.

The essential facts alleged in the complaint are:

In 1891 Bonafacio Marquez owned certain real property at the mouth of the Santa Monica canyon in Los Angeles county, and on July 23, 1891, he agreed to sell and convey to the Pacific Improvement Company a strip of this land 100 feet wide on condition that a railroad be located on said land. Thereafter, September 8, 1891, said Marquez died intestate while the railroad was in the course of construction, and, upon the petition of Pacific Improvement Company, the probate court on October 25, 1892, ordered the administratrix of the Marquez estate to convey all the right, title, and interest of the decedent and his estate in the aforementioned 100 feet of land to Pacific Improvement Company. This the administratrix did October 27, 1892, by a deed which contained among others this provision: "This deed is made upon the express condition that the land hereby conveyed shall be used by the party of the second part, its successors or assigns, for railroad purposes, and in the event that said party of the second part, its successors or assigns, shall fail so to use said land for railroad purposes then and thereupon said land shall revert to and become vested in the heirs of said Bonafacio Marquez, deceased."

From 1892 to January 25, 1934, a railroad was actually located on said land and continuously used. On January 25, 1934, the use of such railroad was discontinued. The plaintiffs are the heirs or successors in interest of said Bonafacio Marquez, deceased.

This is the sole question necessary to be determined:

After having located a railroad on the strip of land conveyed, and operated the same for over forty years, did the successors of the original grantee commit a breach of the reversionary condition in the deed set forth above by ceasing to use the property for railroad purposes?

[1] This question must be answered in the negative. The law is established in California that, where property is conveyed upon condition that it be *used* for a certain purpose, and that in the event it is not so used title is to revert to the grantor, there is not a breach of this condition if the property is used for the purpose designated for a reasonable period and thereafter is not used for the designated purpose. Hasman v. Union High School, 76 Cal.App. 629, 245 P. 464; Booth v. County of Los Angeles, 124 Cal.App. 259, 12 P.2d 72; O. T. Johnson Corp. v. Pacific E. R. Co., 19 Cal.App.2d 306, 65 P.2d 368; Jeffersonville, Madison & Indianapolis Railroad Co. v. Barbour, 89 Ind. 375.

In Hasman v. Union High School, supra [76 Cal.App. 629, 245 P. 465], a deed to the high school district contained a clause providing: "* * * provided the same shall be used for the purpose of maintaining thereon a high school; otherwise, the above described property shall revert to and become the property of the party of the first part, his heirs, or assigns."

The grantee went into possession and maintained a high school on the granted land from 1893 until 1922. In 1920 a different site was chosen for the high school, new buildings were erected and the old buildings used only occasionally during stormy weather for athletic purposes. The administratrix of the estate of the grantor brought an action to recover the property and to quiet title, claiming that the provision in the deed just quoted had been breached. In denying the plaintiff relief the court said, 76 Cal.App. at page 633, 245 P. at page 466:

"The deed involved in this case can be reasonably interpreted so as to avoid a forfeiture, even without applying the rule of strict construction discussed in the foregoing decisions. *In compliance with the literal terms of the deed, the property was 'used for the purpose of maintaining thereon a high school,' and the deed does not provide for a reversion upon the discontinuance of such use, but only upon failure to so use it.* Adapting the language of the opinion in Texas & Pacific R. Co. v. City of Marshall, supra [136 U.S. 393, 10 S.Ct. 846, 34 L.Ed. 385], the condition of the deed was satisfied when the high school district, in good faith, and without any intention at the time of changing the location of the school, erected buildings on the property and conducted a high school therein for 29 years, and until the interests of the school demanded a change of location. Such use of the property was a permanent use under the authorities herein cited. 'If, by a condition that certain buildings or a certain structure shall be permanently located upon the granted land, it is meant simply that this land shall in good faith be selected as the site of such buildings or structure, and that the same shall be erected upon the granted land, the condition is fulfilled by the erection of the buildings or structure upon the land, and the use of it for a time for the purpose intended, though the use of it for this purpose is subsequently abandoned.' Jones on The Law of Real Property in Conveyancing, § 687. See, also, Crane v. Hyde Park, 135 Mass. 147; Maddox v. Adair (Tex.Civ.App.) 66 S.W. 811; Jeffersonville etc. R. R. Co. v. Barbour, 89 Ind. 375.

"Had it been the intention of Kerr that the property should revert upon the discontinuance of its use for high school purposes, it would have been so easy to have so stated, in plain and simple language, that it must be inferred from the terms actually employed that such was not his intention." (Italics added.)

In Booth v. County of Los Angeles, supra, plaintiff sought to quiet title to property which had been conveyed to the county of Los Angeles in 1884 by a deed containing this clause: "This conveyance is made for the purpose of a road or highway, to revert to said J. J. Harshman, his heirs and assigns if not so used."

The county maintained a road upon the property for a period of thirty-two years and then ceased to use it for that purpose. In denying the plaintiff relief the court said, 124 Cal.App. at page 261, 12 P.2d at page 72:

"We are of the opinion that the judgment must be affirmed. The law of the case may be taken from the opinion in the case of Hasman v. Union High School, 76 Cal.App. 629, 245 P. 464, 465.

* * *

"Without further citation, reference may be had to the authorities cited in the Hasman Case, all going to support the rule.

"Paraphrasing a portion of the opinion in the main case cited, had it been the intention of the grantor herein that the property should revert upon the discontinuance of its use for road purposes, it would have been so easy to have so stated in plain and simple language that it must be inferred from the terms actually employed that such was not the intention of the grantor. There appears nothing harsh or inequitable in upholding the rule. It may be assumed, from a general experience, that the entire object of the condition was accomplished when a road or public highway was established and accepted by the public. Cases holding to a seemingly contrary view as cited by appellant are distinguished in the cases cited herein."

In O. T. Johnson Corp. v. Pacific E. R. Co., supra, this court in passing upon a somewhat analogous situation to that presented in the instant case says, 19 Cal. App.2d at page 311, 65 P.2d at page 370: "As there was no express provision in the agreement, or in the deed, that passenger service should be continued perpetually, the position of plaintiffs cannot be maintained unless it be on the theory that an agreement to devote land to a particular use implies an agreement to perpetually devote it to that use. The authorities are strongly against such a construction."

[2] Applying the rule above stated to the facts of the instant case, it appears that the original deed, under which plaintiffs claim, provided that the grantee should *use* the granted property for railroad purposes, and that if the grantee should "fail so to use" the conveyed land "for railroad purposes" the property should revert to the grantor. Under the conceded facts the grantee did use the land for railroad purposes for more than forty years. Therefore the grantee did not fail to use the granted land for railroad purposes, and there being no breach of the condition in the deed, no inchoate reversionary rights ripened into a vested present right in plaintiffs to have possession and title to the devised property.

The cases cited by appellants are all factually distinguishable from the instant case and are therefore inapplicable. For example, appellants strongly rely upon Johnston v. City of Los Angeles, 176 Cal. 479, 168 P. 1047, 1048, in which it appears that a deed was executed to the city of Los Angeles conveying land to be used for the maintenance of a dam etc. The deed contained a reversionary clause reading as follows: "It being also expressly understood and agreed by and between the parties hereto, that in case the party of the second part shall cease to use the said premises for the said purposes of the erection and maintaining of said dam, reservoir, and ditch, that then and in that case the said premises hereinbefore conveyed shall revert to and become the property of the said party of the first part, his heirs, executors, administrators or assigns."

The city after acquiring the property used it for a period as part of its irrigating system and then ceased to use it for such purposes, and the residuary devisee of the grantor successfully maintained an action to recover the property under the forfeiture clause in the deed. This case, however, is clearly distinguishable from the instant case, because in Johnston v. City of Los Angeles, supra, the deed provided that in case the grantor "shall cease to use" the premises for the designated purposes the property should revert to the grantor. In the instant case there was no such provision in the deed, but simply a provision that the property be used for railroad purposes. Note that this distinction is clearly pointed out in Hasman v. Union High School, supra, 76 Cal.App. at page 634, 245 P. at page 464.

[3] There is no merit in plaintiffs' contention that when the property ceased to be used for railroad purposes there was a failure of consideration for the original contract to convey the property and the deed subsequently executed. The contract provided that it was made in consideration of one dollar and "the benefits to be derived by me in the construction of a railroad along the beach and across my property". The contract further provided that it should be void "in case said Railroad shall not be located on said land". The railroad was located on the land, which clearly constituted a valid consideration for the contract and subsequent deed. See on this last point Bell v. Southern Pacific R. Co., 144 Cal. 560, 77 P. 1124.

In view of the foregoing conclusions it is not necessary for us to discuss the other points presented by plaintiffs' counsel.

The judgment appealed from is affirmed.

We concur: MOORE, P. J.; WOOD, J.

36 Cal.App.2d 453

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. GILLETT et al.

Civ. 11169.

District Court of Appeal, First District, Division 2, California.

Jan. 5, 1940.

Hearing Denied March 5, 1940.

1. Executors and administrators 🔑437(7)

A claim against decedent's estate on note secured by trust deed was one for money "due" within statute requiring suit on rejected claim to be brought within three months after receiving notice of rejection if claim is then due, notwithstanding that certain legal processes might be necessary to exhaust security before obligation could be enforced in court of law. Probate Code, § 714.

[Ed. Note.—For other definitions of "Due," see Words & Phrases.]

2. Contracts 🔑214

A debt becomes "due" when it reaches date on which payment may be required, such date usually being that named in instrument fixing primary obligation.

3. Appeal and error 🔑1026

A judgment will not be reversed except for error prejudicial to appellant, or error which substantially affects his legal rights and obligations.

4. Judgment 🔑251(1)

Forms of pleadings are of no importance if pleading in substance states facts showing relief to which pleader is entitled, and in such case pleader may have relief which facts established justify though such relief may not be exactly what he thought he was entitled to.

5. Mortgages 🔑559(7)

A "deficiency judgment" is one determining amount collectible as distinguished from amount due. Code Civ.Proc. § 580a.

[Ed. Note.—For other definitions of "Deficiency Judgment," see Words & Phrases.]

6. Appeal and error 🔑843(2)

On appeal from judgment making debt on note secured by trust deed payable in due course of administration, but requiring plaintiff to proceed as provided by law to exhaust security, reviewing court could not determine what the various processes "provided by law" should be. Code Civ. Proc. § 580a et seq.

7. Appeal and error 🔑1073(1)

A judgment making debt on note secured by trust deed payable in due course of administration, but requiring plaintiff to proceed as provided by law to exhaust security, was not prejudicial to executrices, who stipulated that claim was fair and correct. Probate Code, § 714; Code Civ.Proc. §§ 580 et seq., 1060.

◆

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by the Bank of America National Trust & Savings Association against Isabella Gillett and another, as executrices of the estate of James N. Gillett, on a rejected claim against the estate, based on a note secured by a trust deed. From a judgment for plaintiff, defendants appeal.

Affirmed.

Hart H. North and Henry E. Monroe, both of San Francisco, for appellants.

G. D. Schilling, S. J. Tosi, James S. DeMartini, all of San Francisco, and Donahue, Richards & Hamlin, of Oakland, for respondent.

NOURSE, Presiding Justice.

The plaintiff sued upon a rejected claim presented to the executrices of the estate of James N. Gillett, deceased. The claim was based upon a promissory note, secured by a deed of trust upon real property, payment upon which was long in default. The defendants rejected the claim upon the theory that, since the payee was required to exhaust the security before suing upon the original obligation, the claim presented to the estate was for money not then due. The plaintiff urges that the primary obligation became due upon its due date; that it was therefore necessary to present the claim and sue within three months of its rejection to prevent the running of the statute of limitations. The findings and judgment favored plaintiff, and the pertinent portions of the judgment read: "It is hereby ordered, adjudged and decreed that plaintiff be, and it is hereby, granted judgment against the said defendants in the sum of $27,510.22, payable in due course of administration upon the estate of said decedent, plaintiff, however, to proceed as provided by law to exhaust the security for said indebtedness and apply the proceeds thereof toward the discharge of said indebtedness."

[1, 2] These legal principles compel an affirmance of the judgment: (1) Under section 714 of the Probate Code it was necessary, if the debt was then due, for the respondent to commence its suit within three months after notice of rejection of the claim. The claim against the estate was one for money "then due" within the meaning of the foregoing section; a debt becomes due when it reaches the date upon which payment may be required; such date is usually that named in the instrument which fixes the primary obligation. That such obligation cannot be enforced in a court of law until certain legal processes are followed to exhaust the security for the obligation does not make the obligation a contingent one, and does not make the primary debt unpayable or "undue" at the time of the specified maturity.

[3, 4] (2) A judgment will not be reversed except for error prejudicial to the appellant; i. e., error which substantially affects his legal rights and obligations. The appellants have failed to show such error, because the judgment is nothing more than a judicial declaration of the respective rights and obligations of the respective parties—just such a judgment as might have been entered under section 1060 of the Code of Civil Procedure if the plaintiff had designated his complaint one for "Declaratory Relief." But forms of pleading are of no importance if the pleading in substance states the facts showing the relief to which the pleader is entitled. In such a case the pleader may have the relief which the facts established justify, though that relief may not be exactly what he thought he was entitled to. Brown v. Anderson-Cottonwood Irr. Dist., 183 Cal. 186, 188, 190 P. 797; Zellner v. Wassman, 184 Cal. 80, 88, 193 P. 84.

[5] (3) The controversy here rests largely on a misunderstanding of the meaning of a "deficiency judgment". The appellants assume that it is the amount ultimately found to be due on the debt after the security has been exhausted, and that, accordingly, until this amount has been found "due" no claim against the estate can be sued on as upon a debt then due. A deficiency judgment is defined in section 580a of the Code of Civil Procedure as one for "the amount by which the entire amount of the indebtedness due at the time of sale exceeded the fair market value of the real property". Hence a deficiency judgment is one determining the amount "collectible" as distinguished from the amount due—the latter being determined by the written instrument.

[6, 7] (4) The judgment having declared the amount due upon the original obligation in accordance with the stipulation of the parties, the appellants may not claim error in that respect. It declares that the debt shall be payable "in due course of administration", and this is conceded not to be error. It declares that the plaintiff must proceed "as provided by law" to exhaust the security and thus aid in a partial discharge of the indebtedness. No error is claimed here, but the appellants ask us to decide, in advance of a triable issue, what the various processes "provided by law" should be in this particular case. That this question is not before us now is apparent. Whether, after the respondent has exercised its power of sale under the deed of trust, the trial court should appoint appraisers to fix the fair market value of the security, and whether the deficiency judgment should then be determined by reference to the fair market value of the security, or whether in any other particular, the provisions of sections 580a et seq. of the Code of Civil Procedure should be applied to this obligation, these are all questions which should be decided when the plaintiff proceeds "as provided by law" to exhaust the security and establish the amount of the deficiency which then becomes collectible from the estate. If the proceeds of sale or foreclosure meet all the existing obligations, none of these questions needs be decided. But since the judgment appealed from merely establishes the claim as a valid claim upon the primary obligation and thereby stops the running of the statute of limitations against the respondent, the judgment does not present any error prejudicial to the appellants. If they had but approved the claim, which their counsel now stipulate to be fair and correct, this litigation would have become unnecessary. The judgment is, in legal effect, merely an approval of a concededly proper claim which should not have been rejected.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

PACIFIC VENTURE CORPORATION v. HUEY et al.*

Civ. 12370.

District Court of Appeal, Second District, Division 2, California.

Dec. 29, 1939.

Rehearing Denied Jan. 23, 1940.

Hearing Granted Feb. 26, 1940.

1. Mines and minerals ⚷34

Under contract for sale of interest in mining claim, defendants were not obligated to pay to plaintiff the sum specified in the agreement, where neither of the conditions under which defendants were to become obligated had arisen.

2. Mines and minerals ⚷34

Under contract for sale of interest in mining claim to defendants on the happening of certain conditions, plaintiff could not recover the sum specified in the contract on the theory that defendants by a contract with a codefendant had placed it out of their power to perform the contract with plaintiff.

3. Mines and minerals ⚷34

Where plaintiff's assignors sold their interest in mining claims to defendants who agreed to pay assignors $1,891 upon execution of contract of sale and $2,500 either out of royalties or other proceeds received by defendants or, in event of sale of claims, $2,500 out of final payment thereon, and defendants later sold their equity in claims to codefendant who agreed to pay plaintiff the $2,500 "as per the terms and conditions" in contract between assignors and defendants, codefendant was not obligated to pay plaintiff the $2,500 where there was no showing that codefendant had received any royalties or other proceeds from claims or a final payment for sale of claims.

4. Judgment ⚷562

Where contingencies upon which defendants would become obligated to pay money to plaintiff had not occurred when plaintiff brought action against defendants to recover the money, a judgment for defendants would not preclude plaintiff from recovering from either defendant at a future time if contingencies upon which defendants' obligation was dependent occurred.

◆

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Action by the Pacific Venture Corporation against John W. Huey and others to recover a sum of money alleged to be due pursuant to certain written agreements. From a judgment for defendants, plaintiff appeals.

Affirmed.

Betts & Garrison, of Los Angeles, for appellant.

Robert E. Austin and John N. Helmick, both of Los Angeles, for respondent Albert Beck.

Andrew J. Copp, Jr., of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial before the court without a jury in an action to recover a sum of money alleged to be due pursuant to certain written agreements, plaintiff appeals.

The essential facts are:

July 15, 1936, plaintiff's assignors entered into a contract of sale with defendants John W. Huey and George G. Urie and conveyed to them all of their right, title, and interest in and to certain mining claims. By the terms of the contract defendants Huey and Urie agreed to pay to plaintiff's assignors as the purchase price the sum of $1,891 upon the execution of the contract, and the further sum of $2,500 either out of ten per cent of all royalties or other proceeds received by them or in the event of a sale of the property the sum of $2,500 out of the final payment thereon. $1,891 was in fact paid as agreed. Subsequent to July 15, 1936, defendants Huey and Urie entered into an agreement with defendant Albert Beck, reading as follows:

"Huntington Park California
"July 24, 1937.
"Agreement

"In consideration of $1.00, and other good and sufficient considerations, I, Albert Beck, do hereby agree that the final and last payment on the deal whereby Albert Beck is exchanging certain equities in one apartment house at 1102 West 41st Place, Los Angeles, and 80 acres of land in Imperial Valley subject to their respective mortgages or trust deeds, etc., and as the final and last payment for certain mining claims etc. in Santa Cruz County, Arizona, due John W. Huey and George G. Urie, Albert Beck hereby agrees to pay to the Pacific Venture Co. or their assignors or successors in interest, the $2500.00 mentioned in that certain agreement between John W. Huey, George G. Urie and Pacific Venture Co. and or M. E. Rogers and John A. Hassell dated July 15, 1936.

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*For subsequent opinion see 104 P.2d 641.

"Albert Beck agrees to pay this $2,500.00 as per the terms and conditions provided in said contract to the legal owners or holders of the above mentioned contract, which shall complete the final and last payment to Huey and Urie for above described mining claims. The quit claim deed to be delivered to Albert Beck or his assigns for the interest owned by Huey and Urie in the above mentioned mining claims carries only Huey and Urie's interest after this agreement has been signed and delivered and the complete title to said aforesaid mining claims has been paid for by carrying out of payment as per conditions of the contract between Huey, Urie, and Pacific Venture Co. and or M. E. Rogers and John A. Hassell.

"Albert Beck
John W. Huey
"L. E. Moore George G. Urie"

It is conceded that neither defendant Huey nor Urie has received any royalties from the mining claims.

February 14, 1938, as assignee of the vendors in said contract of July 15, 1936, plaintiff filed this action to recover $2,500 with interest from July 24, 1937, and for a foreclosure of the contract, on the theory that the final payment thereunder had become due by reason of the sale of their equity by Huey and Urie.

These are the questions necessary to be determined:

First: Has an obligation arisen upon the part of defendants Huey and Urie to pay to plaintiff the sum of $2,500 under the agreement of July 15, 1936?

Second: Has any obligation arisen on the part of defendant Albert Beck to pay to plaintiffs the sum of $2,500.00?

[1] The first question must be answered in the negative. It is conceded that defendants Huey and Urie have not received any royalties from the properties which they conveyed to plaintiff's assignor, nor have they received the final payment for the sale of those properties to Albert Beck, because by the terms of the agreement between defendant Beck and themselves it is expressly provided that as and for the final and last payment for the claims which Beck agreed to purchase from his codefendants on July 24, 1937, he would pay $2,500 to plaintiff. It is also conceded that this final payment has never been made. Therefore, neither of the conditions under which defendants Huey and Urie were to become obligated to pay the sum has arisen.

[2] There is no merit in plaintiff's contention that defendants Huey and Urie have placed it out of their power to perform their contract with plaintiff. On the contrary, their agreement with defendant Beck is substantial evidence that they have made an arrangement for the performance of their obligation.

[3] The second question must also be answered in the negative. Defendant Beck agreed to make the payment of $2,500 "as per the terms and conditions" provided in the contract between plaintiff's assignor and Beck's codefendants. The contract referred to provided that the $2,500 payment should be made either out of ten per cent of the royalties or other proceeds received by them or, in the event of a sale of the property, out of the final payment. There is no evidence or finding that defendant Beck had received any royalties or other proceeds or a final payment for the sale of the property. Hence the contingency upon which his obligation to pay plaintiff might arise has not occurred, and plaintiff's right as against this defendant remains inchoate.

[4] There is no merit in plaintiff's contention that the findings and judgment preclude his recovering from either of the defendants at some future time, should any or all of the contingencies upon which their obligation is dependent occur.

For the foregoing reasons the judgment appealed from is affirmed.

We concur: MOORE, P. J.; WOOD, J.

36 Cal.App.2d 450

WALLACE et ux. v. LA VINE.

Civ. 10952.

District Court of Appeal, First District,
Division 2, California.
Jan. 5, 1940.

1. Appeal and error 🔑110, 782

An order denying a motion for new trial was not an "appealable order," and purported appeal from such order was dismissed. Code Civ.Proc. § 963.

[Ed. Note.—For other definitions of "Appealable Order," see Words & Phrases.]

2. Evidence 🔑538

In action against chiropractor for alleged malpractice, testimony of physicians and surgeons was competent.

3. Appeal and error 🔑1012(1)

The rule that no finding of trial court should be sustained unless such finding is supported by a preponderance of the evidence in relation thereto does not apply in California.

4. Appeal and error 🔑1012(1)

Where trial court has made finding supported by substantial evidence, reviewing court will not disturb the finding even if reviewing court should believe that preponderance of the evidence was contrary thereto.

5. Physicians and surgeons 🔑18(8)

Evidence warranted recovery for malpractice from chiropractor on ground that chiropractor unskillfully applied cast to slightly fractured wrist and allowed cast to remain on patient's arm over long period of time during which time he applied diathermy to arm so frequently and with such intensity as to damage tissues, tendons, and bones of arm, wrist, and hand.

6. Appeal and error 🔑1046(5)

The asking of questions by trial judge in endeavor to clear up testimony which was confusing did not indicate prejudice.

7. Physicians and surgeons 🔑18(11)

$3,382.50 for injuries to tissues, tendons, and bones of woman's arm, wrist, and hand due to chiropractor's alleged malpractice, *held* not excessive.

◆

Appeal from Superior Court, Santa Clara County; Maxwell McNutt, Judge.

Action by C. O. Wallace and wife against Louis La Vine for alleged malpractice in the treatment of the wife. From a judgment for the plaintiffs and an order denying a motion for new trial, defendant appeals.

Appeal from order denying motion for new trial dismissed. Judgment affirmed.

Albert L. Johnson, of San Francisco, for appellant.

D. T. Jenkins, of San Jose, for respondents.

SPENCE, Justice.

[1] Plaintiffs, who were husband and wife, brought this action against the defendant chiropractor for alleged malpractice in the treatment of the wife. Upon a trial by the court, sitting without a jury, plaintiffs had judgment. Defendant appeals from said judgment and from the order denying his motion for a new trial. As an order denying a motion for a new trial is not an appealable order, defendant's purported appeal from said order should be dismissed. Code Civ.Proc. § 963; Perumean v. Wills, 8 Cal.2d 578, 67 P.2d 96.

Mrs. Wallace, one of the plaintiffs, injured her wrist on February 24, 1937, the injury consisting of a slight fracture. Defendant treated her for said injury from that date until May 11, 1937. It was plaintiff's claim that defendant negligently and unskillfully applied a first cast and subsequently a second cast so tightly on said plaintiff's arm as to interfere with the circulation and that he allowed said casts to remain on plaintiff's arm over a long period of time, during which time he applied diathermy to said arm so frequently and with such intensity as to damage the tissues, tendons and bones of said plaintiff's arm, wrist and hand. The trial court found in conformity with plaintiff's claim and entered its judgment accordingly.

Appellant's brief fails to "present each point separately under an appropriate heading showing the nature of the question to be presented or the point to be made". (Rule VIII, sec. 2, Rules of the Supreme Court and District Courts of Appeal.) Appellant apparently contends that the evidence was insufficient to support the findings and that "the trial judge displayed prejudice against appellant". We find no merit in these contentions.

[2-5] The evidence produced on behalf of respondents consisted of the testimony

of both lay and expert witnesses. Said expert witnesses were physicians and surgeons and appellant apparently concedes that their testimony was competent against the defendant chiropractor for the purposes for which it was produced. Ellinwood v. McCoy, 8 Cal.App.2d 590, 47 P.2d 796; Hutter v. Hommel, 213 Cal. 677, 3 P.2d 554. We cannot agree that said testimony was "not very damaging to the defendant" and we are of the opinion that there was substantial evidence to sustain all of the material findings. The evidence on many points was admittedly conflicting and the gist of appellant's claim appears to be that "no finding of the trial court should be sustained * * * unless such finding is supported by a preponderance of the evidence in relation thereto". It is a sufficient answer to said claim to state that such is not the rule in this jurisdiction. McLennan v. Holder, 1 Cal.App.2d 305, 36 P.2d 448. Where a trial court has made findings and said findings are supported by substantial evidence, an appellate court may not disturb said findings even if it should believe from the cold record before it that the preponderance of the evidence was contrary thereto.

[6, 7] In his brief, appellant puts the further question, "Did the trial judge display prejudice either in his rulings or the substantial amount of the judgment?" We find no display of prejudice on the part of the trial judge either in his rulings or in the amount of the award which was $3,382.50. If it be appellant's claim that there was prejudicial error in the rulings of the trial court, we find no merit in such claim. If it be appellant's claim that the verdict was excessive, we believe said claim to be likewise without merit. It is true, as pointed out by appellant, that the trial judge did ask many questions but he obviously did so in an endeavor to clear up the testimony and particularly the testimony of appellant which it is conceded was "confusing at times". Such action did not indicate prejudice. The claim of prejudice on the part of the trial judge is suggested for the first time on this appeal and the claim thereof seems to have developed from the fact that appellant found himself on the losing side of a lawsuit which involved the issue of alleged negligence in the performance of his professional duties.

The purported appeal from the order denying the motion for a new trial is dismissed and the judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

15 Cal.2d 24

VOTAW v. FARMERS AUTOMOBILE INTER-INSURANCE EXCHANGE et al.

Sac. 5143.

Supreme Court of California.

Jan. 8, 1940.

1. Insurance ⚷144(1)

The effect of an indorsement to automobile liability policy extending coverage to person in possession of automobile with consent of named insured was to modify in favor of insured the terms of original policy. Civ.Code, § 1714¼.

2. Insurance ⚷146(1)

Where original automobile liability policy required sole and unconditional ownership by insured as condition of recovery, an indorsement extending coverage to person in possession of automobile with consent of named insured, together with letter of transmittal stating that indorsement provided for compliance with owners responsibility laws, rendered contract of insurance as whole ambiguous and consequently subject to construction. Civ.Code, § 1714¼; St.1929, p. 514, § 45; St.1931, p. 2105, § 45¾.

3. Insurance ⚷435

Where insured sold automobile on oral contract of conditional sale, without registering sale or obtaining issuance of certificates of registration and ownership as required by statute, and insured was held liable for injuries to third person caused by buyer's negligent operation of automobile, liability insurer was liable under indorsement to policy extending coverage to persons operating automobile "with permission of insured," notwithstanding provision in policy requiring sole and unconditional ownership by insured as condition of recovery. Civ.Code, § 1714¼; St.1923, p. 517, as amended; St.1929, p. 514, § 45; St.1931, p. 2105, § 45¾.

[Ed. Note.—For other definitions of "Permission of Assured," see Words & Phrases.]

4. Insurance ⚷146(3)

Any doubts arising by reason of ambiguities caused by insurer must be resolved in favor of insured.

EDMONDS and CURTIS, JJ., dissenting.

In Bank.

Appeal from Superior Court, Amador County; A. Caminetti, Judge.

Action by J. E. Votaw against the Farmers Automobile Inter-Insurance Exchange and another on an automobile liability policy. From judgment for plaintiff, the defendants appeal.

Affirmed.

For prior opinion, see 85 P.2d 872.

James W. Hughes, of Oakland, and J. Joseph Sullivan, of San Francisco, for appellants.

Lasher B. Gallagher, of Los Angeles, W. H. Stammer and Galen McKnight, both of Fresno, Morgan J. Doyle, J. Joseph Sullivan, and Bronson, Bronson & McKinnon, all of San Francisco, and Finlayson, Bennett & Morrow and Henry L. Knoop, all of Los Angeles, amici curiae.

J. Calvert Snyder, of Stockton, Ralph McGee, of Jackson, and Harold Raines, and T. P. Wittschen, both of Oakland, for respondent.

SHENK, Justice.

The defendants have appealed from an adverse judgment in an action on an insurance policy.

The plaintiff, as the owner of an automobile, was insured against so-called public liability by a policy issued February 6, 1931. The defendant insurance companies were the insurers. After the policy was issued the plaintiff sold the automobile to one Kin on an oral contract of conditional sale under which Kin paid a portion of the purchase price and received possession of the car. The plaintiff retained both the certificate of ownership and the certificate of registration which had been issued to him pursuant to the California Vehicle Act. Stats.1923, p. 517, as amended. Neither the plaintiff nor Kin made a report of the sale to the department of motor vehicles, as required by the statute. Such was the status of the several parties on June 3, 1933, when the automobile, in the possession of and being operated by Kin, caused personal injuries to one Bunch, who sued the plaintiff and Kin for damages for alleged negligent operation of the car. Judgment was rendered against Kin in the sum of $4,341.27 and in favor of Mr. Votaw. On appeal by the plaintiff therein Mr. Votaw was held to be equally liable in that amount on the ground that no notice of the sale had been given as required by law and that Mr. Votaw continued to be liable for injuries to a third person under the provisions of section 1714¼ of the Civil Code. Judgment was directed accordingly. Bunch v. Kin, 2 Cal.App.2d 81, 37 P.2d 744. Upon the issuance of execution Mr. Votaw satisfied the judgment and brought the present action to recover the amount paid by him.

By the terms of the policy as originally issued the defendants herein were relieved from liability "if the interest in the automobile described herein is at any time other than sole and unconditional ownership". The defendants contend that upon the sale to Kin the insured ceased to possess the ownership required by the provisions of the policy. Much argument is addressed to that point, but it is unnecessary to consider it because of our conclusion that the judgment in any event should be affirmed.

Prior to the accident involved in Bunch v. Kin, supra, the defendants sent to Mr. Votaw a rider having the heading "Extended Coverage (omnibus clause)", to be attached to and to become a part of the policy. The pertinent portions of that rider read as follows: "It is made a condition of the policy to which this endorsement is attached that, beginning at noon, standard time, January 1, 1933, at the address of the named insured stated herein, the insurance granted to the named insured under Part II relating to Property Damage and Public Liability and subject to all the terms, conditions and limitations of the policy, shall also inure to the benefit of any person or persons while riding in or legally operating the automobile described herein, and to any person, firm or corporation legally responsible for the operation thereof, provided such use or operation is with the permission of the named insured."

In transmitting the foregoing endorsement or omnibus clause the defendants addressed a letter to Mr. Votaw in which it was stated: "We are enclosing an endorsement form which you will please attach to your policy. It is for the purpose of broadening the terms of the same to meet present automobile driving conditions. This endorsement provides for the extension of insurance under your policy to others who may be driving your car (with your permission), and gives to them all the protection afforded you by your policy. It also provides for compliance with the Owners Responsibility Laws of the various states in which the Exchange operates or in which you may be traveling at the time of an accident involving your insured car. There will be no additional charge for the extension of this coverage. In granting the extension of this coverage the Governing Board of the Exchange is keeping to the policy of providing its members with adequate coverage to meet the various changes in laws and conditions affecting the driving of automobiles."

It is the contention of the defendants that the provisions of the rider had no effect upon the coverage of the original policy for the reason that the terms of the rider were to be "subject to all the terms, conditions and limitations of the policy", including the sale and unconditional ownership clause.

The plaintiff contends that the purpose of the rider was fairly expressed by the letter of the defendants in transmitting it; that such purpose was to "broaden the terms" of the policy "to meet present day driving conditions", and to make the "endorsement" cover "Owners Responsibility Laws of the various states in which the Exchange operates", and that this "extension of coverage" was to furnish the insured with protection "to meet the various changes in laws and conditions affecting the driving of automobiles".

The letter of transmittal undoubtedly described the purpose and effect of the omnibus clause correctly, at least in so far as it applies to the facts in this case. By its terms the rider was intended to protect the insured in the event that he be held liable under any "Owners Responsibility Laws" of the states in which the defendants operated, which would include this state. If the language of the rider did not have that effect, it was meaningless.

It should be noted that section 1714¼ of the Civil Code had recently been enacted (1929) and was, very significantly, an "Owners Responsibility Law", as reasonably contemplated by the omnibus clause. That section made it possible to impose liability by reason of ownership of the mere legal title of the car provided at the time of the injury the car was being operated with the consent of such owner. There can be no doubt that at the time of the accident the automobile in question was being operated by Kin with the consent of the plaintiff (Sly v. American Indemnity Co., 127 Cal.App. 202, 15 P.2d 522), and it had been established by final judgment that the plaintiff was "legally responsible" for such operation, notwithstanding the fact that he had contracted to sell it and had delivered it to Kin.

[1] The effect of the omnibus clause was to modify in favor of the insured the terms of the original policy. Instances where this result has been declared are cited in the briefs. For example, the case of Firkins v. Zurich General A. & L. Ins. Co., 111 Cal.App. 655, 295 P. 1051, involved the public liability provisions of a policy which provided that said policy should not cover "in respect of any automobile * * * while driven or manipulated by any person * * * under sixteen years of age in any event". An endorsement attached to the policy provided: "The policy to which this endorsement is attached is hereby extended to apply to any person * * * legally responsible for the operation thereof, provided such use or operation is with the permission of the named assured, or if the named assured is (an) individual, with the permission of an adult member of the named assured's household. * * *" The accident occurred while the car was being operated, with the permission of the insured, by his fourteen-year-old son. The insurance company denied liability because of the age of the driver. In passing upon the effect of the rider the court said: "There appears to be no difficulty in reconciling the language of the policy with that of the rider on the subject of liability on account of the age of the chauffeur. It may be reasonably construed to mean that the surety company shall not be liable upon the policy 'while (the machine was) driven or manipulated by any person * * * under sixteen years of age' unless such minor was operating the car 'with the permission of an adult member of the named assured's household,' in which event the company is liable. To construe the language of this instrument otherwise would defeat the apparent intent of the parties and render the quoted language of the rider valueless." A like result was reached in Swift v. Zurich General A. & L. Ins. Co., 112 Cal.App. 709, 297 P. 578, where it was held that a policy providing that coverage should not apply when the car was being operated by a person under sixteen years of age was superseded by a rider attached to the policy which provided that the coverage was extended to apply to any person legally responsible for the operation of the car with the owner's consent.

[2-4] It must be conceded that the omnibus clause here under consideration, together with the letter of transmittal, rendered the contract of insurance as a whole ambiguous and consequently subject to construction, and that this ambiguity was caused by the insurer. Any fair and reasonable interpretation of the original contract as modified by the rider leads to the conclusion that the insured would be protected against any change in the laws of the state with reference to "Owners Responsibility", such as the enactment of section 1714¼ of the Civil Code, especially when considered in connection with sections 45 and 45¾ of the California Vehicle Act in force at the time of the accident. St.1929 p. 514; St.1931, p. 2105. Furthermore, any doubts arising by reason of ambiguities caused by the insurer must, under familiar rules of construction of insurance contracts, be resolved in favor of the insured.

The judgment is affirmed.

We concur: WASTE, C. J.; HOUSER, J.; GIBSON, J.

Mr. Justice CARTER, deeming himself disqualified, did not participate.

EDMONDS, Justice (dissenting).

In my judgment, the decision holding the insurer liable is based upon an erroneous construction of the contract between the parties. Moreover, it passes over, as unnecessary for determination, the question whether the named insured was the sole and unconditional owner of the automobile at the time of the accident which occasioned the present litigation. In effect, the court holds that regardless of the insurer's contract that it will pay the named insured's obligations only so long as the specified ownership continues, it is liable under a supplemental agreement which was made subject to all the terms, conditions and limitations of the policy.

The endorsement provides that "the insurance granted to the named insured * * * and subject to all the terms, conditions and limitations of the policy shall also inure to the benefit of any person or persons while riding in or legally operating the automobile described herein and to any person, firm or corporation legally responsible for the operation thereof, provided such use or operation is with the permission of the named insured". By this addition to the policy the insurer extended the original coverage to include persons other than the insured; that is to say, so long as the policy was in effect "and subject to all the terms, conditions and limitations" of the contract, the insurer agreed to indemnify any third person driving the automobile or responsible for its operation with the permission of the named insured. As stated by the appellant in its letter transmitting the endorsement, it "provides for the extension of insurance under your policy to others who may be driving your car (with your permission) and gives to them all the protection afforded you by your policy".

The two insuring agreements are separate and distinct provisions embodied in the one contract. By the policy as originally written the named insured was the only person insured against loss. Under the endorsement the insurance was extended to protect any unnamed person using the automobile or being responsible for its operation under specific conditions. It provided that the insurance granted to the named insured should also "inure to the benefit of" certain other persons, or, in other words, that such insurance should devolve by law as a right and be available to any one who came within the specific conditions. But it gave the named insured no rights which he did not have before and the added protection was specifically made "subject to all the terms, conditions and limitations of the policy".

It is this provision of the omnibus clause which distinguishes the present case from Firkins v. Zurich General Acc. & L. Ins. Co., 111 Cal.App. 655, 295 P. 1051. There was no dispute presented by that case concerning who was insured at the time of the accident, but the controversy was whether the judgment creditor of the named insured could recover against the insurer because of an accident which occurred when the insured's automobile was driven by a fourteen-year-old boy. The policy excluded coverage when the automobile was driven by any person under sixteen years of age. By the endorsement coverage was extended to "any person" using it with the permission of the named insured. It was held that this provision made the insurer liable to the plaintiff because at the time of the accident the automobile was being operated with the insured's consent.

The action of Swift v. Zurich General Acc. & L. Ins. Co., 112 Cal.App. 709, 297 P. 578, was brought by a named insured, against whom judgment had been rendered, against the insurer. The policy included an endorsement identical with the one before the court in the Firkins case. It was held that the insured might recover the amount of the judgment which was awarded because of an accident in which a minor was driving the automobile with her consent, notwithstanding the age limitation. The recovery was not upon the extended coverage agreement but under the ordinary policy terms. Because of statutory provisions, the insured was liable for the damages resulting from a collision which occurred while the automobile was driven by a minor with her consent, and the court held that the provision limiting coverage to persons under sixteen years of age had been superseded by the endorsement which extended insurance to any person without restriction.

It is difficult to see the logic of this reasoning. Had the judgment been against the minor driver, as the endorsement applied to "any person" without limitation as to age, then he could recover against the insurer. But the court measured the liability of the insurer to the insured by reading into the terms of the contract under which it agreed to protect him, provisions concerning insurance granted to a third person, one driving the automobile with the consent of the insured.

However, that presents a situation entirely different from that of the plaintiff in the present case who must recover if at all as a person insured by the omnibus clause but not by the policy. Here there is no inconsistency or ambiguity between the two insuring agreements. "Where the terms are plain and explicit and the meaning clear, courts indulge in no forced construction in order to cast a liability upon the insurer which it has not assumed." 14 Cal.Jur. 446; Maryland Cas. Co. v. Industrial Acc. Comm., 209 Cal. 394, 395, 287 P. 468.

When the accident happened, Votaw was not riding in or legally operating the automobile with the consent of the named insured; it was Kin who was doing this. Under these circumstances, if the policy was then in effect Votaw was covered as the insured named in it and the extended coverage protected Kin, the driver of the car. Reading the policy of insurance and the endorsement together, it seems obvious that the same person could not be the insured under both agreements, nor could a person insured under one claim the protection afforded by the other.

On the other hand, it seems clear that the insurance was not in effect after Votaw sold his automobile to Kin. The California Vehicle Act, Stats.1923, p. 517, as amended, in effect at that time, required that within ten days after a transfer of the title or interest of a legal owner in or to a registered automobile, the certificate of ownership be forwarded to the division of motor vehicles; thereupon the division "shall issue to the owner and legal owner entitled thereto, by reason of such transfer, a new certificate of registration and certificate of ownership respectively * * *. Until said division shall have issued said new certificate of registration and certificate of ownership as hereinbefore in subdivision (d) provided, delivery of such vehicle shall be deemed not to have been made and title thereto shall be deemed not to have passed and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose." Section 45, St. 1929, p. 514.

This section does not purport to limit or restrict the ownership of an automobile. One may have record title to property and not be its owner; likewise, transfer of the legal title to property may not have any effect upon the ownership. The statute expressly recognizes this distinction in providing for a "certificate of registration" to the "owner" and a "certificate of ownership" to the "legal owner", and affects only the legal title to an automobile as distinguished from equitable ownership of it. See Sly v. American Ind. Co., 127 Cal.App. 202, 207, 15 P.2d 522; Swing v. Lingo, 129 Cal.App. 518, 19 P.2d 56; Kenny v. Christianson, 200 Cal. 419, 253 P. 715, 50 A.L.R. 1297; Pendell v. Thomas, 95 Cal.App. 33, 272 P. 306; Goodman v. Anglo California Trust Co., 62 Cal.App. 702, 217 P. 1078; 23 California Law Review, 557, 562. Therefore, although by Mr. Votaw's failure to comply with the provisions of the California Vehicle Act, supra, the legal title remained in him, yet Mr. Kin acquired an interest in it which, according to the law as I read it, relieved the insurer from liability under its contract in the circumstance shown in this case.

The respondent lays great stress upon the statement in the insurer's letter concerning the endorsement that it "provides for compliance with the Owner's Responsibility Laws of the various states in which the exchange operates, or in which you may be traveling at the time of an accident involving your insured car". This comment is not an insuring agreement and may not be construed accordingly. If it may properly be considered for any purpose it adds nothing to the plaintiff's cause of action.

In California the owner of an automobile is liable for the death or injury of a person or for damage to property occasioned by any person using it with the permission, express or implied, of such owner. Sec. 1714¼, Civ.Code, now Vehicle Code, sec. 402, St.1935, p. 153. Under this statute, which is substantially the same as those of many other states, responsibility is limited to the amount of five thousand dollars for the death of or injury to one person in any one accident. It also provides "that in any action against an owner on account of imputed negligence as imposed by this section the operator of said vehicle whose negligence is imputed to the owner shall be made a party defendant if personal service of process can be had upon said operator within this State. Upon recovery of judgment, recourse shall first be had against the property of said operator so served".

Under this statute the operator remains primarily liable for all damages suffered as a result of his negligence. The owner has a limited responsibility, which is secondary in the sense that execution of a judgment shall first be levied upon the property of the operator. The ability of the operator whom an owner has allowed to drive his car to respond in damages is, therefore, of much interest to the owner in many ways. Undoubtedly, the desire of owners to make certain that any persons to whom they entrust their automobiles have insurance coverage in their own right leads insurers to adopt the omnibus clause as a standard form. By a policy containing that clause the owner has provided insurance protecting any person driving his automobile with his permission. With such a contract in force, he has complied with the statute by making certain that recourse may be successfully had upon the operator for any judgment rendered in an action for damages suffered by reason of the operator's negligence.

According to these views the judgment should be reversed with directions to enter judgment for the defendant.

CURTIS, Justice (concurring in dissent).

I concur in the dissenting opinion of Mr. Justice EDMONDS. It is conceded by the majority opinion that the plaintiff may not recover under the policy as originally written as he was not the unconditional owner of the automobile at the time of the accident, he having disposed of the automobile to Kin under a conditional contract of sale. The right of plaintiff to recover is accordingly predicated solely upon the terms of the rider issued by the insurer and the letter written to the insured enclosing the rider. By the rider the terms of the policy are made to inure to the benefit of all persons operating the automobile "With the permission of the named insured". By no reasonable construction of this language may it be made to refer to the owner of the car as it is specifically limited to those persons driving the car with the permission of the owner. That it was intended by the rider to broaden the terms of the policy so that it would include third persons and third persons only is made clear by the terms of the letter which definitely states that the rider, or endorsement as it is called by the writer of the letter, provides "for the extension of insurance under your policy to others who may be driving your car (with your permission)." I am unable to see how this language which purports only to extend the terms of the policy to third persons can be construed as a waiver by the insurer of the terms of the policy which relieve the insurer of liability to the owner of the car if the latter's interest is at any time other than a sole and unconditional ownership.

15 Cal.2d 1

SOUTHERN SERVICE COMPANY, LIMITED v. LOS ANGELES COUNTY (CITY OF LOS ANGELES, Intervener).

L. A. 16598.

Supreme Court of California.

Jan. 2, 1940.

Rehearing Denied Feb. 1, 1940.

1. Taxation 🔑538, 541

Illegal taxes voluntarily paid may not be recovered by taxpayer in absence of statute permitting refund thereof, and in absence of such statute only illegal taxes paid under duress, coercion or compulsion are considered to have been "involuntarily paid" and therefore recoverable.

2. Taxation 🔑541

Where plaintiff's statutory right to recover taxes which were allegedly illegally collected pursuant to excessive tax rate adopted by county board of supervisors had been withdrawn by subsequent statute, taxpayer could maintain action to recover excess taxes only if taxes were "involuntarily paid," and common-law rule as to what constitutes an "involuntary payment" controlled in determining whether payment was "voluntary" or "involuntary." Pol.Code, §§ 3804, 3804.1–3804.3, as added by St.1939, pp. 1384, 1385, §§ 1–3.

[Ed. Note.—For other definitions of "Involuntary," see Words & Phrases.]

3. Taxation 🔑541, 542

If taxes were "paid involuntarily," namely, by means which amount to duress or coercion, they may be reclaimed by taxpayer without proof that they were paid under protest.

4. Taxation 🔑538, 542

Filing of a protest with a payment of illegal taxes otherwise voluntarily made does not deprive payment of its voluntary character.

5. Taxation 🔑541

Where taxpayer paid taxes prior to date when they would have become delinquent without protest, and subsequently filed claim for refund of portion of tax claimed to have been excessive by reason of alleged errors of county board of supervisors in preparing budget or calculating tax rate, pursuant to statute, there was not an "involuntary payment" so as to entitle taxpayer to recover portion claimed to be excessive under common-law rule, after statutory right had been withdrawn by subsequent statute. Pol.Code, §§ 3804, 3804.1–3804.3, as added by St.1939, pp. 1384, 1385, §§ 1–3.

6. Taxation 🔑541

As respects whether payment of taxes was made under compulsion or coercion, "compulsion" or "coercion" is some actual or threatened exercise of power possessed, or supposed to be possessed by party exacting or receiving payment over person or property of party making payment, from which latter has no other means of immediate relief than by advancing the money.

[Ed. Note.—For other definitions of "Coerce; Coercion" and "Compulsion," see Words & Phrases.]

7. Taxation 🔑535

The statute withdrawing statutory right to refund of taxes voluntarily paid which were levied prior to January 1, 1939, which were excessive by reason of alleged errors in preparation of budget or tax rate, indicates legislative purpose to declare that policy which requires reimbursement of taxes which are illegally levied and collected extends only where overpayment has resulted by reason of overassessment or other error affecting a particular person or piece of property as distinguished from other persons or property not generally affected. Pol.Code, §§ 3804, 3804.1–3804.3, as added by St.1939, pp. 1384, 1385, §§ 1–3.

8. Constitutional law 🔑48

Every intendment is favorable to validity of legislative enactment.

9. Constitutional law 🔑229(3)
Taxation 🔑37

The statute withdrawing statutory right to refund of taxes which were levied prior to January 1, 1939, which were excessive by reason of alleged errors in preparation of budget or tax rate, is not violative of equal protection clause of Federal Constitution. Pol.Code, §§ 3804, 3804.1–3804.3, as added by St.1939, pp. 1384, 1385, §§ 1–3; U.S.C.A. Const. Amend. 14, § 1.

10. Constitutional law 🔑70(3)
Taxation 🔑37

The fact that statute withdrawing statutory right to refund of taxes voluntarily paid which were levied prior to January 1, 1939, and were excessive by reason of alleged errors in preparation of budget or tax rate does not apply indefinitely in future is matter solely of legislative concern and does not affect statute's validity. Pol.Code, §§ 3804, 3804.1–3804.3, as added by St.1939, pp. 1384, 1385, §§ 1–3; U.S.C.A.Const. Amend. 14, § 1.

11. Constitutional law 🔑105, 106
Taxation 🔑537

A taxpayer possessed no right or remedy pursuant to statute authorizing recovery of illegal taxes which existed apart from statute itself and which Legislature could not cut off by repeal. Pol.Code, § 3804.

12. Taxation 🔑1

The general relationship of sovereign and taxpayer is not founded on nor does it create any contractual rights.

13. Constitutional law 🔑105
Taxation 🔑535

The Legislature may withdraw statutory right to a credit or refund of taxes, and a repeal of such statute without a savings clause will terminate all pending actions based thereon.

14. Taxation 🔑537, 541

The Legislature in enacting statute withdrawing statutory right to refund of taxes which were levied prior to January 1, 1939, which were excessive by reason of alleged errors in preparation of budget or tax rate, cut off taxpayer's remedy by action including all pending actions, saving only common-law right to refund of taxes involuntarily paid. Pol.Code, §§ 3804, 3804.1–3804.3, as added by St.1939, pp. 1384, 1385, §§ 1–3.

15. Taxation 🔑535

The statute withdrawing statutory right to refund of taxes which were levied prior to January 1, 1939, which were excessive by reason of alleged errors in preparation of budget or tax rate applies to all pending actions, in view of provision that withdrawal of right to refund in particular class of illegal taxes specified should terminate all pending actions. Pol.Code, §§ 3804, 3804.1–3804.3, as added by St.1939, pp. 1384, 1385, §§ 1–3.

16. Constitutional law 🔑190
Taxation 🔑37

The statute withdrawing statutory right to refund of taxes which were levied prior to January 1, 1939, which were excessive by reason of alleged errors in preparation of budget or tax rate which expressly provides that it shall terminate all pending actions for refund, is not invalid on ground that it attempts to prohibit courts from hearing a pending action. Pol.Code, §§ 3804, 3804.1–3804.3, as added by St.1939, pp. 1384, 1385, §§ 1–3.

17. Constitutional law 🔑105, 137, 229(3), 284(1)
Taxation 🔑37

The application of statute withdrawing statutory right to refund of taxes which were levied prior to January 1, 1939, which were excessive by reason of alleged errors in preparation of budget or tax rate, which expressly provided that it was to terminate all pending actions, to terminate taxpayer's action to recover taxes alleged to have been illegally collected pursuant to excessive tax rate adopted by county board of supervisors did not violate taxpayer's constitutional guarantees of due process and equal protection and prohibition against enactment of laws impairing contract and vested rights. Pol.Code, §§ 3804, 3804.1–3804.3, as added by St.1939, pp. 1384, 1385, §§ 1–3; U.S.C.A. Const. art. 14, § 1.

18. Statutes ⚿107(6), 121(7)

The statute withdrawing statutory right to refund of taxes which were levied prior to January 1, 1939, which were excessive by reason of alleged errors in preparation of budget or tax rate which contains general reference in its title to "property taxation including refund and actions for recovery of taxes heretofore erroneously or illegally levied," is not violative of constitutional provision requiring that every act shall embrace but one subject which will be expressed in its title. Pol.Code, §§ 3804.1–3804.3, as added by St.1939, pp. 1384, 1385, §§ 1–3; Const. art. 4, § 24.

19. Taxation ⚿537

The statute withdrawing statutory right to refund of taxes which were levied prior to January 1, 1939, which were excessive by reason of alleged errors in preparation of budget or tax rate, terminates a taxpayer's pending action to recover taxes alleged to have been illegally collected pursuant to excessive tax rate adopted by county board of supervisors, notwithstanding all of taxes levied in tax year involved had not been collected. Pol.Code, §§ 3804, 3804.1–3804.3, as added by St.1939, pp. 1384, 1385, §§ 1–3.

20. Taxation ⚿543(1)

The constitutional provision relating to revenue and taxation systems of state, which withholds equitable remedy and restricts taxpayer to action at law for refund, does not extend taxpayer's remedy to recover illegal taxes by action at law to cases other than those provided by statute or under the common law. Const. art. 13, § 15, as amended in 1933.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Fletcher Brown, Judge.

Action by the Southern Service Company, Limited, against Los Angeles County, a body corporate and politic, to recover taxes alleged to have been illegally collected pursuant to an excessive tax rate. The City of Los Angeles intervened. From judgment, both the plaintiff and defendant appeal. On motion on behalf of defendant and intervener to dismiss plaintiff's appeal and for a direction to trial court to dismiss the action.

Motion granted.

For prior opinion see 82 P.2d 397.

Bailie, Turner & Lake, Cruickshank, Brooke & Dunlap, Evans & Boyle, all of Pasadena, and Meserve, Mumper, Hughes & Robertson, Overton, Lyman & Plumb, Loyd Wright, and W. Sumner Holbrook, Jr., all of Los Angeles (Allard, Holbrook & Whyte, of Pomona, and Stater & Dawson and Holbrook & Tarr, all of Los Angeles, of counsel), for plaintiff, appellant and respondent.

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Clock, McWhinney & Clock, Laurence B. Martin, and David E. Hinckle, all of Los Angeles, B. J. Feigenbaum, of San Francisco, and U. T. Clotfelter, of Los Angeles, amici curiæ in opposition to petition for rehearing.

Roy A. Linn, of Los Angeles, appearing on behalf of California Taxation Improvement Ass'n and Tax Committee, California Exchange Clubs.

J. H. O'Connor, Asst. Co. Counsel, Los Angeles County, S. V. O. Prichard, Asst. Co. Counsel, and A. Curtis Smith, Deputy Co. Counsel, Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., Leon T. David, Asst. City Atty., and Franklin W. Peck, Deputy City Atty., all of Los Angeles, in support of motion to dismiss.

Holbrook, Taylor, Tarr & Reed, of Los Angeles, Allard, Holbrook & Whyte, of Pomona, W. Sumner Holbrook, Jr., and Stater & Dawson, all of Los Angeles (Bailie, Turner & Lake, of Los Angeles, Cruickshank, Brooke & Dunlap and Evans & Boyle, all of Pasadena, and Meserve, Mumper, Hughes & Robertson, Overton, Lyman & Plumb, and Loyd Wright, all of Los Angeles, of counsel), in opposition to motion to dismiss.

Newlin & Ashburn and Wood, Crump & Rogers, all of Los Angeles, amici curiæ.

SHENK, Justice.

The plaintiff commenced an action under section 3804 of the Political Code to recover taxes alleged to have been illegally collected pursuant to an excessive tax rate adopted by the board of supervisors for the tax year 1933-1934. See Otis v. Los Angeles County, 9 Cal.2d 366, 70 P.2d 633. The plaintiff recovered a judgment for items aggregating $50.16. As to other items the court rendered judgment for the intervener, City of Los Angeles, and the defendant, County of Los Angeles. Both the plaintiff and the defendant, County of Los Angeles, have appealed from the judgment and the appeals are now pending in this court.

The present proceeding is a motion on behalf of the County of Los Angeles and the City of Los Angeles to dismiss the plaintiff's appeal and for a direction to the trial court to dismiss the action on the ground that the same has abated by reason of the provisions of chapter 159, Statutes of 1939 (page 1384). The moving parties will be referred to as the defendants.

Chapter 159, approved May 16, 1939, is entitled: "An act to add sections 3804.1, 3804.2 and 3804.3 to the Political Code, and to add sections 4806, 5097.3 and 5097.4 to the Revenue and Taxation Code, relating to property taxation, including refund and actions for recovery of taxes heretofore erroneously or illegally levied."

Section 1 adds section 3804.1 to the Political Code, reading as follows:

"No refund shall be made under section 3804 of this code, nor shall any action be hereafter commenced nor shall any action heretofore commenced be further prosecuted for the recovery, of any tax voluntarily paid which was levied prior to January 1, 1939, claimed to be erroneous or illegal, by reason of errors, omission or illegalities in preparing, transmitting, computing, determining or fixing the budget or tax rate or rates of any county, city and county, school district, municipal corporation or other public corporation, or political subdivision, in any case in which the taxes collected from such erroneous or illegal levy have been applied in the next or any succeeding fiscal year to reduce the tax levy for such year, or have been expended, appropriated, or applied for a public purpose. For the purposes of this section, the mere payment of a tax under protest shall not be deemed to constitute such payment an involuntary payment."

Sections 3804.2 and 3804.3 also added to the Political Code by the new enactment (sections 2, 3) provide for the time within which and the conditions under which claims for certain refunds of taxes may be filed; and the provisions thereof need not be specifically noted at this time. Sections 4806, 5097.3 and 5097.4 added to the Revenue and Taxation Code incorporate the language of sections 3804.1, 3804.2 and 3804.3 respectively added to the Political Code, to become effective only upon the adoption of a Revenue and Taxation Code by the 53rd legislature. Chap. 154, Stats. of 1939 (page 1274).

In support of their motion the defendants have filed affidavits presenting further facts to establish the applicability of section 3804.1, namely, facts showing that the taxes collected from such erroneous or illegal levy have been applied in the next or a succeeding fiscal year to reduce the tax levy for such year, or have been expended, appropriated or applied for a public purpose. Upon the showing made the defendants are entitled to the relief sought by their motion, unless the provisions of section 3804.1 of the Political Code violate some provisions of the state or federal constitutions.

The first contention to be noted in that respect is that section 3804.1 violates the constitutional guaranties of due process and equal protection and the prohibition against the enactment of laws impairing contract and vested rights. In order to support its arguments in this connection the plaintiff contends, and must necessarily contend, that the payment of the taxes sought to be recovered was made involuntarily.

The plaintiff paid the taxes herein involved prior to the date when they would have become delinquent. The payment was not made under protest. Subsequently the plaintiff filed its claim pursuant to section 3804 of the Political Code for a refund of that portion of the 1933-1934 tax payment claimed to have been excessive by reason of alleged errors in the preparation of the budget or the calculation of the tax rate, or both. The board of supervisors rejected the claim and the plaintiff filed its action thereon, which action was still pending when the legislature in 1939 added said section 3804.1 to the Political Code. The effect of that legislative action, pursuant to cases hereinafter cited, was to cut off the remedy to the plaintiff and to terminate the action herein unless the plaintiff had a vested property interest in or a contractual right to recover the claimed excessive portion of the taxes so paid.

[1] It is the settled law of this state that illegal taxes voluntarily paid may not be recovered by the taxpayer in the absence of a statute permitting a refund thereof; and in the absence of such statute only illegal taxes paid under duress, coercion or compulsion are considered to have been involuntarily paid and therefore recoverable. Brumagim v. Tillinghast, 18 Cal. 265, 269, 271, 79 Am.Dec. 176; Grimes v. County of Merced, 96 Cal.App. 76, 81-83, 273 P. 839; Maxwell v. San Luis Obispo County, 71 Cal. 466, 12 P. 484. See also, Brandt v. Riley, 139 Cal.App. 250, 33 P.2d 845, and cases hereinafter cited.

[2-6] The plaintiff concedes that the common law as to what constitutes an involuntary payment is the rule for the guidance of this court in determining whether the payment of the tax herein was volun-

tary or involuntary. The presence or absence of a written protest does not appear to be the distinguishing feature. That is, if the taxes were paid involuntarily, namely, "by means which amount to duress or coercion, they may be reclaimed * * * without proof that they were paid under written protest". Brandt v. Riley, supra, 139 Cal.App. at page 253, 33 P.2d at page 846, citing Whyte v. State, 110 Cal.App. 314, 294 P. 417; Grimes v. County of Merced, 96 Cal.App. 76, 273 P. 839, and other authorities. On the other hand it has also been held that the filing of a protest with a payment of illegal taxes otherwise voluntarily made does not deprive the payment of its voluntary character. Brumagim v. Tillinghast, supra, 18 Cal. at page 275, 79 Am.Dec. 176; Bucknall v. Story, 46 Cal. 589, 13 Am.Rep. 220; Bank of Woodland v. Webber, 52 Cal. 73; Merrill v. Austin, 53 Cal. 379; Dear v. Varnum, 80 Cal. 86, 89, 22 P. 76; Justice v. Robinson, 142 Cal. 199, 75 P. 776; Warren v. City & County of San Francisco, 150 Cal. 167, 88 P. 712; see, also, Meek v. McClure, 49 Cal. 623. The plaintiff argues that decisions in this state and elsewhere upon which it relies establish that the payment involved herein was involuntary in character. But the contrary appears from an examination of the pertinent decisions in this state. In the case of Brumagim v. Tillinghast, supra, 18 Cal. at page 271, 79 Am.Dec. 176, it was said: "The illegality of the demand paid constitutes of itself no ground for relief. There must be, in addition, some compulsion or coercion attending its assertion, which controls the conduct of the party making the payment. It is the compulsion or coercion under which the party is supposed to act which gives him a right to relief. If he voluntarily pay an illegal demand, knowing it to be illegal, he is of course entitled to no consideration; and if he voluntarily pay such demand in ignorance or misapprehension of the law respecting its validity, he is in no better position, for it would be against the highest policy to permit transactions to be opened upon grounds of this character." The court there held to have been voluntary a payment of illegal taxes imposed upon bills of lading for transportation of gold and silver, because the payment was made without the compulsion or coercion which the law recognized as sufficient to render payments involuntary. It defined such compulsion or coercion in general as "some actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment over the person or property of the party making the payment, from which the latter has no other means of immediate relief than by advancing the money". The court followed many cited cases from other jurisdictions.

In Williams v. Corcoran, 46 Cal. 553, 556, it was held that a threat to sell lands, made before the taxes had become delinquent, was idle and did not amount to coercion, citing Bucknall v. Story, 46 Cal. 589, 13 Am.Rep. 220, which approved and followed the rule of Brumagim v. Tillinghast, supra, to the effect that where there is no legal duress or coercion, the payment is voluntary.

In Bank of Woodland v. Webber, 52 Cal. 73, the court held that the payment of a tax under protest was voluntary where the payment was made before delinquency.

Relying on the last cited case and the decision in Bucknall v. Story, supra, the court in the case of Bank of Santa Rosa v. Chalfant, 52 Cal. 170, held that a threat to sell made before delinquency—the defendant not being armed with any authority real or apparent to carry out the threat—did not constitute legal duress and a payment of taxes made thereunder was a voluntary payment.

Consistently it was also so held in Wills v. Austin, 53 Cal. 152, 180, and that payment of an illegal tax was voluntary even when made pursuant to the collector's threat to add the five per cent penalty and to place the property on the delinquent list. A similar decision was handed down in the case of Merrill v. Austin, 53 Cal. 379, while in De Fremery v. Austin, 53 Cal. 380, the facts were held not to be controlled by the foregoing cases because payment of the tax was made after the delinquent list had been issued to the tax collector giving him authority to seize and sell the property.

The rule of Brumagim v. Tillinghast was considered as established in 1886 when it was followed in the case of Maxwell v. San Luis Obispo County, supra. Similar recognition of the rule appears in Meek v. McClure, 49 Cal. 623; Younger v. Board of Supervisors, 68 Cal. 241, 242, 9 P. 103; Cooper v. Chamberlin, 78 Cal. 450, 21 P. 14; Dear v. Varnum, 80 Cal. 86, 22 P. 76; Phelan v. City & County of San Francisco, 120 Cal. 1, 52 P. 38; San Diego L. & T. Co. v. La Presa School Dist., 122 Cal. 98, 54 P. 528; Wheeler v. Ridenour, 149 Cal. 782, 87 P. 802; Warren v. City & County of San Francisco, 150 Cal. 167, 88 P. 712; Justice v. Robinson, 142 Cal. 199, 75 P. 776 (see, also, Spencer v. City of Los Angeles, 180 Cal. 103, 179 P. 163), and other cases, such as Hayes v. County of Los Angeles, 99 Cal. 74, 33 P. 766, and Stewart Law & Collection Co. v. County of Alameda, 142 Cal. 660, 76 P. 481. The particular circumstances involved in the case of Whyte v. State of California, 110 Cal.App. 314, 294 P. 417, relied on by the plaintiff, prevent what was said concerning the coercive features appearing in that case from becoming applicable here.

[7-10] The case of Hellman v. City of Los Angeles, 147 Cal. 653, 82 P. 313, 314, recognized that the foregoing was the general common-law rule which, however, has been abrogated by the adoption of sections 3819 and 3804 of the Political Code so as to permit recovery although the payments were voluntary in all those cases coming within the provisions of the code sections. Section 3819 of the Political Code, allowing an action to recover a refund of certain taxes paid under protest, was involved in the Hellman case. In that case the court stated that the statute in derogation of the common-law rule was "befitting to this more enlightened age". It is obvious, however, from the language of section 3804.1, adopted in 1939, that the legislature had before it facts which satisfied it that the motives of justice which prompted a previous legislature to create the remedy for refund of illegal taxes voluntarily paid do not apply where the illegality attached by reason of a miscalculation in the tax rate and the resulting collections effected a proportionate decrease in the tax rate in a subsequent year. In such a case every taxpayer in the district is proportionately affected and has an equal right to recover the portion of the tax which is excessive by virtue of the erroneous calculation, or, if uniformly the excess is not refunded, all are proportionately benefited by a decrease in the tax rate in a subsequent year. Therefore, to obtain an orderly and economic routine in the collection of taxes the legislature was prompted to correct an existing condition by withdrawing the application of the Political Code sections creating the right of refund, and expressly terminating all pending actions based thereon, except where the payments were involuntary in accordance with the common law adopted in this state. The withdrawal of the remedy in such cases does not contravene the policy exemplified in sections 3804 and 3819 of the Political Code, but in fact is consistent therewith. This is so for the reason that equality among taxpayers is maintained more uniformly and economically by withdrawing the statutory remedy in the case of such blanket errors and permitting the application of the excess to reduce the tax rate uniformly on all affected property in a subsequent year. Therefore, the 1939 additions to the Political Code indicate the legislative purpose to declare that the policy denominated "justice," which "requires the reimbursement of taxes which are illegally levied and collected" (Brandt v. Riley, 139 Cal.App. 250, 253, 33 P.2d 845, 846), does not necessarily extend to situations such as the present, but more correctly to those situations only where overpayment of taxes has resulted by reason of overassessment or other error affecting a particular person or piece of property as distinguished from other persons or property not similarly affected, thus resulting in an inequality. See Hayes v. County of Los Angeles, 99 Cal. 74, 78, 79, 33 P. 766. The legislature has now declared a rule to govern a situation which this court, because of controlling general rules of construction of tax statutes, was precluded from applying in the case of Otis v. Los Angeles County, supra. Every intendment, under well-known principles, is favorable to the validity of the enactment. What we have said indicates that the distinction made by the legislature is not one which may be held to violate the equal protection clause of the federal Constitution (U.S.C.A.Const. Amend. 14, § 1) invoked by the plaintiff, but it is apparent that it is founded on a rational basis. The fact that the provision does not apply indefinitely in future is a matter solely of legislative concern and does not affect its validity.

[11-13] The foregoing discussion and review leads to the conclusion that the plaintiff possessed no right or remedy pursuant to section 3804 of the Political Code which existed apart from the statute itself and which the legislature could not cut off by repeal. The general relationship of sovereign and taxpayer is not founded on nor does it create any contractual rights. Perry v. Washburn, 20 Cal. 318, 350; Spurrier v. Neumiller, 37 Cal.App. 683, 174 P. 338. A right to a credit or refund of taxes is purely statutory. Spurrier v. Neumiller, supra; Bell v. County of Los Angeles, 90 Cal.App. 602, 266 P 291, citing

Brooks v. County of Tulare, 117 Cal. 465, 49 P. 469. The legislature may withdraw such a statutory right or remedy, and a repeal of such a statute without a saving clause will terminate all pending actions based thereon. Napa State Hospital v. Flaherty, 134 Cal. 315, 66 P. 322; Moss v. Smith, 171 Cal. 777, 155 P. 90; Callet v. Alioto, 210 Cal. 65, 290 P. 438; Penziner v. West American Finance Co., 10 Cal.2d 160, 170, 74 P.2d 252; Spurrier v. Neumiller, supra. Our conclusion that the legislature had the power to enact a statute which would cut off the right theretofore accorded the plaintiff and terminate pending actions under section 3804 is also supported by the case of People ex rel. Sears Roebuck & Co. v. Lindheimer, 371 Ill. 367, 21 N.E.2d 318, 320. In that case the writ of mandamus was sought to collect a refund of taxes erroneously but voluntarily paid. Before final judgment the statute giving the right to the refund was repealed. It was said: "The obligation of the citizen to pay taxes is purely a statutory creation, and taxes can be levied, assessed and collected only in the method pointed out by express statute. * * * So, also, any right to a refund or a credit of taxes is purely of statutory origin, and in the absence of an authoritative statute, taxes voluntarily, though erroneously, paid, cannot be recovered, nor even voluntarily refunded by a county, although there may be justice in the claim. * * * there is no vested right in a public law which is not in the nature of a private grant, and, however beneficial a statute may be to a particular person or however injuriously the repeal may affect him, the legislature has the right to abrogate it." The court concluded that the right to refund was cut off by the unconditional repeal of the statute creating it, saying: "The unconditional repeal of a special remedial statute without a saving clause stops all pending actions where the repeal finds them. If final relief has not been granted before the repeal goes into effect it cannot be granted afterwards, even if a judgment has been entered and the cause is pending on appeal. The reviewing court must dispose of the case under the law in force when its decision is rendered."

[14] In the case before us, therefore, the legislature was acting within its constitutional powers when it withdrew the right to a refund of such illegal taxes and cut off the remedy by action including all pending actions, saving only the common-law right to a refund of taxes involuntarily paid.

The numerous cases upon which the plaintiff relies, such as Fall River Valley Irrigation Dist. v. Mt. Shasta Power Corp., 202 Cal. 56, 259 P. 444, 56 A.L.R. 264; Callet v. Alioto, 210 Cal. 65, 290 P. 438; Laforge v. Magee, 6 Cal. 650; Grimes v. County of Merced, 96 Cal.App. 76, 273 P. 839; Chapman v. City of Brooklyn, 40 N.Y. 372; Pacific Mail Steamship Co. v. Joliffe, 2 Wall. 450, 69 U.S. 450, 17 L.Ed. 805; Ettor v. City of Tacoma, 228 U.S. 148, 33 S.Ct. 428, 57 L.Ed. 773; Forbes Pioneer Boat Line v. Board of Commissioners, 258 U.S. 338, 42 S.Ct. 325, 66 L.Ed. 647; Coombes v. Getz, 285 U.S. 434, 52 S.Ct. 435, 76 L.Ed. 866, and similar cases, involved either rights which existed independently of the statute, or so-called validating acts (which the statute here considered does not purport to be), and the conclusions there announced under the particular facts are neither pertinent nor controlling in the present case.

[15] No serious consideration may be accorded the contention that the foregoing stated principles do not apply herein because the 1939 act does not repeal section 3804 of the Political Code. True, the words of the 1939 statute are not expressly words of repeal without a saving clause, but the effect is the same in so far as the application of the principles is concerned when the legislature by apt expression has withdrawn the right and remedy in particular cases, including all pending actions based thereon. The legislature, no doubt having in mind the holding of this court in Krause v. Rarity, 210 Cal. 644, 654, 655, 293 P. 62, 77 A.L.R. 1327, expressly provided that the withdrawal of the right to refund in the particular class of illegal taxes specified should terminate all pending actions. Its expression in this respect is sufficient to accomplish the declared intent and purpose.

[16] The foregoing likewise answers the contention, made in reliance upon such cases as Puterbaugh v. Gila County, 45 Ariz. 557, 46 P.2d 1064, and Frink v. Clark, Iowa, 285 N.W. 681, that the statute is invalid because it attempts to prohibit the courts from hearing pending actions and deprives them of jurisdiction. The statute does not so purport to do. In those cases, as well as other cases cited herein, it is recognized that the legislature may take

away the right of action itself. The fact that the statute here involved does take away the right of action distinguishes it from the legislation involved in the cases relied upon by the plaintiff.

[17] We conclude that the application of the provisions of chapter 159 of the 1939 statutes to terminate the action here pending violates none of the constitutional rights or guaranties invoked by the plaintiff.

[18] No merit may be accorded the contention that the act is invalid as a violation of section 24 of article IV of the state Constitution providing that every act shall embrace but one subject which shall be expressed in its title. The title contains a general reference to "property taxation, including refund and actions for recovery of taxes heretofore erroneously or illegally levied". The plaintiff states that the title should have more fully indicated the nature of the legislation, that is, that it prohibited or withdrew the right of refund and abated pending actions in certain cases of taxes heretofore erroneously or illegally levied. The plaintiff argues that the wording is deceiving and misleading within the meaning of the language used in Ex parte Liddell, 93 Cal. 633, 636, 29 P. 251, and Jackson v. City of Santa Monica, 13 Cal.App.2d 376, 390, 57 P.2d 226. The general references contained in the title were sufficient. Anything more specific would have led to a prolix or complicated statement of the context of the act itself. The act has but one general object and therefore does not embrace more than one subject. By the general statement of the subject-matter, which is property taxation and specifically refund and actions for recovery of certain illegal taxes indicated, the reader is put on notice that the context of the act affects such refunds and actions therefor, which, under accepted formulae, is sufficient. Ex parte Liddell, supra; Abeel v. Clark, 84 Cal. 226, 229, 24 P. 383; O. T. Johnson Corp. v. City of Los Angeles, 198 Cal. 308, 323, 245 P. 164; Estate of Phillips, 203 Cal. 106, 115, 263 P. 1017; Heron v. Riley, 209 Cal. 507, 510, 289 P. 160; Evans v. Superior Court, 215 Cal. 58, 62, 63, 8 P.2d 467.

[19] It is also contended that chapter 159 of Statutes of 1939 does not apply herein because all of the taxes levied in the tax year involved have not been collected. The plaintiff urges that the words "the taxes collected" appearing in section 3804.1 of the Political Code as adopted by the legislature refer to all "the taxes" which have been levied. Inasmuch as the word "collected" must be given the force which the plain language implies, we must conclude that its employment to modify the word "taxes" is sufficient answer to the plaintiff's contention.

[20] The plaintiff also contends that the provisions of section 15 of article XIII of the California Constitution guarantees to it the right to maintain the present action to recover the taxes herein claimed to be illegal. The language of that section is: "No injunction or writ of mandate or other legal or equitable process shall ever issue in any suit, action or proceeding in any court against this State, or any officer thereof, to prevent or enjoin the collection of any tax levied under the provisions of this article; but after payment thereof action may be maintained to recover, with interest, in such manner as may be provided by law, any tax claimed to have been illegally collected." The plaintiff's argument is that the portions of the sentence separated by the semicolon are separable and separate; therefore that "any tax" as used in the latter portion is not limited by and has no reference to the words "any tax" as used in the first part of the sentence, and that the second part of the sentence constitutes a guaranty of the right to maintain an action for the recovery of any tax, without limitation, which may be claimed to have been illegally collected. It appears too obvious to merit extended discussion that the quoted section comprises but a single sentence, whose subject-matter is stated in the first portion thereof and that the words "any tax" used in the latter portion refer to that subject-matter. Prior to June, 1933, the words "this section" appeared in the place of the words "this article", used in the sentence as amended in 1933. Article XIII relates to the revenue and taxation system of the state, and in general terms requires taxation of all personal and real property in the state with certain exemptions. However, the plaintiff's further argument based on the change of wording cannot avail it here. The provision withholding the equitable remedy and restricting the taxpayer to an action at law for a refund does not have the effect claimed by the plaintiff. The provision may not be construed to extend the remedy by action at law to cases other than as provided by statute or under the common law.

The foregoing disposes of all of the contentions raised by the plaintiff.

The additional factual showing by the defendants, which brings the present case within the provisions of said section 3804.1, and our conclusion that the 1939 enactment does not contravene any constitutional provision require that the motion to dismiss the appeal and to abate the action be granted. Accordingly, the appeal of the plaintiff herein is dismissed, and to accomplish the abatement of the pending action the judgment in favor of the plaintiff is reversed with directions to the trial court to dismiss said action.

We concur: WASTE, C. J.; GIBSON, J.; KNIGHT, J. pro tem.; SPENCE, J. pro tem.; CURTIS, J.

CARTER, J., deeming himself disqualified, did not participate.

PEOPLE v. NEWLAND.*

Cr. 3285.

District Court of Appeal, Second District, Division 2, California.

Jan. 11, 1940.

Hearing Granted Feb. 8, 1940.

1. Gaming 🔑98(5)

To authorize conviction for violating statute prohibiting occupying premises for purposes of recording wagers on results of certain events, prosecution was bound to prove beyond reasonable doubt that defendant kept or occupied room in question for purpose of recording illegal wagers. Pen. Code, § 337a, subd. 2.

2. Gaming 🔑98(5)

That defendant who was charged with violating statute prohibiting occupying premises for purposes of recording wagers on results of certain events may have had betting markers on his person at time of arrest, although a suspicious circumstance, was not sufficient to establish beyond reasonable doubt that defendant kept or occupied gambling room in question in building where defendant was arrested. Pen.Code, § 337a, subd. 2.

3. Criminal law 🔑552(3)

Where evidence against an accused is entirely circumstantial, the evidence must not only be consistent with hypothesis of guilt, but inconsistent with any other rational hypothesis.

4. Criminal law 🔑552(3)

Where circumstances relied on as incriminatory are equally compatible with innocence as with guilt, there is a failure of proof necessary to sustain a conviction.

5. Gaming 🔑98(5)

Evidence *held* not to authorize conviction for violating statute prohibiting occupying premises for purposes of recording wagers on results of certain events. Pen. Code, § 337a, subd. 2.

6. Criminal law 🔑661

Proceedings at hearing on defendant's application for probation and defendant's statements at such hearing could not be used to supply proof necessary to sustain defendant's conviction for violating statute prohibiting occupying premises for purposes of recording wagers on results of certain events. Pen.Code, § 337a, subd. 2.

7. Criminal law 🔑661

The practice of presenting a criminal case to the superior court on transcript of testimony received at preliminary examination is condemned.

MOORE, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

John Newland was convicted of violating a statute prohibiting the occupying of premises for purposes of recording wagers upon the result of certain events, Pen.Code, § 337a, subd. 2, and he appeals.

Reversed and remanded for new trial.

Martin S. Ryan, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for respondent.

WOOD, Justice.

Defendant was convicted of violating subdivision 2 of section 337a of the Penal Code, the specific charge being that he occupied certain premises for the purpose of recording wagers on horse races. The case was tried before the court without a jury. Defendant prosecutes this appeal from the judgment of conviction.

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*For subsequent opinion see 104 P.2d 778.

Defendant's contention that the evidence is insufficient to justify the conviction must be sustained. Officer Benton testified that at about 3:30 p. m. on June 15, 1939, he went with officer McCoy to the premises at 3167 Cahuenga boulevard in the city of Los Angeles. The premises are not clearly described but it appears that on the ground floor there is a "rooming house" with bedrooms, living room, kitchen, bath and lavatory, where a number of men were living. In response to the question, "Is there a proprietor at that rooming house?" one of the officers testified: "There is, but I didn't know the man and I didn't see him." Several men were on the premises drinking liquor when the officers arrived. The officers saw defendant and one Miller come from the lavatory, through a hallway and into a living room. Defendant left the premises. Until that time he had not been taken into custody or placed under arrest. The officers and Miller went down a hallway to the rear and after climbing a ladder which was "behind the lavatory down this dark hallway" they entered a room where there were five telephones, a counter and chairs, betting markers and run-down sheets. Miller was arrested on the premises but the charge against him was dismissed at the preliminary examination.

Defendant was arrested at about 6:45 p. m. on the same day and at the same premises. As they drove up the officers saw defendant enter the front door and shortly thereafter he was arrested as he came out of the lavatory. He was searched and two A B C betting markers were found on his person. Certain notations had been made on the betting markers but it was not shown in whose handwriting the notations had been made. Upon his arrest defendant denied that he knew anything regarding the operation of a bookmaking establishment on the premises. He also denied that he had been on the premises in the afternoon of that day. A number of keys were found on the person of defendant, who, when asked if the keys would fit any of the doors, replied that "he didn't know, they might". One of the officers testified that one of the keys would fit the front door of the rooming house. The sum of $52 in currency was also found on defendant. Defendant told the officers that he had come to the premises to see friends.

[1-5] It may be conceded that the prosecution established that the room above the lavatory was kept for the purpose of recording illegal wagers but it was incumbent upon the prosecution to prove beyond a reasonable doubt that the defendant kept or occupied the room in question for this purpose. The circumstances that defendant was seen coming from the lavatory and that he had upon his person the sum of $52 are not so unusual as to be regarded as incriminatory. His presence on the ground floor where a number of men resided cannot be regarded as proof that he was maintaining a gambling room above, especially when his explanation that he had come to see friends on the lower floor is taken into account. The possession of the key which was shown to fit the front door of the lower floor and which defendant admitted upon his arrest might open one of the doors cannot be regarded as of convincing probative force. The prosecution must rely, therefore, mainly upon the circumstances that he had on his person certain betting markers at the time of his arrest. This is doubtless a suspicious circumstance but either standing alone or considered in connection with the other circumstances shown in evidence it is not sufficient to establish beyond a reasonable doubt that defendant kept or occupied the gambling room on the upper floor. For aught that appears in the evidence, if it indicates guilt of any crime, it might as well be argued that the possession of the markers would arouse suspicion of guilt of the crime of receiving a sum to be wagered, an offense defined in subdivision 3, of section 337a, of the Penal Code, and not the offense of which defendant was convicted. The evidence against defendant is entirely circumstantial and when the evidence is of such a character it must be not only consistent with the hypothesis of guilt, but inconsistent with any other rational hypothesis. Where the circumstances relied on as incriminatory are equally compatible with innocence as with guilt there is a failure of proof necessary to sustain a conviction. People v. Staples, 149 Cal. 405, 86 P. 886; People v. Lamson, 1 Cal.2d 648, 36 P.2d 361. We cannot hold that the evidence establishes the guilt of defendant with such certainty as to justify his conviction.

[6] In his brief the attorney-general refers to certain answers given by defendant

to questions propounded by the court at the time of the hearing of his application for probation. He refers particularly to defendant's statement then made that he had formerly worked on the premises in question. The proceedings at such hearing may not be used to supply the proof necessary to sustain a judgment of conviction. It might be added that nothing occurred at the hearing of defendant's application for probation to suggest a decision other than the one at which we have arrived.

[7] The case was presented to the superior court on the transcript of the testimony received at the preliminary examination, an unsatisfactory practice which was recently condemned by one of the other divisions of this court. People v. Fisk, 32 Cal.App.2d 26, 89 P.2d 142. From the testimony of one of the officers it appears that no effort was made to reach the proprietor of the rooming house. Apparently no watch was kept on the room containing the gambling paraphernalia to discover the identity of the persons conducting the illegal operations. No proof was presented to establish the name of the lessee of the room or the owner of the furniture being there used. Nor was there proof concerning the party who installed or paid for the telephones. The District Court of Appeal has recently been compelled to reverse other convictions of violating section 337a of the Penal Code because of the failure of the authorities to present sufficient evidence. People v. Yoder, Cal.App., 95 P.2d 470; People v. Rabalete, 28 Cal.App.2d 480, 82 P.2d 707; People v. Fisk, supra. Infractions of this statute should be prosecuted with the same diligence as is exercised in the prosecution of other crimes.

The judgment is reversed and the cause remanded for a new trial.

I concur: McCOMB, J.

MOORE, Presiding Justice.

I dissent. However, I must concur with the gentle admonition that a proper adjudication of such cases would be facilitated by the exercise of a bit more of diligence on the part of the law-enforcing agencies in gathering evidence before trial. Notwithstanding the shortcomings of the evidence, however, I think the judgment should stand.

The majority opinion states that "where the circumstances relied on as incriminatory are equally compatible with innocence as with guilt there is a failure of proof necessary to sustain a conviction", citing People v. Staples, etc. The Staples case has, for more than three decades, been the refuge and the shield of persons convicted on circumstantial evidence. Seldom is it applicable. In predicating judgments upon the language there used, a court should ever keep in mind that, in the Staples case, the corpus delicti was never established. The significance of that decision lies in its iteration of the ancient principle that unless a crime be first proved, it is folly to undertake to establish the defendant's participation therein.

To justify the verdict of a jury in convicting a person of crime, it is necessary only that proof be made (1) that the crime has been committed, and (2) that the criminal agency was the accused. If the verdict be approved by the trial judge, it arrives at the appellate court with such a degree of sanctity as to require a high degree of caution in considering a reversal. The trial court is the constitutional tribunal for determining the force and value of facts presented in proving crime. The appellate court has only one function in dealing with the record of a criminal trial where the insufficiency of the evidence is claimed and that is *to decide whether sufficient facts could not have been found by the jury to warrant the inference of guilt.* This is, of course, equally true where the facts are originally determined by the trial judge alone. Before his decision can be set aside "it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below". People v. Tom Woo, 181 Cal. 315, 184 P. 389, 393. This is quite a different doctrine from that announced in the Staples and Lamson cases and the difference creates a wide gulf between the holding of the majority opinion and that which, I opine, should prevail here.

In the Woo case, there was only circumstantial evidence with inconsistent statements of the defendants. Convictions of murder were affirmed. Long years after Dr. Staples was acquitted by the Supreme Court, Mr. Justice Houser, in adverting to the Staples case, observed: *"in practically every criminal prosecution that is dependent for its success upon circumstantial evidence each fact adduced is not only susceptible of a 'rational hypothesis' of innocence of the accused, but also is possibly as compatible with his innocence as it is with his* *guilt*". If this were to justify the trial court in declaring a failure of proof, he argued, then most prosecutions of secretly committed crimes would fail because even the corpus delicti as well as the criminal participation must be established wholly by circumstances. "The right to draw proper inferences from the evidence submitted is the function of the jury; and, as long as its conclusion does no violence to reason, an appellate court is not permitted to substitute its finding of the ultimate fact for that reached by the constitutional as well as the statutory arbiter thereof. On the ground here urged by the appellants an interference by an appellate court with a verdict of guilt of the accused is warranted only when the evidence, rightly considered, unmistakably leads to an inference of innocence." People v. Patello, 125 Cal.App. 480, 13 P.2d 1068, 1069, 1070.

Where circumstances reasonably justify an inference of guilt, the fact that an inference of innocence may also be reasonably drawn therefrom does not present a question of law for review by the appellate court. People v. Martinez, 20 Cal.App. 343, 128 P. 952. Moreover, the court cannot disturb a verdict unless there is no evidence to submit or where the evidence relied upon is so improbable or false as to be credible. People v. Willard, 150 Cal. 543, 89 P. 124.

In the Helt case, People v. Helt, 100 Cal. App. 279, 279 P. 1046, the corpus delicti, to-wit, maintaining a whiskey distillery, was established. The facts connecting defendant with the crime were circumstantial only. He drove to the rear of the house; he carried three keys, one of which fitted the garage lock, and one unlocked the front door of the house; when he answered the telephone he was saluted by his first name. His conviction was affirmed.

In the Borrego case, People v. Borrego, 211 Cal. 759, 297 P. 17, 19, the evidence that convicted Borrego was (1) the three-jointed piece of pipe, and (2) twenty-five gallons of gasoline taken from his car. "Circumstantial evidence need not," said the court, "in order to justify the inference of legal guilt, consist of inculpatory facts which are absolutely and to the point of demonstration incompatible with innocence. 'A conviction in the minds of the jurors to a moral certainty and beyond a reasonable doubt, arising from the evidence of the defendant's guilt, is sufficient.'"

Now to the facts of the instant case. Here we have definitely established the corpus delicti of the crime of maintaining a room for the registering of bets on horse races. The house at 3167 Cahuenga avenue, on June 15, 1939, stood in the suburbs of the city of Los Angeles, some twelve miles from defendant's home and fifteen miles from the metropolitan center. It was a "u-shaped" court with stores and apartments. Each apartment consisted of a living room, two bedrooms, a kitchen and lavatory. The apartment visited by the officers had a rear hall exit. When they entered said rear hallway at 3:30 o'clock p. m., defendant and one Miller were headed toward the living room at the front. The officers ordered them to return to the rear whence they had just departed. Defendant escaped and fled from the premises. Without resistance or assistance the officers entered the lavatory and climbed a ladder attached to the wall to the bookie room. Having completed this task, they lay in wait for defendant to return. This occurred at 7 o'clock p. m. on the same day. Defendant walked through the living room, back through the bedroom where five drunks sat intoxicated, and on into said lavatory. On his exit therefrom he was arrested and searched. He carried on his person $52 in currency, two A B C betting markers and some keys. On being quizzed by the officers, he declared that (1) he did not know whether any of the keys fitted any of the doors; (2) he was not there in the afternoon at any hour; (3) he was there to pay a social call; (4) he had a daughter graduating that night and would like to be excused to attend her graduation.

But the officers demonstrated that one of the keys fitted the front door, which put him in constructive possession of the apartment and the bookie-room, which was accessible by anyone who had gained entrance into the living room. They identified him as the person who had fled from them at 3:30 o'clock p. m. He named no friend on whom he had called although requested to do so. He named neither the school nor its location at which his daughter was to graduate. He offered no rational explanation for his presence there. He was not there to sleep; his home was distant only a fifteen minute drive. He was not there to shop; there were numerous shopping districts between this bookie house and his home. Arrested on the premises at 7 o'clock in the evening, after one flight from the same place on the same day; in such a situation with said key, currency and A B C betting markers in his pocket; entering said apartment without let or hindrance; walking with familiarity through the bedroom, among the drunks, into the lavatory and out again; denying his prior arrest or presence; offering no explanation of his having $52 on his person at that place and at that hour—he stood at the bar with every essential mark of guilt, if the trial judge believed beyond a reasonable doubt that he was one of the keepers of the bookie-room. These facts might well be consistent with innocence but they are also consistent with guilt. That being the verdict and judgment of the trial judge, it should not be disturbed but the judgment should be affirmed.

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36 Cal.App.2d 528

PEOPLE v. SNYDER.

Cr. 527.

District Court of Appeal, Fourth District, California.

Jan. 11, 1940.

1. Prostitution 🔑1

Procuring a female to become an inmate of a house of prostitution, even though not accomplished by a promise, threat, violence, or some other device whereby female was persuaded or encouraged to become or remain such inmate, constitutes a crime under the statute. St.1911, p. 9.

2. Indictment and Information 🔑196(7)

An information charging the commission of the two distinct offenses of procuring a female to become an inmate of a house of prostitution and of inducing, persuading, and encouraging by promises a female person to become an inmate of a house of prostitution, was not objectionable, in absence of demurrer. St.1911, p. 9; Pen.Code, § 1004.

3. Criminal law 🔑1032(6)

Where a count, under which only one penalty could be imposed, alleged commission of two distinct offenses, defendant after failing to file a demurrer to the count could not on appeal claim that he had been prejudiced by a failure to separate charges into separate counts. St.1911, p. 9.

4. Prostitution 🔑4

Evidence that defendant persuaded a female to become a prostitute and directed her to a house of prostitution sustained conviction for procuring a female person to become an inmate of a house of prostitution and for persuading by promises such female person to become a prostitute. St. 1911, p. 9.

5. Criminal law 🔑511(4)

Evidence of a claimed accomplice that he delivered a female to defendant for purposes of prostitution, corroborated by undisputed fact that prostitute subsequently worked in house of prostitution from which defendant derived a portion of his maintenance, was sufficient to sustain conviction of defendant for procuring a female as an inmate of a house of prostitution. St.1911, p. 9; Pen.Code, § 1111.

6. Prostitution 🔑4

Evidence that defendant procured a female to come to a named city for purpose of acting in a house of prostitution, but that as a consequence of clinical examination she was never permitted to work in house of prostitution, was sufficient to sustain conviction of defendant for procuring a female inmate for a house of prostitution. St. 1911, p. 9.

7. Prostitution 🔑4

Evidence that a male person lived in house of prostitution and received a portion of prostitute's earnings was sufficient to sustain his conviction for deriving support and maintenance, in part, from earnings of prostitute. St.1911, p. 9.

8. Criminal law 🔑1130(2)

Reviewing court would not consider an alleged error in an instruction for failure of appellant to comply with court rule requiring printing in full in appellant's brief all of the instructions given bearing on the subject. Rules for the Supreme Court and District Courts of Appeal, rule 8, § 3.

9. Criminal law 🔑942(1)

Newly discovered evidence which is merely impeaching in character is not ground for a new trial.

10. Criminal law ⟹941(1)

Cumulative evidence is not "newly discovered evidence" which would justify granting a new trial.

[Ed. Note.—For other definitions of "Newly Discovered Evidence," see Words & Phrases.]

11. Criminal law ⟹938(1)

Trial court did not abuse its discretion in refusing to grant motions for a new trial based on cumulative evidence and evidence which could have been obtained before the trial.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Sam Snyder was convicted for procuring female persons for a house of prostitution, and for deriving support and maintenance from earnings of a prostitute, and he appeals.

Affirmed.

Frank Curran and Harry L. Meyers, both of Fresno, for appellant.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Appellant was charged in an information in count one with the violation of Act No. 1906, section 1, General Laws (Stats.1911, p. 9), that on January 16, 1937, in Fresno county, he "procured a female person for a house of prostitution, and by promises induced, * * * a female person to become an inmate of a house of prostitution". In count two he was charged with the violation of the same statute in that on March 20, 1939, he "procured a female person as an inmate for a house of prostitution, and induced, persuaded and encouraged a female person to become an inmate of a house of prostitution, and by promises induced, persuaded and encouraged an inmate of a house of prostitution to remain in such house of prostitution as an inmate therein". In count four he was charged with the violation of the same statute in that on March 23, 1939, he "procured a female inmate for a house of prostitution". Appellant was likewise charged in another information with the violation of the same section in that on February 1, 1939, he being a male person and then and there "knowing that a female person or persons to be a prostitute, derived support and maintenance, in part, from the earnings of such prostitute".

A plea of not guilty was entered as to each count in the informations. Upon stipulation both of the actions were consolidated for trial which was had by a jury, resulting in a verdict of guilty on all counts above enumerated. Motions for new trial were made and denied. Notice of appeal was thereupon given from the orders denying the motions for new trial and from the judgment.

Briefly, the grounds of appeal are: (1) Alleged insufficiency of the evidence to support the judgment on each count and in each case. (2) Alleged error of the court in instructing the jury. (3) Alleged error of the court in denying the motions for new trial.

Though the girls were not named in the information, count one obviously had to do with one Carmen Roberts, also referred to as Carmen Lopez, as announced by the district attorney in his opening statement to the jury. This girl, according to the evidence, came to Coalinga to obtain a position as a waitress, where she met the appellant and told him the object of her visit. He stated that there was no chance for her to obtain such a position but that he knew of a place where they wanted a girl and told her to go to the Northern Rooms. The evidence is undisputed that appellant at all times knew that the Northern Rooms was a house of prostitution and that any girl working in the Northern Rooms worked therein as a prostitute. The evidence discloses that later that evening the appellant went to the establishment and suggested to Carmen Roberts that she act as a prostitute and when she stated that she had never acted as a prostitute and did not want to do so, he answered: "Why, there is nothing to it. All the girls make money like that. It is easy living." She stated that she was distressed financially at the time and did not have any place to go and so she "just took a chance". She thereafter, for three months, worked in the house as a prostitute. During that period of time appellant was around the establishment. He ate and slept there. She took orders from appellant and he told her that if any customer gave her a tip she was supposed to take the tip and the money and put it in a box. When money was taken from a customer it was placed in a little box with the name of the girl who had taken it. Appellant had access to the box and at times the girls had to wait for their money until he arrived. On few occasions she saw appellant take the money out of the box and put it in his pocket.

[1] Count one of the information alleged that appellant *"procured a female person for a house of prostitution,* and *by promises induced, persuaded and encouraged a female person to become an inmate of a house of prostitution"*. (Italics ours.) Appellant cites People v. Burns, 75 Cal. App. 84, 241 P. 935, and argues that it has not been made a crime merely to cause, or to induce, or to persuade, or to encourage a female to become or to remain an inmate of a house of prostitution, but that an additional fact has been made a prerequisite, namely, some one or more of the means named in the statute, i. e., a promise, threat, violence, or some device or scheme whereby the female was thus caused, induced, persuaded or encouraged to become or remain such inmate. The case of People v. Cimar, 127 Cal.App. 9, 15 P. 2d 166, 16 P.2d 139, is quite applicable to the facts in the instant case and disposes of this argument. There the defendant was charged only with procuring "for a female person * * * a place as an inmate of a house of prostitution" and the court, after sustaining the charge, said that "anything in the opinion in the case of People v. Burns [supra], contrary to the decision herein is hereby expressly disapproved".

[2] It is quite apparent that two distinct offenses are alleged in count one, namely, procuring a female person for an inmate of a house of prostitution, and by promises inducing, persuading, and encouraging a female person to become an inmate of a house of prostitution. Pleading offenses in such manner, in the absence of demurrer, has been upheld. People v. Rosenbloom, 119 Cal.App.Supp. 759, 2 P. 2d 228; People v. Horiuchi, 114 Cal.App. 415, 300 P. 457; sec. 1004, Pen.Code; People v. Welton, 190 Cal. 236, 211 P. 802; People v. Nahhas, 121 Cal.App. 428, 9 P. 2d 278.

[3, 4] The information is supported by proof which shows the commission of the first of the series of acts charged. Appellant cannot now claim that he has been prejudiced by a failure to separate the charges into separate counts. There is only one penalty to be imposed thereunder. People v. Steelik, 187 Cal. 361, 370, 203 P. 78. The case, as to this count, was tried on the theory that appellant procured Carmen Roberts as an inmate of a house of prostitution and without further recitation of detailed facts, the evidence fully supports the theory on which the case was tried. People v. Cimar, supra; People v. Mead, 145 Cal. 500, 502, 78 P. 1047; People v. Pryor, 17 Cal.App.2d 147, 150, 61 P.2d 773; People v. Beesly, 119 Cal.App. 82, 87, 6 P.2d 114, 970.

[5] As to count two, the evidence indicates that one Tanksley testified that he knew a Dorothy Lewis and first met her about March 20, 1939, in Los Angeles; that he took her to Avenal, California, and there she and Tanksley saw appellant and Lucille Newby. When Dorothy Lewis was introduced to appellant he talked with her about working "there". Tanksley then left and appellant and Lucille Newby took Miss Lewis to Coalinga where she went to work as a prostitute. On the way to Avenal, Tanksley stopped at Coalinga and telephoned to the Northern Rooms and tried to talk to appellant and found that he was not there but that he had gone to Avenal. He then drove to Avenal because appellant had told him to bring the girl and turn her over to him.

Appellant offered the same argument, with one exception, in respect to count two, as above related in reference to count one. The same answer to the argument as there given is applicable here. It is also claimed that the witness Tanksley was an accomplice of appellant and that therefore his testimony should be corroborated under section 1111 of the Penal Code. The evidence clearly establishes facts and circumstances which, when considered together, sufficiently corroborate the testimony of the claimed accomplice. It is clear that the evidence supports the first offense charged in count two of the information for, as stated by the witness Tanksley, the appellant told him to bring Dorothy Lewis to him (appellant) and turn her over to him, which Tanksley did, and it is undisputed that Dorothy Lewis subsequently worked in the Northern Rooms as a prostitute. It is thus clear that appellant at least aided and assisted in procuring Dorothy Lewis, a female person, as an inmate for a house of prostitution. The testimony introduced on the part of the prosecution and just referred to, taken in connection with appellant's undisputed connection with the Northern Rooms, prompted the jury to draw the inference and conclusion that appellant was the procuring cause of Dorothy Lewis becoming an inmate of said house of prostitution. People v. Cimar, supra; People v. Marron, 140 Cal.App. 432, 35 P. 2d 610. The evidence thus being sufficient to sustain the judgment as to count two, it becomes unnecessary to discuss the remainder of the charges alleged in that count.

[6] In connection with count four, appellant argues that the evidence at the most simply shows an attempt to commit the crime of pandering. The count charges that appellant "procured a female inmate for a house of prostitution". The evidence shows unquestionably, if the jury saw fit to believe it, that appellant procured Tommy Lou Williams to come from Los Angeles to Coalinga for the purpose of acting in the Northern Rooms as a prostitute; that she went to the Northern Rooms to engage in such occupation, submitted to a clinical examination and as a consequence of the results of said examination never went to work in said house as a prostitute. The fact that she did not work in said house as a prostitute in no way lessened the culpability of the appellant.

In People v. Hirsch, 21 Cal.App. 737, 132 P. 1062, 1063, the woman whom the defendant in that case was charged with having procured as an inmate for a house of prostitution was received in said house with the consent of the keeper, allowed a room there in which she stayed. Her purpose in going to the house was to engage in the calling of a prostitute. The woman in that case was, as stated by the court, "at least received and accepted into the house as an inmate, to ply the calling of a prostitute upon condition subsequent that she should register with the police department and pass the clinic". Although it is contended by appellant that Miss Williams occupied a room in the building not devoted to the purposes of prostitution, and that she could not be said to be occupying a house of prostitution, under the authority of the foregoing case, taken in connection with the charge made and the evidence introduced in support thereof, we are convinced that the evidence sufficiently supports the verdict of the jury.

[7] Finally, in the remaining charge, that of deriving support and maintenance, in part, from the earnings of prostitutes, the evidence is overwhelming that the girls received only one-half of their earnings and tips which were placed in a box as heretofore described and that time and again appellant took from the prostitutes this money, or that he took money from the box in Lucille Newby's room wherein money received by the prostitutes for plying their trade was placed. The evidence is undisputed that the appellant lived in the building in which the Northern Rooms was situated and that he ate his meals there; that his clothing was kept in the same room occupied by Lucille Newby, the keeper of the Northern Rooms. There is, of course, no question but that the Northern Rooms were maintained from the earnings of the prostitutes engaged therein. Appellant certainly in part, derived his support and maintenance from the earnings of the prostitutes, which is the very crime denounced by the statute. Appellant claims that he paid for what he received. However, it was proper for the jury to consider in the light of all the evidence and to draw the inference therefrom, that appellant did not in fact pay for his room and meals. The evidence of the prosecution showed appellant to be the one who gave orders at the establishment. There is direct evidence in the case that appellant owned the Northern Rooms. From a reading of the entire record there is sufficient evidence, if believed by the jury, to support the judgment of conviction as to this charge.

[8] Appellant next complains of a certain instruction given by the court in defining circumstantial evidence as "proof of a chain of circumstances pointing sufficiently *strongly* to the commission of a crime by the defendant". Appellant has failed to comply with rule VIII, section 3, of the Rules for the Supreme Court and District Courts of Appeal, by not printing in full in appellant's brief all of the instruction or other instructions given bearing upon the subject. People v. Myrick, 112 Cal. App. 117, 296 P. 320. However, the portion complained of was but a part of the usual stock form instruction used in defining circumstantial evidence. The complaint has little, if any, merit.

[9-11] Appellant's motions for new trial are predicated upon claimed cumulative and newly discovered evidence tending to impeach the testimony of witnesses who testified at the trial. His own statement in his opening brief is a fair summary of the affidavits presented with the motions for new trial and dissipates their merit and

destroys their character of legitimacy. The statement is as follows: "It must be admitted that much of the newly discovered evidence set forth in the affidavits on motion for new trial was cumulative of evidence produced at the trial and could have been obtained before the trial as well as after, if defendant's counsel had foreseen that cumulative evidence on the points involved would have any effect on the outcome of the case." Newly discovered evidence which is merely impeaching in character is not ground for a new trial nor is cumulative evidence "newly discovered evidence". People v. Ong Git, 23 Cal.App. 148, 137 P. 283, 284; People v. McCurdy, 68 Cal. 576, 10 P. 207; People v. Goldenson, 76 Cal. 328, 19 P. 161; People v. Grider, 13 Cal.App. 703, 110 P. 586; People v. Loveless, 140 Cal.App. 291, 35 P.2d 574; People v. James, 24 Cal.App.2d 616, 75 P. 2d 633; People v. Tallmadge, 114 Cal. 427, 46 P. 282. We see no abuse of discretion by the trial court in denying the motions. The evidence fully justifies the verdict of the jury.

The judgment and orders from which this appeal has been perfected are affirmed.

We concur: BARNARD, P. J.; MARKS, J.

WEST KEY NUMBER SYSTEM

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36 Cal.App.2d 512

HEINZ et al. v. CITY OF ANAHEIM.

Civ. 2441.

District Court of Appeal, Fourth District, California.

Jan. 10, 1940.

1. Municipal corporations 🔑845(2)

Adjoining property owners' complaint alleging general damage resulting from raising of street grade and installation of curb by defendant city was sufficient, in absence of general demurrer, as against contention that complaint should have alleged that accumulated surface water would be turned upon land by act of city, in view of finding that improvement had brought in added water against which property owners must protect themselves.

2. Appeal and error 🔑907(3)

On appeal, on judgment roll alone, from judgment in favor of adjoining property owners whose complaint alleged general damage resulting from raising of street grade and installation of curb by defendant city, appellate court would assume that finding that certain street improvements had brought in added water against which property owners must protect themselves was supported by sufficient evidence.

3. Municipal corporations 🔑845(6)

In adjoining property owners' action against city for general damage resulting from raising of street grade and installation of curb, finding that street grade was raised two inches was not inconsistent with finding that property was higher than grade of street and that curb was unnecessary to keep water out of property prior to street improvement.

4. Municipal corporations 🔑845(6)

In adjoining property owners' action against city for general damage resulting from raising of street grade and installation of curb, finding that street grade was raised two inches sustained judgment for property owners, as against contention that such a small change in street level could not have caused any substantial damage to property.

5. Appeal and error 🔑907(2)

All presumptions are in favor of judgment where evidence is not before appellate court.

◆

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by Genevieve R. Heinz and another against the City of Anaheim, a body politic, for damages alleged to have been suffered as the result of the raising of an existing street grade and the installation of a curb by the City of Anaheim. From a judgment for the plaintiffs, the defendant appeals upon the judgment roll alone.

Affirmed.

George F. Holden and Leo J. Friis, both of Anaheim (Warren L. Schutz, of Anaheim, of counsel), for appellant.

Wm. J. M. Heinz, of Anaheim, and Head, Wellington & Jacobs, of Santa Ana, for respondents.

BARNARD, Presiding Justice.

This is an action for damages alleged to have been suffered as a result of the raising of an existing street grade and the installation of a curb by the defendant city.

Among other things the complaint alleged that the defendant, without authority and without complying with certain statutes, raised the street grade and installed a curb in front of property belonging to the plaintiffs; that this property consisted of about 10 acres, being subdivision property which was improved with two dwellings with garages, drives and walks; that these improvements had been installed to conform with the then existing street grade; that by reason of the wrongful and unauthorized installation of the curb and the raising of the street level in the paving of this street, these structures and approximately four acres of plaintiffs' property now lie below the curb level of the street; and that it will be necessary to raise the foundations of these structures and fill in approximately four acres of the property.

The court found in all respects in favor of the plaintiffs, finding that the defendant raised the existing street grade along plaintiffs' property approximately two inches; that by raising this grade and installing the curb it caused the plaintiffs' dwelling houses to be left in a depression, interfering with the free access to and egress from the property; that prior to the paving of the street and the installation of the curb the plaintiffs' property was higher than the grade of the street and it was not necessary to have any curbing or to raise the land in order to keep water out of the property; that by reason of the acts of the defendant in raising the street level and causing the installation of the curb it will be necessary to raise the structures on this property and the land around the same in order to permit free access to and egress from the same and in order to "prevent the added water along Santa Ana street in front of plaintiffs' property, occasioned by said acts, from flowing over and upon plaintiffs' property"; and that a considerable portion of the land surrounding said structures "will require an earth fill because of these acts of the defendant". Judgment was entered in favor of the plaintiffs and the defendant has appealed upon the judgment roll alone.

[1, 2] The appellant's first contention is that the complaint failed to state a cause of action in that it was not alleged that any accumulated surface water would be turned upon the land of the respondents by any act of the appellant. In this connection it is argued that no liability rests upon a municipal corporation to protect property adjoining a street from the natural flow of surface water nor to receive surface water from such property. The complaint contained general allegations alleging damage resulting from certain acts of the appellant and no demurrer was interposed. We are not here concerned with any problem about surface water as it would naturally flow, but the court has found that the street improvements in question had brought in added water against which the respondents must protect themselves. In the absence of a demurrer the complaint was sufficient and we must here presume that the findings were supported by sufficient evidence.

[3] It is next contended that two of the findings are inconsistent with each other and cannot support the judgment. It is argued that a part of one finding, to the effect that in the making of these improvements the street grade was raised approximately two inches, is inconsistent with a part of another finding where it was found that prior to the paving of this street and the installation of the curb the respondents' property was higher than the grade of the street and no curb was necessary to keep water out of the property. The argument seems to be that before the making of these improvements the respondents' property must have been considerably higher than the adjoining street and therefore the property could not have been affected by merely raising the street grade approximately two inches. There is nothing in the record before us which discloses the previous height of the property with reference to the then condition of the street, nor to show as a matter of law that the raising of the grade approximately two inches would cause no damage to the property in question. Moreover, the court found that the resulting damage was caused not only by the raising of the street grade but by the installation of the curb. The record does not disclose the height of the curb which may have been sufficient to bring in added water and discharge the same upon the land in question, through openings left for driveways, and thus cause the damage found by the court to have been suffered. The findings complained of are not inconsistent and the findings, taken as a whole, sustain the judgment.

[4, 5] It is finally urged that the raising of the existing street grade an approximate two inches was such a small change in

the street level that it could not have caused any substantial damage to respondents' property. This is sufficiently answered by what we have said on the preceding point. The evidence is not before us and all presumptions are in favor of the judgment. The judgment roll discloses no reversible error.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

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36 Cal.App.2d 494

STEVENSON v. STEVENSON et al.

Civ. 6356.

District Court of Appeal, Third District, California.

Jan. 10, 1940.

Hearing Denied March 9, 1940.

1. **Husband and wife** 🔑279(2)

In suit to set aside property settlement between plaintiff and his former wife, evidence *held* insufficient to show that plaintiff executed settlement because of threats by and fear of former wife's second husband.

2. **Contracts** 🔑99(3)

A defense of duress must be established with reasonable certainty by clear, cogent and convincing evidence.

3. **Conspiracy** 🔑19
Fraud 🔑58(1)

A person seeking to establish conspiracy and fraud must do so by full, clear and satisfactory proof.

4. **Husband and wife** 🔑279(2)

In suit against plaintiff's former wife and her second husband to set aside property settlement, evidence *held* insufficient to establish conspiracy between defendants to get plaintiff's property.

5. **Husband and wife** 🔑278(1)

A threat to institute damage action for alienation of wife's affections did not constitute menace invalidating property settlement between person threatened and his wife, where he testified that he had heard rumor of such threat, but that most prominent threat, which he claimed induced settlement, was threat to kill him.

6. **Fraudulent conveyances** 🔑174(3)

A husband, conveying property to his wife to delay or defraud writ of execution in action against him for alienation of affections of plaintiff's wife, cannot recover such property in equitable proceeding to set aside property settlement with grantee as executed because of such plaintiff's threats pursuant to conspiracy between him and grantee.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Suit in equity by Robert A. Stevenson against Pauline B. Stevenson and another to set aside a property settlement between plaintiff and named defendant as husband and wife. From a judgment setting aside the settlement, defendants appeal.

Reversed.

W. H. Stammer and Douglas A. May, both of Fresno, for appellants.

B. M. Benson, of Fresno, for respondent.

PULLEN, Presiding Justice, delivered the opinion of the court.

This appeal is from a judgment setting aside a property settlement on the ground that it was executed by Robert A. Stevenson because of threats and fear made against him by appellant Arthur M. Steintorf pursuant to a conspiracy between appellants.

Appellants contend the evidence was insufficient to justify the finding that respondent executed the property settlement and conveyance because of fear, duress, coercion or menace, or that appellants conspired to get the property of respondent. A divorce decree issued by the courts of Nevada is also questioned, but our conclusions as to the other points make a consideration of the latter question unnecessary.

The facts before the trial court reveal that Robert A. Stevenson and Pauline Stevenson were married in Tia Juana, Mexico, on June 18, 1929. After their marriage they moved to a four-room ranch house on their property in the San Joaquin valley, where they lived, and with them lived an uncle of Stevenson. During the next eight years they accumulated by their joint efforts real and personal property of some $200,000. Although within a year after their marriage there was some element of dissension, nevertheless, they lived together, Pauline caring for Stevenson and his uncle and assisted in the building up of their properties, and they apparently treated each other with respect and consideration, and even now Stevenson has not charged his wife as being the cause of the separation which occurred in May, 1937.

On an adjoining ranch lived Arthur Steintorf and his wife Frances, and the two families became friends and visited back and forth as good neighbors. This friendly relationship continued until 1936, when respondent seemed to become indifferent toward his wife Pauline, and about the middle of May, 1937, suggested that she take a trip to Mexico, and that he would go to Pennsylvania to visit his sister. Pauline went to Mexico and remained until August 8, 1937. During this time it is apparent Stevenson planned upon a divorce. In June he went to Tia Juana, Mexico, and there secured a certified copy of the marriage certificate evidencing his marriage to Pauline. On July 16th, he wrote Pauline in Mexico City enclosing the certified copy of their Mexican marriage and suggesting that it would be a simple matter for her to obtain a divorce in Mexico.

During this time the domestic affairs of Arthur and Frances Steintorf had not been progressing smoothly; in fact, it is in evidence that for several years they had not been happily married. On July 15, 1937, Frances told Steintorf she wanted a divorce and a property settlement, and a few days thereafter a property settlement between the two was entered into and Frances immediately left her home and went to Alameda, never to return to him again. During the five or six days intervening between her going to Alameda and Stevenson's trip to the east, they met almost daily, riding and dining together in the company, however, of a woman friend of Mrs. Steintorf. On July 27th, Stevenson started on his trip to the east.

About this time Steintorf learned that his wife Frances and Stevenson were interested in each other. He called upon his wife in Alameda on July 30th, and objected to Stevenson paying her so much attention and demanded that she get a divorce, or if she did not, he would. It was also about this time that Steintorf made threats against Stevenson to some of their mutual friends, which will be more particularly referred to later. Upon learning of these threats, Mrs. Steintorf telephoned to Stevenson in New Orleans, telling him of the threats and gossip that was going around concerning herself and Stevenson. Stevenson immediately returned by airplane, arriving in Oakland August 2d, where he was met by Mrs. Steintorf and a friend of hers. The next day Stevenson suggested going to the home of Steintorf and talk matters over, but was dissuaded from that course, and after going to Fresno and withdrawing his money from the bank he resumed his trip to Pennsylvania.

During all of this time Pauline was in Mexico City, ignorant of all that had been transpiring in California during her absence. About July 31st, however, Steintorf wrote to Pauline Stevenson, telling her that Stevenson and Frances Steintorf were in love with each other and intended to be married. On August 8th, Pauline returned to California. She was met in Los Angeles by Steintorf and two of her friends, a Mr. and Mrs. Britton. On August 10th, she went to Fresno, and was taken by Steintorf to the office of Mr. May, an attorney in that city, and an action for divorce was filed, in which she alleged certain acts of mental cruelty, and asked for one-half of their community property. An order was also issued restraining the defendant therein, Stevenson, from encumbering or transferring any of the property, which restraining order was served by Steintorf upon Stevenson's ranch manager. Steintorf then left Fresno county on a hunting trip near Santa Maria, and did not return until August 20th, when he went to his ranch near Firebaugh.

On August 17th, Stevenson returned from his eastern trip, and employed Mr. Powell, an attorney of San Francisco, to advise him with reference to the divorce proceedings. By appointment, Mrs. Stevenson and her attorney, Mr. May, met with Stevenson and his attorney, Mr. Powell, in San Francisco. In these conferences Mr. Stevenson insisted upon a dismissal of the divorce proceedings pending in Fresno county before he would discuss any property settlement. This, Mrs. Stevenson, upon the advice of her attorney, refused to do. They then returned to Fresno where a property settlement agreement, prepared by Mr. Guntner, acting apparently for Mr. Stevenson, and Mr. May, was executed. That agreement, the basis of this litigation, transferred to Mrs. Stevenson, the ranch, worth $140,000, upon which was growing a cotton crop, which netted approximately $30,000, and $20,500 in cash in various banks. Property worth approximately $34,000 was transferred to Stevenson. The divorce action filed in Fresno was then dismissed.

On August 25th, Pauline left for Reno, after giving to her mother the furniture in her home, and arranged with the ranch manager to remain at an increased salary. She made the trip to Reno by automobile with Mr. and Mrs. Britton, Mr. Steintorf and a Mr. Murray,—the latter four having planned to go to Klamath Falls on a fishing trip, but later changed their plans and went to Pyramid lake, leaving Mrs. Stevenson in Reno, where she established a residence, and on October 8th, was granted a divorce from Stevenson.

On September 24th, Stevenson met Pauline in Reno, and with her attorney discussed their contemplated divorce. While in Nevada, Stevenson employed an attorney to represent him at the divorce hearing and executed a power of attorney in order to expedite the matter. On the day before the matter was to be heard, Stevenson and his attorney and Mrs. Stevenson and her attorney met and discussed several matters, including the property settlement, and also at that time Mrs. Stevenson renewed in writing a promise she had theretofore made to pay to the uncle of Stevenson the sum of $100 each month as long as she was financially able so to do. Upon the hearing, Mrs. Stevenson and her attorney were present as was the attorney for Stevenson. The property settlement was, without objection, introduced in evidence, and a decree was entered granting the divorce, and affirming the settlement.

At no time had Stevenson asked for a return of any of the property conveyed by the settlement to Mrs. Stevenson, and no return was asked until a demand was served upon her on December 20, 1937, and at that time it was not suggested that the property settlement had been procured because of fear of any threats. It was asserted by Mrs. Stevenson, and not denied by Stevenson, that on more than one occasion she objected to taking more than one-half of their property, and offered to return to him one-half thereof, which offer he refused. It is quite apparent and not denied, that Stevenson was anxious to convey to Mrs. Stevenson practically all of his property to get it beyond the power of Steintorf to levy upon in an action for alienating the affections of Mrs. Steintorf. The property was not reconveyed, and on January 15, 1938, this action was commenced.

In the meantime, Frances Steintorf had established a residence in Nevada, and on November 4th, she and Steintorf were divorced. On that day Stevenson met her in Reno and accompanied her back to Fresno county. On November 28, 1937, Pauline Stevenson and Arthur Steintorf were married in the county of Fresno.

Upon the foregoing facts the trial court found the existence of a conspiracy, and further that the property settlement of August 20, 1937, had been obtained solely by reason of threats, menace and duress, and, among other things, set aside the property settlement, and decreed that all of the property accumulated while the parties were living in good faith as husband and wife, should be divided equally between them, and that an accounting and a partition of all the property be had.

Appellants now contend that the evidence is insufficient to show that respondent executed the property settlement because of menace; that the record fails to show that Pauline Stevenson conspired to get any of respondent's property, and that the property settlement had been ratified by respondent. Respondent devotes considerable effort to establish that the courts of Nevada acquired no jurisdiction over the parties in the divorce proceeding in Stevenson v. Stevenson, but our conclusions make it unnecessary to consider the validity of that decree.

[1] The court found that some time in 1937 Steintorf and Pauline Stevenson conspired to cause the wife of Steintorf, Frances M. Steintorf, to go to Reno to obtain a divorce from Steintorf, and that Pauline Stevenson should likewise go to Reno and obtain a divorce in order that Steintorf and Pauline Stevenson could marry, and also by means of threats, duress and coercion these two conspired, so it is found, to get the property of plain-

tiff Stevenson. Three specific instances of such threats are alleged in the complaint and found to have been made and communicated to plaintiff, prior to the execution of the property settlement in question. They are, first, a statement to Mrs. Fourchy on July 31, 1937, where Steintorf is found to have said: "I brought my gun along up here with me and if that son-of-a-bitch were here I would shoot him in cold blood and kick him in the face," and "I am living for one thing alone, that is to get even." Also the statement made by Steintorf to Seaman Malm, on August 5th, when he said to him: "Seaman, I am out to ruin Bob and after I do it I'm going to kill the son-of-a-bitch; I'm carrying a gun just for this purpose," and about August 15, 1937, Steintorf, speaking to Charles Snyder, said: "Charlie, I am out to ruin Bob and no holds are barred."

It is also alleged, and found to be true, that these threats were made shortly before the execution of the property settlement, and were conveyed to Stevenson, and that he entered into the settlement solely under fear, duress and coercion, inspired by these threats.

As bearing upon the fear of plaintiff we find that upon being informed by long distance telephone while in New Orleans of such threats he immediately returned to Oakland where he met Mrs. Steintorf. A day or so following his arrival in Oakland, and after hearing of the threats made by Steintorf against him, and telling a friend, Mr. Murray, that he was going to Fresno to meet Steintorf and talk things over, he went to Fresno, drew his money out of the bank and returned to Oakland, and then resumed his trip to the east. On August 17th, he returned to California, and the next day went to Fresno, and was at his ranch, adjoining the ranch of Steintorf, and in Fresno many times after that. Some months later he and Steintorf met in Reno, and plaintiff struck Steintorf, and again at a subsequent date, he walked up to Steintorf who was seated in a cafe, and again struck him. These facts are not disputed, and would indicate that plaintiff was not afraid of any physical violence from Steintorf.

There is nothing in this record indicating that Stevenson sought any protection from the threats of Steintorf, and it is quite plain, aside from the bare assertion that he was afraid of Steintorf, there is nothing to indicate he was. Neither is there anything in the threats nor in the communication of such threats to Stevenson that they were designed or intended to secure a transfer of any property to Pauline, nor was she connected in any way with the threats.

[2] It is a well-established rule that evidence relied on to establish a defense of duress must establish the fact with reasonable certainty by clear, cogent and convincing evidence. 13 C.J. 779; Keck v. Wingert, 132 Cal.App. 475, 23 P.2d 99.

[3, 4] As to the conspiracy between Steintorf and Mrs. Stevenson, we can find no evidence to indicate any such relationship. Mrs. Stevenson was in Mexico City until August 8, 1937. The only conversation during that time between Steintorf and Mrs. Stevenson was when he wrote her of the relations between Stevenson and Mrs. Steintorf. She then started back to California. It will be recalled that the first threat that Steintorf is alleged to have made against Stevenson was on July 31st, the second one on August 1st, and the third on August 15th. About August 9th, Pauline Stevenson was taken to the office of Douglas May, an attorney of Fresno, by Steintorf. There, May prepared a divorce complaint in which Pauline Stevenson was plaintiff and in which she asked the court to award to her one-half of the community property. Upon the insistence of Stevenson the action was dismissed after he had signed the property agreement here in question. Prior to the agreement having been signed, Stevenson never told Pauline that Steintorf had made any threats against him. Prior to the execution of the agreement, Pauline told Stevenson, when he told her he was going to give it all to her, that such a division would be unfair, and he then said, "Well, just don't mention it to anybody, that is between the two of us."

On August 18th, Stevenson and his attorney, Mr. Powell, were in San Francisco, preparing a property settlement. Mrs. Pauline Stevenson and her attorney, Mr. May, met with them; Mr. May refused to dismiss the divorce action filed by Mrs. Stevenson in Fresno county, and Stevenson refused to negotiate. On August 20th, Stevenson asked Mrs. Stevenson to meet him in the office of his attorney and tax advisor, Mr. Guntner, in Fresno. Mrs. Stevenson called upon Mr. May and they met Mr. Stevenson and Mr. Guntner. There the agreement in question was finally executed. At that time Stevenson insisted upon conveying to Pauline all of his property, but she refused to accept the pump station, upon which her mother resided, as well as two automobiles and certain life insurance policies. During these negotiations Steintorf was on a hunting trip and did not return to Fresno county until after this agreement had been executed.

After this settlement had been signed Stevenson invited Mrs. Stevenson, Mr. May, her attorney, and Mr. Guntner to accompany him to a restaurant where they all had dinner. No attempt was made to recover any of this property until after Pauline Stevenson and Steintorf had announced their proposed marriage. He then sent Charles Snyder to Pauline to ask her if she would still live up to her agreement, that is, that she would reconvey one-half of the property back to him upon demand. She replied that all of her property was then tied up. The next demand was after the marriage of Pauline and Steintorf in December, when he called upon Mr. May and told him he had given up the property to avoid a scandal, and if all of the property was not returned to him he would create a scandal.

On December 20, 1937, just prior to the filing of this action, a written demand was made for the return of the property, not claiming menace or conspiracy, but threatening to set aside the Nevada divorce decrees of Pauline Stevenson and Frances Steintorf. All of the foregoing facts are undisputed.

As was said in Fernandez v. Cano, Tex. Civ.App., 108 S.W.2d 310, 313, in reversing a judgment based upon conspiracy upon the grounds of insufficiency of the evidence: "We are aware of the rule which requires us to indulge in every reasonable presumption in favor of the findings of the trial court, and that any doubts as to the facts raised by the evidence, and any view of the law which the court could have applied under the pleadings and evidence, will be resolved in support of the judgment. On the other hand * * * a person seeking to establish conspiracy and fraud must do so by full, clear, and satisfactory proof." We cannot here find that degree of proof.

Quite obviously the property was conveyed to Pauline not because of fear or coercion but to prevent Steintorf from reaching any assets in case of a suit for alienation of affection of his wife, Frances, by Stevenson.

[5] Steintorf had apparently threatened to sue Stevenson for damages for alienating the affections of his wife Frances. Respondent admits of having heard of these threats, as is evidenced by the following testimony given by him:

"Q. Now you knew prior to entering into this property settlement that Arthur Steintorf had threatened to sue you for alienation of affection, didn't you? A. Well, there were two things that were—the air was full of them,—and one was the alienation of affection, but the most prominent was he threatened my life.

"Q. But you did hear that he threatened to sue you for alienation of affection, didn't you? A. That was the general rumor, yes.

"Q. You had heard of it? A. I had heard the rumor."

Under these circumstances a threat to institute a damage action did not constitute menace. Lyon v. Lyon, 70 Cal.App. 607, 233 P. 988; Silberschmidt v. Moran, 79 Cal.App. 533, 250 P. 205; Santa Ana Sugar Company v. Smith, 116 Cal.App. 422, 2 P.2d 866.

[6] Furthermore, if Stevenson conveyed any part of his property to Pauline to delay or defraud a writ of execution in an alienation of affection suit, he cannot, in this equitable proceeding, recover that property. Pomeroy's Equity Jurisprudence, vol. 1, p. 738; 10 Cal.Jur. 515.

It seems clear that the evidence fails to show that Stevenson executed the property settlement because of menace, or that Pauline Stevenson ever knew of any threats against the life of Stevenson or conspired to take any of respondent's property. The judgment is reversed.

We concur: THOMPSON, J.; TUTTLE, J.

36 Cal.App.2d 483

In re KLEPSCH'S ESTATE.

AKERS v. VEITCH et al.

Civ. 11224.

District Court of Appeal, First District, Division 1, California.

Jan. 10, 1940.

1. Appeal and error ⚷110, 782

An order denying motion for new trial is not appealable, and appeal therefrom must be dismissed.

2. Wills ⚷312

In proceeding by one claiming to be testatrix's adopted daughter to revoke probate of will not mentioning petitioner, trial judge properly ruled that issue whether petitioner was person interested in estate should be tried preliminary to trial of will contest.

3. Judgment ⚷577(1)
Records ⚷17(5)

A judgment restoring alleged destroyed records of adoption in proceeding instituted by adopted child's friend after deaths of real parents, alleged adopting mother and her husband and majority of child, not shown to be laboring under any disability, without notice to executrix of adopting mother's estate or legatees under her will, was void on its face and hence properly excluded from evidence in proceeding by such child to revoke probate of will, which did not mention her, though legatees had constructive knowledge of judgment and did not move in any court, nor bring independent suit in equity, to set it aside. Gen.Laws 1937, Act 1028, §§ 1, 2; Code Civ.Proc. § 473.

4. Records ⚷17(1)

The statute relating to restoration of court records destroyed by conflagration or other public calamity and other acts passed as result of destruction of public records of San Francisco by 1906 fire are remedial and should be liberally construed to effectuate their objects, but courts cannot extend benefits thereof to persons not included within their purview under guise of liberal construction, and such statutes being special in nature, persons proceeding thereunder must reasonably comply with conditions therein. Gen.Laws 1937, Act 1028, §§ 1, 2.

5. Records ⚷17(5)

The statute requiring court, to which application is made for restoration of court record destroyed by public calamity, to cause notice of application to be given as provided in certain Code sections, where no certified copy of such record exists, requires notice not only to parties to proceeding, record of which is sought to be restored, but to all known persons whose interests would be affected by restoration decree. Gen.Laws 1937, Act 1028, § 2; Code Civ.Proc. §§ 1010–1017.

6. Records ⚷17(5)

The executrix of testatrix' estate sufficiently represents testatrix to require service on executrix of notice of proceedings to restore records which would adversely affect estate, such as destroyed record of testatrix' adoption of daughter petitioning for revocation of probate of will not mentioning petitioner. Gen.Laws 1937, Act 1028, § 2; Code Civ.Proc. §§ 1010–1017.

7. Wills ⚷432

A determination by District Court of Appeal on appeal from judgment dismissing petition to revoke probate of will that trial court properly excluded from evidence judgment roll of proceedings for restoration of alleged destroyed records of petitioner's adoption by testatrix does not adversely affect petitioner's right to resort to proper suit in equity to establish her rights, if she can prove that she is testatrix' adopted daughter and hence a pretermitted heir, who succeeds to parent's estate as of date of parent's death in spite of and in hostility to will. Gen. Laws 1937, Act 1028, § 2; Probate Code, § 90.

◆

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

In the matter of the estate of Emilie Klepsch, deceased. From a judgment dismissing a petition by Henrietta Akers, nee Henrietta Klepsch, for revocation of the probate of deceased's will, naming Mary Veitch and another as principal legatees, and an order denying petitioner's motion for a new trial, petitioner appeals.

Appeal from order denying motion for new trial dismissed, and judgment affirmed.

Walter E. Dorn, of San Francisco, for appellant.

S. T. Hogevoll and Nathan Merenbach, both of San Francisco, for respondents.

PETERS, Presiding Justice.

[1] Henrietta Akers appeals from a judgment dismissing her petition for the

revocation of the will of Emilie Klepsch, deceased, and from the order denying her motion for a new trial. The last order is not appealable, and the appeal therefrom should be dismissed. Estate of Ivey, 110 Cal.App. 561, 294 P. 420.

Emilie Klepsch died testate in San Francisco in April, 1937. On October 6, 1937, a will of the deceased, naming Mary Veitch and John A. Koehler as principal legatees, and not mentioning Henrietta Akers, was admitted to probate, and Mary Veitch was appointed executrix. On November 12, 1937, appellant, Henrietta Akers, claiming to be the adopted daughter of the decedent, filed a petition for the revocation of the probate of the will on the grounds that the same had been executed as the result of duress, menace, fraud and undue influence of the principal legatees; that the decedent was of unsound mind at the time of the execution of the will, and that the will does not bear the true signature of the decedent.

[2] On the trial of the will contest, the trial judge properly ruled that the issue as to whether the contestant was a person interested in the estate should be tried preliminary to the trial of the contest. In support of her contention that she was the adopted daughter of the decedent, appellant offered in evidence the judgment roll in a certain proceeding instituted by one Rose Cuneo to restore the alleged destroyed records of the adoption of appellant by decedent. This judgment of restoration of the adoption papers was recorded November 9, 1937, and three days later the present will contest was instituted. It appeared from the judgment roll that the restoration proceedings had been instituted by a stranger to the proceedings and that no service or notice was given to the executrix of the will, to the legatees, or to any other person other than to Henrietta Akers. When this judgment roll was offered in evidence the trial judge refused to admit it on the ground that the judgment was void on its face. The trial judge offered appellant full opportunity to offer other evidence of the fact of adoption, but this offer was refused. The trial court thereupon, on motion of respondents, dismissed the petition to revoke the probate of the will.

[3] Appellant contends that at the time the judgment roll in the restoration proceeding was presented in the will contest, the judgment of restoration had become final; that respondents at least had constructive knowledge of the restoration judgment a few days after it was rendered when the will contest was filed by appellant; that respondents did not move in any court to have the judgment of restoration set aside, did not move under section 473 of the Code of Civil Procedure, nor bring an independent suit in equity to have the judgment set aside; that these three remedies were the only remedies open to respondents; that a collateral attack cannot be now made on the restoration judgment. Respondents reply that the judgment of restoration is void on its face, and therefore was totally ineffectual for any purpose. With this contention we agree.

The judgment roll that was refused admission into evidence discloses the following:

The petition for the restoration of the adoption papers was not filed by the appellant Henrietta Akers, but was filed by one Rose Cuneo, who alleges that she is a "personal friend and well acquainted" with Henrietta Schuhrer, who is now Henrietta Akers, and also well acquainted with the real mother and father of Henrietta, as well as with the decedent and her husband, and "as such friend of the respective parties named herein, is probably the only person who is familiar or remembers anything in relation to the adoption of" appellant. It should be mentioned that, at the time this petition was filed, the blood mother and father of Henrietta were dead, as well as decedent and her husband, and that Henrietta Akers was then an adult, and, so far as the record shows, laboring under no disability of any kind. There are no other allegations in the petition showing any interest of Rose Cuneo in this petition, nor any allegation that the petition was brought on behalf of Henrietta Akers.

The petition then recites that in June, 1897, a proper petition for the adoption of Henrietta Akers was filed in San Francisco by Emilie Klepsch and her husband; that the petition came on for hearing before Judge Coffey, then a judge of the superior court in and for the city and county of San Francisco; that petitioner Rose Cuneo, the mother and father of Henrietta, Henrietta, and Mr. and Mrs. Klepsch were all present in court at the hearing of the adoption proceeding; that in open court the proper documents were signed and Judge Coffey signed the decree of adoption. The petition then recites that all of the original documents relating to the adoption were destroyed in the 1906 fire. Petitioner Rose Cuneo prays that the documents be restored.

[4] The statute under which the court purported to act in restoring the adoption record is entitled: "An act relating to the restoration of court records which have been lost, injured or destroyed by conflagration or other public calamity." Stats. Ex.Sess. 1906, p. 73; Deering's Gen.Laws (1937) Act 1028. Section 1 of the act provides for restoration of destroyed documents when a certified copy exists. Section 2 is the section applicable to the present case, it covering situations where a certified copy does not exist. So far as pertinent here, this section provides that whenever in any action or special proceeding any court record is lost, injured or destroyed by any public calamity, and no certified copy exists *"any party or person interested therein* may make written application to the court to which the same belongs, verified by affidavit or affidavits, showing such loss, injury or destruction * * * and that such loss, injury or destruction, unless supplied or remedied *will or may result in damage to the party or person making such application,* and thereupon such court shall cause notice of such application to be given, as provided in section ten hundred and ten to ten hundred and seventeen inclusive of the Code of Civil Procedure". (Italics ours.) The act then provides that if satisfied by the showing made, the court shall make an order restoring the lost, injured or destroyed record "which order shall have the same effect that such original would have had if the same had not been lost, injured or destroyed, so far as concerns the party or persons making such application, and the persons who shall have been notified, as provided for in this section"; that judgments and records in in rem proceedings may be restored "upon like notice to all persons who have appeared therein, and notice by publication or postings to all persons who have not appeared for not less than ten days, as the court may order, and the same when restored shall have the same effect upon all persons who have been personally served with notice of such application as the original, and as to all other persons the same shall be prima facie evidence of the contents of such original".

This statute is but one of a series of acts passed as a result of the destruction of the public records of San Francisco by the fire of 1906. The various statutes are collected and referred to in 22 California Jurisprudence 644, section 51. Such laws are, of course, remedial in their nature, and should be given a liberal construction to effectuate the objects for which they were intended. Estate of Patterson, 155 Cal. 626, 102 P. 941, 26 L.R.A.,N.S., 654, 132 Am.St.Rep. 116, 18 Ann.Cas. 625; Hynes v. All Persons, etc., 19 Cal.App. 185, 125 P. 253. However, the courts cannot, under the guise of a liberal construction, extend the benefits of the statutes to persons not included within their purview. Such statutes are special in nature, and one who proceeds under such a special statute must reasonably comply with the conditions set forth in the statute.

Tested by these standards it is clear that the judgment of restoration here involved is void on its face. In the first place, the benefits of the statute may only be invoked by a "party or person interested" and only then, when the written application discloses that the loss, injury or destruction of the court record "unless supplied or remedied will or may result in damage to the party or person making such application". As already indicated, the judgment discloses that the present application was filed not by the adopted child, now an adult, but by a person named Rose Cuneo, who describes herself as a "personal friend" of the parties involved, and as "probably the only person" who knows the facts relating to the adoption. Obviously, Rose Cuneo was not a person legally interested in the original adoption, nor in the restoration proceedings, nor has Rose Cuneo any interest that would or could be adversely affected by the failure to restore the documents. The judgment roll discloses that she is a total stranger to both proceedings. Under such circumstances the trial court at no time secured jurisdiction of the restoration proceedings. To permit a stranger to invoke the jurisdiction created by the statute in question would lead to abuses too obvious to mention—abuses which the legislature clearly foresaw and sought to prevent by the requirements above mentioned.

[5, 6] In the second place, the judgment roll in the restoration proceedings discloses that no notice was given by appellant, or by Rose Cuneo, either personal or by publication, to any interested person

as required by the statute. Appellant contends that the only persons legally interested in the adoption proceedings were her parents, her adopting parents and herself, and that, since she is the sole survivor, no service was necessary to anyone but herself. She further contends that neither the executrix of the estate of the woman she contends is her adopted mother, nor the legatees of her will, were persons interested in the restoration proceedings. This contention is made in spite of the fact that if the restoration proceedings resulted in the restoring of the alleged adoption, the appellant would then be a pretermitted heir, and as such would inherit the entire estate. It would seem quite clear that the restoration statute requires notice to be given not only to the parties to the original proceeding, the record of which is sought to be restored, but also to all known persons whose interests would be affected by the restoration decree. Clearly, if Emilie Klepsch were still alive, no proceeding to restore alleged adoption papers declaring she was the adopted mother of appellant would have been valid without service on her. But appellant contends that no service was necessary on the executrix, even though, by such restoration proceedings, if successful, the expressed desires of the testatrix in her will would be defeated. We think that the executrix of the estate sufficiently represents the testatrix to require service upon her before any proceedings to restore records that would adversely affect the estate can be held to be valid. Although we have been referred to no case directly in point, the following cases establish principles which, by analogy, are applicable here: McGuinness v. Superior Court, 196 Cal. 222, 237 P. 42, 40 A.L.R. 1110; In re Dahnke's Estate & Guardianship, 64 Cal.App. 555, 222 P. 381; In re Sielcken, 51 Cal.App. 538, 197 P. 668. There is nothing in Estate of Grazzini, 31 Cal.App.2d 168, 87 P.2d 713, nor in the other cases cited by appellant, contrary to the views herein expressed.

[7] This determination that the trial court properly excluded from evidence the judgment roll of the restoration proceedings for the reasons given, although it will result in preventing appellant from contesting the will on the grounds of mental incompetency and undue influence, will not adversely affect the rights of appellant, if, in fact, in a proper proceeding, she can prove that she is the adopted daughter of Emilie Klepsch, and therefore a pretermitted heir. A pretermitted heir, under the provisions of section 90 of the Probate Code, succeeds to the estate of his parent, as of the date of the death of such parent, in spite of the will and in hostility to it. So far as the pretermitted heir is concerned, in contemplation of law, there is no will, and he may resort to a proper suit in equity to establish his rights. Estate of Sankey, 199 Cal. 391, 249 P. 517.

The appeal from the order denying the motion for a new trial is dismissed; the judgment appealed from is affirmed.

We concur: WARD, J., GOODELL, Justice pro tem.

36 Cal.App.2d 521

SAVAGE v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 11275.

District Court of Appeal, First District, Division 1, California.

Jan. 11, 1940.

1. Exceptions, bill of 🔑39(1)

Under statutes relating to the filing of bill of exceptions, time for filing draft of bill does not begin to run until appellant has been served with written notice of the entry of judgment or such notice is waived in the manner specified by statute. Code Civ. Proc. §§ 650, 953d.

2. Exceptions, bill of 🔑39(1)

Where no written notice of entry of judgment was served on appellant or his attorney, and neither of them in open court or otherwise waived such written notice, appellant was not in default in filing draft of bill of exceptions more than four months after judgment was rendered. Code Civ. Proc. §§ 650, 953d.

3. Exceptions, bill of 🔑39(1)

The mere presence of appealing party in court at time of rendition of judgment is not sufficient to meet mandatory requirements of statute requiring that a written notice of entry of judgment be given such party. Code Civ.Proc. § 953d.

4. Exceptions, bill of ⚷39(1)

Filing of notice of appeal from judgment does not constitute a waiver of the written notice of entry of judgment required by statute. Code Civ.Proc. § 953d.

5. Exceptions, bill of ⚷39(1)

That judgment from which appellant was appealing was rendered in accordance with prayer of petition filed by him would not deprive appellant of right to written notice of entry of judgment on ground that he was not an adverse party. Code Civ.Proc. § 953d.

6. Exceptions, bill of ⚷53(4)

Where judgment was rendered in March and in May petitioner served and filed notice of appeal and filed draft of bill of exceptions in September, and no written notice of entry of judgment was served on petitioner or his attorney and neither of them in writing or by oral stipulation waived such written notice, peremptory writ of mandate would issue directing trial court to consider proposed bill and to settle it in accordance with the facts. Code Civ.Proc. § 953d.

◆

Proceeding for writ of mandate by John Savage against the Superior Court of the state of California in and for the City and County of San Francisco, and Frank H. Dunne as judge thereof.

Peremptory writ issued.

Joseph T. Curley and Marvin C. Hix, both of San Francisco, for petitioner.

Edward M. Leonard, Asst. Dist. Atty., of San Francisco, for respondents.

KNIGHT, Justice.

Petitioner seeks a writ of mandate to compel the settlement of a bill of exceptions proposed by petitioner after having taken an appeal from a judgment rendered by the respondent court in the exercise of its juvenile court jurisdiction.

The judgment was rendered in a proceeding instituted by petitioner as guardian of the estates and persons of two orphaned children named Dorothy and Bernard Jones, wherein petitioner asked that the children be declared wards of the court. At that time the children were aged fourteen and ten years respectively, and for approximately a year and a half had been living with petitioner and his wife at their home in San Francisco. Petitioner was present at the court hearings which took place as the result of the filing of the petition in the juvenile court, and he was also represented by an attorney. At the final hearing and before the cause was submitted he asked leave to withdraw his petition and to dismiss the proceeding, but his request was denied; whereupon and on March 29, 1939, the court adjudged the children to be wards of the court and committed them to the custody of the chief probation officer, thereby removing the children from the home of petitioner and depriving him of their future care and custody. Judgment was entered accordingly, and within sixty days thereafter, to-wit, on May 25, 1939, petitioner served and filed notice of appeal therefrom. However, no written notice of the entry of the judgment was ever served on petitioner or his attorney, nor did either of them in writing, or by oral stipulation made in open court and entered in the minutes, or otherwise, ever waive such written notice; and on September 11, 1939, petitioner filed his draft of a bill of exceptions. The draft had been served on the district attorney before it was filed, but no amendments thereto were proposed; and during the month of October, 1939, the draft was presented to the judge of said court for settlement, with the result that he refused to take any action toward the settlement thereof. In addition to the foregoing facts and incidental thereto it may be stated that about the time petitioner appealed from said judgment he sought by way of habeas corpus to have the judgment annulled; but after a hearing and on August 10, 1939, the habeas corpus proceeding was by this court dismissed upon the grounds that the juvenile court was not wanting in jurisdiction to hear and determine the proceeding; that the judgment entered therein was in legal form, and that petitioner was afforded adequate remedy by way of appeal from the judgment to have reviewed the question of the sufficiency of the evidence and any assignments of error or irregularities which he claimed were committed during the trial court proceedings. In re Jones, Cal.App., 93 P.2d 185.

[1, 2] The question now presented for determination is whether the respondent

court was justified in refusing to settle the bill upon the ground that it was not filed within the time allowed by law; and after having examined the record we are of the opinion that the question must be answered in the negative. Section 650 of the Code of Civil Procedure provides: "Where * * * a party desires to have exceptions taken at such trial settled in a bill of exceptions, he may, at any time thereafter, and within twenty (20) days after service upon him of written notice of entry of the judgment * * * or within such further time as the court * * * may allow, prepare and file with the clerk of the court the draft of a bill. * * *" Section 953d of the same code declares that "Any notice of entry of judgment * * * required by the provisions of section 650 * * * of this code, must be given in writing, unless written notice thereof be waived in writing or by oral stipulation made in open court and entered in the minutes." And in construing and applying the foregoing code provisions it has been definitely held that the time mentioned in section 650, within which an appellant shall file the draft of his bill, does not begin to run until he is served with written notice of the entry of judgment or such notice is waived in the manner specified in said section 953d. See Rinaldo v. Board of Medical Examiners, 123 Cal.App. 712, 12 P.2d 32, and cases cited therein, to which may be added Benson v. Gardner, Cal.Sup., 95 P.2d 136, and Kling v. Kimball Pump Co., Inc., 115 Cal.App. 517, 1 P.2d 998. Here, as stated, no written notice of the entry of judgment was ever served on petitioner or his attorney, nor did either of them in writing or by oral stipulation made in open court or otherwise ever waive such written notice. Therefore, under the established rule of the cases to which reference has been made, petitioner was not in default on September 11, 1939, when he filed the draft of his bill.

[3, 4] As shown by the return filed in response to the alternative writ, and by the brief submitted in support of the return, the refusal to settle the bill was based principally upon the claim that petitioner was present in court at the time of the rendition of the judgment, and that therefore no written notice of the entry thereof was necessary to charge him with notice of its entry. In view of the decisions above mentioned, the position so taken by respondents is not tenable. As pointed out therein, the provisions of said section 953d are mandatory; hence the mere presence of the appealing party in court at the time of the rendition of the judgment is legally insufficient to meet the mandatory requirements of said section or to take the case out of the operation thereof. In addition thereto it must be shown that an oral stipulation was made by him in open court and entered in the minutes of the court waiving the giving of written notice of the entry of judgment. The strictness with which those statutory directions are enforced is emphasized in numerous cases decided since the enactment of section 953d in 1927, wherein it is held that on account of the mandatory terms thereof, even the filing of the notice of appeal from the judgment does not constitute a waiver of the written notice of the entry of judgment. Among those cases are the following: Sterling Corporation v. Superior Court, 207 Cal. 370, 278 P. 859; Best v. Smith, 22 Cal.App.2d 363, 71 P.2d 78; Rinaldo v. Board of Medical Examiners, supra; Griffin v. Kent, 206 Cal. 263, 274 P. 56; Attkisson v. Reynolds, 94 Cal.App. 185, 270 P. 686; Benson v. Gardner, supra.

[5] Respondents make the further contention that the judgment from which petitioner is appealing was rendered in accordance with the prayer of the petition filed by him, and consequently that he cannot be deemed to be an "adverse party" such as entitled him to written notice of the entry of judgment. It is evident, however, that the question of whether the judgment as entered operated to his prejudice is one that must be determined on the appeal; and since petitioner, by appealing therefrom, claims that such was the effect thereof, he is entitled to present the appeal on a record to be settled in conformity with the provisions of the statute and the facts of the case.

[6] It is ordered, therefore, that a peremptory writ of mandate issue herein directing the respondent court to consider the proposed bill filed by petitioner and to settle the same in accordance with the facts.

We concur: PETERS, P. J.; WARD, J.

36 Cal.App.2d 298

LYYDIKAINEN v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 11164.

District Court of Appeal, First District,
Division 1, California.
Dec. 29, 1939.

1. Notice 🔑10

All except first sentence of statute, authorizing service of papers on clerk when defendant resides out of state and has no attorney, but providing that where party has attorney, service must be on such attorney, instead of party, applies to all litigants, resident and nonresident alike. Code Civ.Proc. § 1015.

2. Statutes 🔑212
Workmen's compensation 🔑1094

The section of labor code, providing that any notice required thereby may be served in manner provided by statute requiring service of papers on party's attorney, instead of party, and Industrial Accident Commission's rule that service of any notice issued thereby by mailing to party affected shall be made substantially in accordance with provisions of such statute, must be presumed to have been drafted in light of previous settled judicial interpretation of statute as requiring service of notice on attorney for such party. St.1937, p. 294, § 5316; Code Civ.Proc. § 1015.

3. Workmen's compensation 🔑2021

The section of labor code, providing that notice required thereby to be served on any person before, during or after institution of proceeding before Industrial Accident Commission may be served in manner provided by statute requiring service of papers on attorney for party affected, requires that notice of commission's intention to amend for permanent disability rating its award of compensation for temporary total disability be served on disabled employee's attorney. St.1937, p. 294, § 5316; Code Civ.Proc. §§ 442, 1011, 1015.

4. Workmen's compensation 🔑2021

The mailing of notice of Industrial Accident Commission's intention to amend for permanent disability rating its award of compensation for temporary total disability to disabled employee personally, instead of his attorney of record, was not mere procedural irregularity, but vitiated commission's proceedings and rendered its decision so amending award subject to annulment. St. 1937, p. 294, § 5316; Code Civ.Proc. § 1015.

5. Workmen's compensation 🔑1079

The Industrial Accident Commission, in matters within its jurisdiction, acts as judicial body, exercises judicial functions, and is a court in legal effect.

6. Workmen's compensation 🔑2021

A disabled employee did not waive defect in notice of Industrial Accident Commission's intention to amend for permanent disability rating its award of compensation for temporary total disability because of mailing thereof to employee personally, instead of his attorney of record, by appearing and filing petition for rehearing, showing that notice was delayed in reaching him, in absence of anything in petition to suggest that he voluntarily relinquished right to object to failure to give him legal notice. St. 1937, p. 294, § 5316; Code Civ.Proc. § 1015.

7. Workmen's compensation 🔑2021

A disabled employee was not given legal notice of Industrial Accident Commission's intention to amend for permanent disability rating its award of compensation for temporary total disability, where notice thereof was mailed to him personally and not to his attorney of record. St.1937, p. 294, § 5316; Code Civ.Proc. § 1015.

◆

Proceeding for compensation under the Workmen's Compensation Act by Henry Lyydikainen, employee, opposed by Matson Terminals, Inc., employer. To review an award of the Industrial Accident Commission, amending its award of compensation for temporary total disability by determining that such disability had terminated and denying compensation for permanent disability, claimant brings certiorari.

Award annulled.

Alfred C. Skaife, of San Francisco, for petitioner.

Everett A. Corten and Eldon B. Spofford, both of San Francisco, for respondents.

GOODELL, Justice pro tem.

The petitioner, while working as a longshoreman for respondent Matson Terminals, Incorporated, suffered an injury to his right knee and applied for compensation, on which application, and at the hearing thereon, he was represented by an attorney whose name and address appeared on the record. The proceeding resulted in an award of $15.44 per week for temporary total disability and there was no application for rehearing or review. On January 21, 1939, almost fourteen months after the award, the respondent employer, a self-insurer, filed its petition requesting that liability for temporary disability indemnity be terminated and that the award be amended for permanent disability rating. A copy of this petition, together with a copy of the medical report, was mailed to petitioner personally, *and not to his attorney of record.* On January 26, 1939, the commission signed a notice of intention to amend for permanent disability rating, and on the same day a copy thereof was mailed to petitioner personally, *and not to his attorney of record.* The notice fixed no time for hearing. It said that liability would be terminated or the award amended for permanent disability rating on the record as it then stood, ten days after service of the notice, unless good cause was shown to the contrary in writing. This notice was misplaced and did not come to petitioner's attention until after the expiration of the ten-day period. Nothing was done on petitioner's behalf after he received the notice, as far as the record shows. On March 27, 1939, the commission made an order amending its findings and award for permanent disability, therein determining that petitioner's temporary disability had terminated on January 13, 1939, that his permanent disability was 16¼ per cent, and that the amount already paid for temporary disability, $1,513.12, exceeded the amount due for permanent disability. Accordingly petitioner was awarded nothing either by way of pecuniary compensation or medical treatment. This order recited that notice had been served upon the parties "and there having been no response thereto within the allotted period of 10 days from and after January 26, 1939". Within twenty days thereafter petitioner filed a petition for rehearing in which he pointed out, among other things, that the notice of intention to amend for permanent disability had been placed in the wrong letterbox in his hotel, to which it had been addressed, and that it had not come to his attention until after the ten-day period had expired, too late to file medical reports within that period. With this petition the applicant submitted the reports of two doctors, both of whom disagreed with the medical report upon which the commission had acted. On this petition, Jarl Lindfors, the consul of Finland at San Francisco, appeared for the petitioner, signing as petitioner's agent. The respondent employer filed an answer to the petition wherein it pointed out, among other things, *that petitioner had appeared in the proceeding by an attorney and could have availed himself of the services of his attorney* in answering the petition for termination of temporary disability and for permanent disability rating. On May 12, 1939, the petition for rehearing was denied.

Several points are presented in this pending proceeding. The petitioner contends that, because of the fact that he had an attorney of record before the commission, the copy of the petition and the notice of intention should have been sent to such attorney, and not to himself, and that, as this was not done, he did not get the due and legal notice to which he was entitled; that, for this reason, he was deprived of the opportunity to oppose the employer's petition or make any timely or adequate showing on his own behalf. The change in rating was, of course, of the utmost importance to petitioner. That he was entitled to notice is conceded, but it is claimed by the respondent commission that the notice he got was sufficient. The commission admits that ordinarily the notice would have been mailed to petitioner's attorney, and the only explanation given is that on the folder in the compensation department the name and address of the attorney had been "penciled out". When, why or by whom this was done, or on whose authority, does not appear. The question presented is whether the mailing of these papers to the petitioner himself, instead of to his attorney, constituted legal notice to him.

[1] Section 5316 of the Labor Code (St. 1937, p. 294) reads as follows: "Any notice, order, or decision required by this division to be served upon any person either before, during, or after the institution of any proceeding before the commission, may be served in the manner provided by Chapter V, Title XIV of Part II of the Code of Civil Procedure, unless otherwise directed by the commission or a commissioner. In the latter event the document shall be served in accordance with the order or direction of the commission or a commissioner. * * *" Said chapter V embraces sections 1010 to 1020 inclusive. Section 1015 is headed: "Service upon nonresident party." Its first sentence reads:

"When a plaintiff or a defendant, who has appeared, resides out of the State, and has no attorney in the action or proceeding, the service may be made on the clerk or on the justice where there is no clerk, for him." The section then proceeds: *"But in all cases where a party has an attorney in the action or proceeding, the service of papers, when required, must be upon the attorney instead of the party,* except service of subpoenas, of writs, and other process issued in the suit, and of papers to bring him into contempt. * * *" (Italics ours.) Because of the heading: "Service upon nonresident party" it would seem at first blush that section 1015 might not be of general application. The decisions, however, have always treated this section (except the first sentence thereof which, clearly, applies only to nonresidents) as applicable to all litigants, resident and nonresident alike. Estate of Nelson, 128 Cal. 242, 60 P. 772; Farrar v. Steenbergh, 173 Cal. 94, 159 P. 707; Finch v. McVean, 6 Cal.App. 272, 91 P. 1019; Wood v. Johnston, 8 Cal.App. 258, 96 P. 508; Ritter v. Braash, 11 Cal.App. 258, 104 P. 592. There are other cases as well which so treat it. Counsel for respondents concede that the section has that general and unlimited scope and meaning. What bearing, then, has section 1015 upon this case? In Estate of Nelson, supra, 128 Cal. at page 243, 60 P. at page 773, the court, in discussing a notice of appeal, says that the provision of section 940, Code of Civil Procedure "that the notice shall be served upon 'the adverse party or his attorney' is to be read in connection with section 1015 [of the Code of Civil Procedure] that 'in all cases where a party has an attorney in the action or proceeding the service of papers when required must be upon the attorney instead of the party.'" The opinion says "the statute provides that the party can receive the information *only through a service of the notice upon his attorney*". (Italics ours.) In Rose v. Mesmer, 134 Cal. 459, 66 P. 594, 595, one of the litigants had been served with notice of appeal, and it was claimed that that personal service started the time running for the filing of the undertaking on appeal. If so, the undertaking was in time. But this litigant had appeared by attorneys, who had been served some days before. The court held that the service upon the attorneys, and not upon the litigant, started the time running, saying: "the later service upon him in person upon August 15th was a mere nullity, and could not avail to postpone the time * * *."

[2] The respondent commission contends that in this case there was a compliance with its rule VIII, in that the mailing was *"to the party affected"*. That rule provides, in part, as follows: "1. Service of the original process of the Commission, consisting of a copy of the application with notice of time and place of hearing thereof, and service of any order, decision, award or notice issued by the Commission, will regularly be made by the Commission by mailing such process, order or notice to the party affected, *in the manner prescribed hereafter,* * * * 2 * * * *Where service is made by mailing, it shall be made substantially in accordance with the provisions of Chapter V, Title XIV of Part II of the Code of Civil Procedure,* * * *." (Italics ours.) This rule is consonant with section 5316 of the Labor Code. Both refer to said chapter V, and the rule distinctly says that where the notice is mailed it shall be done in accordance with that chapter. The words "to the party affected" must be read in connection with section 1015. In other words, the language must be interpreted as if it literally read "to the [*attorney for the*] party affected" in all cases where the party has an attorney. Such, clearly, is the holding of Estate of Nelson, supra, and such, also, is the meaning of Rose v. Mesmer, supra. Both section 5316 and rule VIII were adopted after those decisions, and it must be presumed that they were drafted in the light of that settled judicial interpretation.

[3] Any doubt that the words "the party affected" found in rule VIII mean his attorney, if he has one, is removed by other cases in this state already cited. Section 442 of the Code of Civil Procedure provides that a cross-complaint must be served upon "the parties affected thereby". In certain litigation in California the cross-complaint was served upon the attorneys of record for the plaintiff. The cross-complainant prevailed, and later sued in Texas on his judgment. The courts of that state denied full faith and credit to the California judgment, claiming that there must be service on the party himself and that service on his attorney was insufficient. The case found its way to the Supreme Court of the United States (Adam v. Saenger, 303 U.S. 59, 58 S.Ct. 454, 82 L.Ed. 649), and that court followed California's, and not Texas', construction of the California

statutes, read our sections 442, 1011 and 1015 together, and followed the holdings in Farrar v. Steenbergh, supra; Wood v. Johnston, supra, and Ritter v. Braash, supra, on the precise point now under discussion. In our opinion section 5316 clearly requires service upon the attorney, when there is one, and rule VIII does likewise.

[4] The commission argues that this mailing was a mere irregularity and that "mere irregularity of procedure does not vitiate the acts of the commission, or render its decisions subject to annulment". The four cases relied upon are not in point, for none of them involves an *absence of notice.* In Massachusetts Bonding & Ins. Co. v. Industrial Accident Commission, 176 Cal. 488, 168 P. 1050, the notice, which was received, was apparently in the same form as that mailed in the instant case. Because it "did not state the time for hearing, but merely declared that the proposed amendment would be made unless good cause to the contrary was shown in writing within ten days", it was contended that there was no jurisdiction to make the award. The court held that this method did not contravene the provisions of the act. In Frankfort General Ins. Co. v. Pillsbury, 173 Cal. 56, 159 P. 150, 152, the referee refused to permit certain questions to be answered on cross-examination. The court held this to be a mere error in the taking of testimony; that the commission was not bound by the technical rules of evidence, and that "The grounds of review * * * do not include matters like the one under discussion." In Walsh v. Industrial Accident Commission, 1 Cal.2d 747, 36 P.2d 1072, the court conceded that the referee acted improperly in reaching his decision upon a medical report without giving petitioners an opportunity to controvert it, but held this to be a mere error in procedure. In re Hughes, 159 Cal. 360, 113 P. 684, was a habeas corpus proceeding where the court held simply that procedural defects, where jurisdiction exists, are merely errors of law not fatal to the jurisdiction.

[5] After conceding that section 1015 is general in its application counsel for the commission say. "If a court action were herein involved, that might dispose of the question." It was, however, settled at an early date that "the commission in matters within its jurisdiction acts as a judicial body and exercises judicial functions and in legal effect is a court." Bankers' Indemnity Ins. Co. v. Industrial Accident Commission, 4 Cal.2d 89, 97, 47 P.2d 719, 723; citing 27 Cal.Jur. 449; Carstens v. Pillsbury, 172 Cal. 572, 576, 158 P. 218; Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319, 322, 153 P. 24; and Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 411, 156 P. 491, Ann.Cas.1917E, 390. The vital importance of notice is stressed throughout the opinion in Carstens v. Pillsbury, supra, 172 Cal. at page 577, 158 P. at page 220, wherein, inter alia, it is said that "The right to be present at any hearing necessarily includes the right to have notice of such hearing *in time to attend.*" (Italics ours.) Again, the court says, 172 Cal. at page 577, 158 P. at page 220: "* * * the Commission, upon such hearings, must find facts and declare and enforce rights and liabilities, in short, it acts as a court, and it must observe the mandate of the Constitution of the United States that this cannot be done except after due process of law." See, also, Union Lumber Co. v. Industrial Accident Commission, 124 Cal. App. 584, 12 P.2d 1047. In Larsen v. Industrial Accident Commission, 125 Cal. App. 13, 13 P.2d 850, it was held that an order made without notice was void. In that case it was claimed that the granting of a petition for rehearing cured the error in the making of the order without notice, but the court held otherwise.

[6] It is claimed that petitioner "waived any defect of notice by appearing and filing a subsequent petition for rehearing". On the petition for rehearing petitioner was not represented by an attorney at law but by the counsul for Finland, who appeared as petitioner's agent. In the petition the showing was made that the notice had been delayed in reaching petitioner. A bona fide, if not a strictly legalistic, showing, designed to excuse failure to come in within the ten days, was made. It cannot very well be held to be a waiver when a petitioner thus seeks to bring before the commission the reason why he has not appeared sooner. To hold that there was a waiver would mean that the petitioner had voluntarily relinquished his right to object to the failure to give him legal notice, and there is nothing in his petition to suggest this.

[7] For the reasons herein given we are satisfied that the notice required by law was not given to the petitioner in the proceedings now under review. That view renders it unnecessary to discuss other points urged by the petitioner.

The award is annulled.

We concur: PETERS, P. J.; WARD, J.

36 Cal.App.2d 346

STERNBECK v. VALINDER.

SNYDER et al. v. SAME.

Civ. 12317, 12316.

District Court of Appeal, Second District, Division 2, California.

Dec. 29, 1939.

1. Appeal and error 🔑659(2)

Where minute order of trial court which granted motions for new trials did not specify that the motions were granted on ground of insufficiency of evidence to sustain verdicts, and subsequently trial court made nunc pro tunc order which specified that the motions were granted because of insufficiency of evidence, plaintiffs' motion for diminution of record, on defendant's appeal from the orders to bring before the District Court of Appeal the nunc pro tunc order, was granted.

2. Appeal and error 🔑1015(2)

Where trial court granted motion for new trials on ground of insufficiency of evidence to sustain verdicts and there was substantial conflict in the evidence, District Court of Appeal would not disturb the trial court's ruling, but would dismiss appeal from orders granting new trials.

◆

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by Lydia Sternbeck, and by Joe Snyder and another, against David Valinder. Verdicts were for the defendant. From orders granting new trials to plaintiffs, defendant appeals. On plaintiffs' motions for diminution of record and to dismiss the appeal.

Motions granted.

Sigurd E. Murphy, of Hollywood, and Bernard E. Allard, of Los Angeles, for appellant.

Victor C. Rose, of Los Angeles, for respondent Lydia Sternbeck.

Peter T. Rice, of Los Angeles, for respondents Joe Snyder and Belle Snyder.

McCOMB, Justice.

Respondents move (1) for a diminution of the record to bring before this court a minute order of the trial court dated July 12, 1939, and (2) to dismiss the appeal on the ground that it is frivolous and taken for the purpose of delay.

(1) January 30, 1939, the trial judge granted respondents Joe and Belle Snyder's motion for a new trial and submitted Respondent Sternbeck's motion for a new trial, which was thereafter granted. The minute orders entered did not specify that the motions for new trials were granted on the ground of insufficiency of the evidence to sustain the verdicts. February 21, 1939, appellant appealed from the foregoing order. Thereafter on July 12, 1939, the trial court made the following order:

"In the Superior Court of the State
of California in and for the
County of Los Angeles

"Joe Snyder and Belle Snyder, Plaintiffs, v. David Volinder, et al., Defendants.
——
Lydia Sternbeck, Plaintiff, v. David Volinder, et al., Defendants.

No. 429808
Order Nunc
Pro Tunc

"George Dockweiler, Judge, presiding in Department 49 of the above court, in open session does, upon motion of the court, hereby order the entry nunc pro tunc in the records of this court the complete order heretofore made by this court in granting plaintiff a new trial by the addition to the minute order of the following words omitted by the Clerk of Court, to-wit:

" '* * * upon the ground of the insufficiency of the evidence to sustain the verdict'

"thereby making the order granting new trial to read as announced by this court on January 30th, 1939 when granting plaintiff's motion for new trial, to-wit:

" 'In case number 429808, Snyder, et al., Volinder et al., plaintiffs' motion for new trial is granted upon the ground of the insufficiency of the evidence to sustain the verdict.'

"Dated, June 29th, 1939, Dept. 49, Superior Court, Los Angeles, California.
"George A. Dockweiler
"Judge, Superior Court"

[1] It is to have the foregoing order of the trial court, which is applicable to both of the above entitled cases, made a part

of the record in this court that respondents make their motion for a diminution of the record. No valid reason has been urged by appellant in opposition to this motion. It appears to us that it should therefore be granted.

[2] (2) Respondents' motion to dismiss the appeal is predicated upon the rule of law that, where a motion for new trial is granted upon the ground of insufficiency of the evidence to sustain the verdict, an appellate court will not disturb the ruling of the trial court if the record discloses a conflict in the evidence, and an appeal from the order granting a new trial will under such circumstances be dismissed by the appellate court. Robbins v. Jenkins, 9 Cal.App.2d 580, 583, 50 P.2d 826. Applying the foregoing rule to the facts of the instant case, it appears that the trial court granted the motion for new trials on the ground of insufficiency of the evidence to sustain the verdicts; and it further appears that there is a substantial conflict in the evidence. Therefore, respondents' motion should be granted.

For the foregoing reasons the motions (1) for a diminution of the record and (2) to dismiss the appeal are and each is granted.

We concur: MOORE, P. J.; WOOD, J.

36 Cal.App.2d 462

MARSHALL et al. v. BALDY.

Civ. 6362.

District Court of Appeal, Third District, California.

Jan. 5, 1940.

Appeal and error 🔑627(2)

Where no transcript on appeal had ever been settled, and lower court had by order dismissed proceedings to obtain transcript, which order had never been modified, vacated, or set aside, appeal would be dismissed. Code Civ.Proc. § 953a; Supreme Court Rule 7.

Action by E. M. Marshall, Kelvel E. Marshall, and Mary Marshall, by her guardian ad litem, E. M. Marshall, against Pearl Baldy. From a judgment for defendant, plaintiffs appeal. On motion to dismiss appeal.

Appeal dismissed.

E. M. Marshall and Kelvel E. Marshall, for appellants.

Joseph Barcroft and David P. Barcroft, both of Madera, for respondent.

Mr. Justice TUTTLE delivered the opinion of the court.

Respondent moves to dismiss this appeal upon the ground that appellant has failed to file a transcript or to perfect the appeal.

The status of the matter is revealed by the following excerpt from a certificate filed by the clerk of the lower court, and made pursuant to rule VI of the Supreme Court: "Notice of appeal from said judgment was filed in said Superior Court by the plaintiffs on the 8th day of August, 1939. No demand for a transcript has ever been filed with the clerk by the plaintiffs, or either of them. No transcript on appeal has ever been settled under Section 953a of the Code of Civil Procedure, or at all, but on the contrary the judge of this Superior Court, on the 25th day of September, 1939, made an order terminating and dismissing the proceedings to obtain a transcript on appeal, which order is of record herein, and has never been modified, vacated or set aside, and at the time of making this certificate, is in full force and effect. There is no proceeding pending for the obtaining of a bill of exceptions for use on this appeal. The time in which any proceedings might be instituted for the obtaining of a bill of exceptions has expired."

The notice of this motion was filed in this court October 28, 1939. No attempt has been made since that time to proceed further with the appeal.

Appellants have filed a counter-affidavit, and also a motion to indefinitely set aside the motion of dismissal. They appear in propria personam. We find nothing in the affidavit which would excuse the failure to perfect the appeal. Appellants urge that the transcript was completed and presented to the trial judge and settled by him on September 13, 1939. On the other hand, the clerk of the superior court certifies that no transcript was ever settled, but on the contrary, upon motion of respondent, an order was made in the superior court terminating and dismissing the proceedings to obtain a transcript on appeal, which order is still in effect. We are inclined to hold that the clerk's version of the matter is the correct one. Not only does it appear that no proceedings were taken to procure the transcript under the provisions of rule 7 of the Supreme Court, but it also appears that the superior court has ordered a termination of appeal proceedings.

No legal excuse having been made for the failure to file the transcript, as required by law, and no transcript having been filed while this motion was pending, it is ordered that the motion be granted and the appeal dismissed.

We concur: PULLEN, P. J.; THOMPSON, J.

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36 Cal.App.2d 364

THURMAN et al. v. ICE PALACE et al.

Civ. 12336.

District Court of Appeal, Second District, Division 2, California.

Dec. 29, 1939.

Hearing Denied Feb. 26, 1940.

1. Theaters and shows 🔑6

A spectator at an ice hockey game, who voluntarily selected seat, on edge of rink, which was not protected by a screen, did not as matter of law assume risk of being struck by a puck used in the game, but it was question of fact to be determined by jury from all of the evidence whether those staging game were negligent in not providing either notices warning patrons of danger from flying pucks or screens to protect spectators in case puck should be driven above railing surrounding rink.

2. Evidence 🔑5(2)

It is not common knowledge that pucks used in ice hockey games are liable to be batted into section occupied by spectators.

3. Theaters and shows 🔑6

The average spectator at ice hockey game does not have knowledge that rubber puck used in game is liable to be batted into section occupied by spectators, so as to be held to have assumed risk of being hit by flying puck while observing game.

4. Theaters and shows 🔑6

In action for injuries sustained by spectator at ice hockey game when struck by flying puck, where there was no evidence showing that players were connected with management or shared in proceeds or had any interest in the venture, no recovery could be had as against them.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Mary Katherine Thurman, a minor, by her guardian ad litem, Robert M. Thurman, and Robert M. Thurman, against the Ice Palace, a corporation, and others, for injuries sustained by Mary Katherine Thurman when a spectator at a hockey match. From judgment for defendants, the plaintiffs appeal. Part of the defendants move to dismiss appeal or affirm judgment as to them.

Judgment in accordance with opinion.

Murchison & Clopton, of Los Angeles, for appellants.

Shattuck & Davis, of Los Angeles, for respondent Ice Palace.

Reginald I. Bauder, of Los Angeles, for respondents University of Southern California, Associated Students of the University of Southern California and Arnold Eddy.

James G. Scarborough and Don Petty, both of Los Angeles, for respondents Alfred Fitzgerald, Jerome Bernack, Fergus Rowland, Nathaniel Harty, Earl Robson, Howard Smith, Benny Novicki, L. S. Armstrong, John Mariucci, John Hokanson, Ray H. Wallace, Loane Randall and Richard Kroll.

McCOMB, Justice.

From a judgment in favor of defendants predicated upon the granting of their motion for a directed verdict in an action to recover damages for personal injuries caused by the alleged negligence of defendants, plaintiffs appeal.

There is also a motion of defendants Alfred Fitzgerald, Jerome Beranek, Fergus Rowland, Nathaniel Harty, Earl Robson, Howard Smith, Benny Novicki, L. A. Armstrong, John Mariucci, John Hokanson, Ray H. Wallace, Loane Randall, and

Richard Kroll to dismiss the appeal or affirm the judgment as to them.

The essential facts are:

March 24, 1938, Mary Katherine Thurman, aged eighteen and daughter of plaintiff Robert M. Thurman, suffered injuries when she was struck in the mouth by a hockey puck while watching an ice hockey match in a pavilion known as the Ice Palace. The Ice Palace was owned by the defendant Ice Palace, a corporation, which had entered into an agreement with the Associated Student Body of the University of Southern California for the playing of the ice hockey match, which plaintiff Mary Katherine Thurman was witnessing. This agreement provided for the division of the gate receipts between said defendants and granted to the defendant Associated Student Body of the University of Southern California the right to all proceeds from the printing and distribution of programs, reserving to defendant Ice Palace, a corporation, all concessions in and about the premises, including auto park, restaurant, shoe shine stand, and all games of amusement other than the ice hockey game, together with the exclusive right to all of the proceeds from the operation of said concessions and said games of amusement.

Defendant Arnold Eddy is graduate manager of defendant Associated Student Body of the University of Southern California. The balance of the defendants were players on the ice hockey teams.

The Ice Palace contained a rink in size, construction, and equipment conforming to the general custom and usage of such rinks prevailing throughout the United States and Canada. The skating surface was a sheet of ice approximately 194 feet long and 80 feet wide encompassed by a solid wooden wall three and one-half feet high. Tiers of seats for spectators surrounded the playing surface, those closest to the rink being box seats separated from the ice only by a wooden wall. A wire screen for the protection of spectators had been erected at each end of the rink. It extended upward from the wooden wall and for approximately 10 to 16 feet along both sides. The spectators' seats were approximately 160 feet along each side of the rink and were not protected by screens. There were no signs giving any warning of danger to spectators, although on prior occasions spectators had been struck by flying pucks during the playing of ice hockey games.

About ten minutes before plaintiff Mary Katherine Thurman received her injury, she entered the rink and was seated in a box on one side of the rink, which was unprotected by any wire screen. She had never seen an ice hockey game before and had not theretofore been in the Ice Palace. Shortly after she was seated, the puck, a hard rubber disk approximately three inches in diameter and one inch in thickness, was driven off the ice and struck plaintiff Mary Katherine Thurman in the mouth, causing serious personal injury.

[1] This is the sole question necessary for us to determine:

Does a spectator at an ice hockey game, who voluntarily selects a seat, which is not protected by a screen, on the edge of the rink, as a matter of law assume the risk of being struck by a puck used in the game?

This question must be answered in the negative. Although the state of New York holds to the contrary (Ingersoll v. Onondaga Hockey Club, Inc., 245 App.Div. 137, 281 N.Y.S. 505; Hammel v. Madison Square Garden Corporation, 156 Misc. 311, 279 N.Y.S. 815), we believe the correct rule of law to be that it is a question of fact to be determined by the jury from all of the evidence whether the defendants were negligent in not providing either notices warning patrons of danger from flying pucks or screens to protect the spectators in case a puck should be driven above the railing surrounding the rink. Shanney v. Boston Madison Square Garden Corp., 1936, Mass., 5 N.E.2d 1; James v. Rhode Island Auditorium, Inc., 1938, R.I., 199 A. 293, 294. A full discussion of the reasons for this rule, which it is unnecessary to repeat here, will be found in the Massachusetts and Rhode Island cases just cited.

[2] Defendants rely upon Quinn v. Recreation Park Ass'n, 3 Cal.2d 725, 46 P.2d 144. In that case the plaintiff was a high school student who was active in several kinds of athletics, including baseball. She had frequently attended professional baseball games at the baseball park at which the accident occurred and knew the frequency with which foul balls had been batted into the grandstand. The grandstand contained an unusually large number of screened seats, some in the section along the first-base line and some behind the home plate. The plaintiff asked the ticket seller for a screened seat near

first-base and not behind the home plate. When she reached the grandstand the usher escorted her to an unscreened seat near first-base, all of the screened seats on that side being occupied. At the time she was assigned to her seat there were a number of unoccupied screened seats in the section behind the home plate. During the game she was struck by a ball batted by one of the players. She admitted knowing that at the time she took the unscreened seat she would be in danger of being struck by a batted ball. In sustaining the action of the trial court in directing a verdict for the defendant the reviewing court said, 3 Cal.2d at page 729, 46 P.2d at page 146: "* * * The duty imposed by law is performed when screened seats are provided for as many as may be reasonably expected to call for them on any ordinary occasion (Wells v. Minneapolis Baseball, etc., Ass'n, 122 Minn. 327, 142 N.W. 706, 46 L.R.A. (N.S.) 606, Ann. Cas.1914D, 922; Brisson v. Minneapolis Baseball, etc., Ass'n, 185 Minn. 507, 240 N.W. 903); and if as in the cases of Wells v. Minneapolis Baseball, etc., Ass'n, supra, and Kavafian v. Seattle Baseball Club Ass'n, 105 Wash. 215, 177 P. 776, 181 P. 679, a spectator chooses to occupy an unscreened seat, or, as in the Brisson case, supra, is unable to secure a screened seat and consequently occupies one that is not protected, he assumes the risk of being struck by thrown or batted balls; and, if injured thereby, is precluded from recovering damages therefor. As aptly said in Cincinnati Baseball Club Co. v. Eno, 112 Ohio St. 175, 147 N.E. 86, it is common knowledge that in baseball games hard balls are thrown and batted with such great swiftness they are liable to be thrown or batted outside the lines of the diamond, and spectators occupying positions which may be reached by such balls assume the risk of injury therefrom."

It is not common knowledge that pucks used in ice hockey games are liable to be batted into the section occupied by the spectators. Indeed, the puck is ordinarily batted along the surface of the ice, but in a baseball game the ball is ordinarily batted into the air rather than along the surface of the playing field.

[3] The rule which has apparently uniformly been applied to baseball cases is, we believe, inapplicable to ice hockey games, for the reason that the average person of ordinary intelligence in this country is familiar with the game of baseball and it is reasonable to presume that such person appreciates the risk of being hit by a pitched or batted ball without being specifically warned of such danger. Hence a spectator at this nationally-known game may ordinarily be held to assume such a risk. However, the average person does not have the same knowledge respecting ice hockey or the risk of being hit by a flying puck while observing such a game. The game of ice hockey is practically a new one so far as the state of California is concerned and has only been played at regular intervals in this state for approximately twelve years last past.

[4] With reference to the defendants who move to dismiss the appeal or affirm the judgments, there is a total lack of any evidence showing that they were in any way connected with the management or shared in the proceeds or had any interest in the venture. Therefore, the judgment should be affirmed as to them.

For the reasons set forth above the judgment in favor of Ice Palace, a corporation, and Associated Student Body of the University of Southern California is reversed.

The motion to dismiss is denied and the judgment is affirmed as to the other defendants.

We concur: MOORE, P. J.; WOOD, J.

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36 Cal.App.2d 477

PEOPLE v. GRAF.

Cr. 1718.

District Court of Appeal, Third District, California.

Jan. 8, 1940.

Criminal law ⚿1182

A judgment of conviction of failure to provide for minor child would be affirmed where transcript on appeal was filed November 24, 1939, no brief had been filed in behalf of appellant, cause was regularly placed on calendar for oral argument on January 8, 1940, and no appearance was made for appellant at time case was called for hearing Pen.Code, § 1253.

Appeal from Superior Court, Lassen County; Ben V. Curler, Judge.

Henry Graf was convicted of failure to provide for his minor child, and he appeals.

Affirmed.

Grover C. Julian, of Susanville, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

PER CURIAM.

The appellant was convicted in the superior court of Lassen county of the crime of failure to provide for his minor child, a misdemeanor.

The transcript on appeal was filed in this court November 24, 1939. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on January 8, 1940. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code the judgment is affirmed.

36 Cal.App.2d 525

PEOPLE v. TEPPER.

Cr. 3254.

District Court of Appeal, Second District, Division 2, California.

Jan. 11, 1940.

1. Gaming 🔑98(5)

Evidence that accused was occupying vacant storeroom in which were found betting tab and national scratch sheet used in making bets on horse races, with fact that front door of room was locked and the condition of the room at the time of accused's arrest, sustained conviction of keeping a gambling room. Pen.Code, § 337a, subd. 2.

2. Gaming 🔑98(5)

In prosecution for keeping a gambling room, it was not necessary to establish by direct evidence the purpose for which room was being occupied, but the purpose could be gathered from all the surrounding circumstances shown in evidence. Pen.Code, § 337a, subd. 2.

McCOMB, J., dissenting.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Frank Tepper was convicted of violation of section 337a, subd. 2 of the Penal Code, and he appeals.

Affirmed.

Joseph L. Fainer, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Paul D. McCormick and Philip C. Jones, Deputy Attys. Gen., for respondent.

WOOD, Justice.

Defendant was charged by information with the crime of violation of subdivision 2 of section 337a of the Penal Code. At a trial before the court without a jury he was found guilty. He prosecutes this appeal from the judgment of conviction.

It is the contention of defendant that the evidence is insufficient to justify the conviction. By stipulation the case was submitted to the court upon a transcript of the evidence received at the preliminary examination. It appears from the transcript that the only witness testifying for the prosecution was J. F. Fitzpatrick, a police officer, who, according to the stipulation of the parties, is an expert in matters covered by the section of the code under which defendant was charged. Defendant did not testify and did not present any witnesses on his behalf. Officer Fitzpatrick testified that on March 23, 1939, at about 12:30 p. m. he went to the premises at 127 N. La Brea street in the city of Los Angeles, a vacant store building. The front door was locked and the witness went to the rear entrance. On entering he observed defendant seated at a table and a colored man named Smallwood was standing close to him. The furniture in the place consisted of two tables and six or eight chairs. The transcript shows the following testimony of the witness:

"A. Well, as I walked in the defendant was seated at the table at the far part of the store and I heard this one man say, 'One dollar to place on 409,' and when I got up there it was marked on this tab here in front of the defendant '409', and marked in the second column. I asked him what he was doing and he didn't answer my question. I said, 'You again?' He just looked at me.

"Q. You are referring to the top sheet of a pad you have here? A. Yes.

"Mr. Whichello: May that be marked A for identification?

"The Court: A for identification.

"Q. Which entry was it, that last one? A. Yes. I heard the colored man say that.

"Q. Is this a form with which you are familiar as a result of your experience in bookmaking? A. Yes.

"Q. What is it used for? A. Recording bets.

"Q. What does this 'E' mean. A. That is the initial of the apparent bettor.

"Q. '409'? A. That is the number of the horse.

"Q. And the mark under the 'B' and '1'? A. Would be in the 'place' column.

"Q. A dollar on that horse to place? A. That is what it signifies.

"Q. Did you check that number against any of the other things found there? A. Yes, I checked it with the National Scratch Sheet.

"Q. Was that there also? A. It was. I found it to be a horse by the name of Radio Gold running in the first race at Oaklawn Park."

The witness further testified that a pencil was in the hand of defendant, he being the only person present who had a pencil in his hand. No other person was near defendant.

[1, 2] The evidence is sufficient to justify the conviction. Under subdivision 2 of section 337a it was necessary for the prosecution to prove that defendant kept or occupied a room, or part of a room with a book, paper, or paraphernalia for the purpose of recording or registering a bet upon the result of a horse race. The court was justified in concluding that defendant was occupying the vacant storeroom for the purposes prohibited by the section in question. There is no indication that the room was occupied for any purpose other than that of recording or registering bets. After the officer entered the room he heard Smallwood saying, "One dollar to place on 409." According to the officer's testimony no reasonable conclusion can be reached but that Smallwood was placing a bet on the horse represented by the number 409. Immediately thereafter the officer observed that the entry of this bet had been placed on the betting tab in front of defendant. Since defendant was the only person holding a pencil the only reasonable conclusion to be reached is that defendant had made the entry on the tab. The presence of the betting tab and the National Scratch Sheet completed the necessary proof to establish the guilt of defendant of the charge on which he was being tried. It was not necessary for the prosecution to establish by direct evidence the purpose for which the room was being occupied. The purpose in keeping the room could be gathered from all the surrounding circumstances shown in evidence. People v. Tuttle, 27 Cal.App.2d 647, 81 P.2d 571, and cases there cited. The fact that the front door of the room was locked, the condition of the room at the time of defendant's arrest, and the presence of betting paraphernalia on the table are circumstances pointing directly to the conclusion that the storeroom was occupied for the purposes prohibited by the statute.

The judgment is affirmed.

I concur: MOORE, P. J.

I dissent: McCOMB, J.

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36 Cal.App.2d 478

DUNLAVY v. NEAD et al.

Civ. 6241.

District Court of Appeal, Third District, California.

Jan. 9, 1940.

Rehearing Denied Feb. 8, 1940.

Hearing Denied March 9, 1940.

See 99 P.2d 1044.

1. Negligence 🔑121(3)

Where flames enveloping can of gasoline which employee was removing from machine shop burned customer who was reentering back door of machine shop, doctrine of res ipsa loquitur applicable to cases of explosion did not apply, since ignition of the gasoline was not the "proximate cause" of the injuries.

[Ed. Note.—For other definitions of "Proximate Cause," see Words & Phrases.]

2. Negligence ⚷58

To constitute "proximate cause" creating liability for negligence, the injury must have been the natural and probable consequence of the negligent act, or the cause which, unbroken by any intervening, independent agency, naturally produces a given result.

3. Appeal and error ⚷1010(1)

Finding of trial court in negligence case is not to be overthrown unless it is very plain to the appellate court that the conclusion reached cannot be supported on any rational view of the testimony.

4. Negligence ⚷134(4)

In action by customer for injuries sustained from blazing can of gasoline which employee was removing from machine shop just as customer was re-entering machine shop by rear door, finding that owner of machine shop, foreman, and employee were free from negligence *held* sustained by the evidence.

◆

Appeal from Superior Court, Tuolumne County; J. T. B. Warne, Judge.

Action by Leo Dunlavy against H. C. Nead, H. H. Tweed, and Chris Valenzuala to recover damages for personal injuries arising out of the alleged negligence of defendants. From a judgment for defendants, plaintiff appeals.

Judgment affirmed.

Gumpert & Mazzera and J. Calvert Snyder, all of Stockton, for appellant.

Rowan Hardin, of Sonora, for respondents.

Mr. Justice TUTTLE delivered the opinion of the court.

This action was brought to recover damages for personal injuries arising out of alleged negligence of respondents. Upon a trial before the court, judgment was rendered for respondents, and appellant now appeals from such judgment.

Respondent Nead conducts a machine shop in the city of Sonora. This shop consists of the building where work is performed. At the rear of such building there is a door which opens into an area where respondent deposited junk from his shop, including scrap iron, bolts and nuts of various sizes. On the date of the accident appellant went to said shop for the purpose of having certain holes cut in a metal plate so that an engine could be bolted to it, using it as a foundation. While the foreman of respondent Nead (defendant Tweed), was working on the plate in the shop building, appellant, without being directed to do so, and of his own volition, went out the rear door mentioned above, got a nut from the junk pile outside, and started to enter the door. Just at that time a can of gasoline within the building caught fire, another employee of respondent Nead (defendant Valenzuala), put this flaming can out the rear door. Some of the flames enveloped appellant as he was about to enter the door, and burned his legs. It is alleged in the complaint that the injuries inflicted were permanent.

It is contended by appellant that there is no evidence to support the finding to the effect that respondents were free from negligence. In other words, he contends that the evidence adduced is reasonably susceptible of one construction only—that respondents were negligent. In the case of Vaughn v. Bixby, 24 Cal.App. 641–643, 142 P. 100, it is said: "Even if there be no conflict in the evidence, nevertheless, if the inferences fairly deducible therefrom are such that different conclusions might rationally be drawn therefrom by men equally sensible and impartial, the conclusion reached by the jury should be deemed final and not disturbed on appeal for want of sufficient evidence to justify the verdict. Herbert v. Southern Pacific Co., 121 Cal. 227, 53 P. 651; Hoff v. Los Angeles Pacific Co., 158 Cal. 596, 112 P. 53."

Appellant states that the doctrine of res ipsa loquitur applies to the case, and relies upon the rule laid down in Sistrunk v. Texas Holding Co., 88 Cal.App. 698, 264 P. 259, 261: "The effect of the doctrine when applied to this case is that proof of the injuries to the plaintiff, provided such injuries are shown to have been caused through the explosion or ignition upon the defendant's property of crude petroleum located thereon, which property and which petroleum were under the exclusive management and control of the defendant, created a prima facie case or presumption of negligence on the part of the defendant, which it is called upon to meet or rebut. This presumption that the injury or damage was caused by the negligence of the defendant is itself a fact which the jury must consider in determining its verdict, and which in the absence of any other evidence, and in the absence of contributory negligence, necessitates a verdict in favor of the plaintiff."

[1, 2] We are of the opinion that the rule laid down in the foregoing case is not applicable to the situation here, for the reason that the ignition of the gasoline was not the proximate cause of the injury. "To constitute proximate cause creating liability for negligence the injury must have been the natural and probable consequence of the negligent act. It is the cause which, unbroken by any intervening, independent agency, naturally produces a given result." 45 C.J. p. 911, par. 482. Additional facts relating to the ignition of the gasoline are as follows: Just prior to the fire, one of the employees of respondent Nead (defendant Valenzuala), was cleaning an engine with gasoline, a can of which was held in one of his hands. In the same shop another employee (defendant Tweed), was working upon appellant's order, and using an acetylene torch. The can of gasoline suddenly burst into flame, and the man who was holding the burning can in his hand went to the rear door and "put" the can outside the door. At that moment appellant started to enter the door, and the flames ignited his clothing. Defendant Valenzuala, who was working with the acetylene torch, testified that in his opinion the fire was caused by the torch, but there is no direct evidence of the cause of the ignition of the gasoline. If appellant had been standing inside the shop and was burned by the sudden fire, the doctrine of res ipsa loquitur could be invoked, following the Sistrunk case, supra, and the case of Faras v. Lower California Dev. Co., 27 Cal.App. 688, 151 P. 35. But this doctrine cannot be invoked as a rule of evidence in a case where the alleged act of negligence was not the proximate cause of the injury, and where there was an independent intervening agency—in this case, the act of the employee in setting the flaming fluid in the doorway. No injury would have resulted if such agency had not intervened. The proximate cause of the injury was not the ignition of the gasoline, but the act of the employee, as indicated.

[3, 4] As the doctrine mentioned is not available to appellant under such facts, it becomes necessary to consider whether or not the record is such that only one conclusion could be reasonably drawn therefrom—that respondents were negligent. The facts must be examined and construed in the light of the rule that "such finding is not to be overthrown on appeal, unless it is very plain to the appellate court that the conclusion reached cannot be supported on any rational view of the testimony". Lewis v. Lewis, 167 Cal. 732, 141 P. 367, 368, 52 L.R.A.,N.S., 675. If the evidence showed that defendant Valenzuala, who set the burning can in the doorway, knew that appellant was about to enter there, the position of appellant might be sustained. The record does not show such knowledge. The area reached by the doorway in the rear of the shop was not a part of the shop, and not a place where customers would ordinarily be found. It appears that appellant and an employee, a short time prior to the fire, had passed through the door to the junk pile mentioned, and that when appellant went out the last time, defendant Valenzuala testified: "I didn't pay attention if he (appellant) go out the door or not. I just see him go by." We believe that the trial court could reasonably conclude that the last-mentioned employee did not know that appellant had gone out the rear door, and necessarily it would follow that he did not know that appellant would be returning through the door when the can of burning gasoline was put just outside the doorway. The trial court could properly conclude that such employee acted in a prudent manner, and as a person of ordinary discretion would act. We are of the opinion that the trial court could reasonably infer, from the evidence, that such employee had no reason to believe that appellant was about to enter the doorway in question when the flaming can was placed there, and that there is sufficient evidence to support the finding in question.

It is unnecessary to discuss the question as to the status of appellant, and the contention of respondents that appellant was a mere licensee, and, as such, respondents owed him no duty except not to wilfully or wantonly injure him.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

36 Cal.App.2d 460

PEOPLE v. COON et al.

Cr. 3214.

District Court of Appeal, Second District, Division 1, California.

Jan. 8, 1940.

Rehearing Granted Jan. 19, 1940.

1. Larceny ⚷65

Evidence that member of fire department, with others, removed from cabins, which were destroyed by fire, personal property belonging to occupants, that value of property removed from one cabin was less than $200, whereas value of property removed from other exceeded $200, that the property was stored in a rented garage, and that firemen gave owners information implying that the property had been destroyed, sustained conviction for grand and petty theft.

2. Criminal law ⚷1144(13)

A review of the evidence introduced at trial would be made in light most favorable to accused.

3. Larceny ⚷65

Evidence that personal property removed by policeman and others from cabins which were burned exceeded $200 in value, that certain of the articles were stored in his garage, and that he made no effort to turn over the property to the proper authorities or to apprize them of its whereabouts, until several days had elapsed, sustained conviction of grand and petty theft.

WHITE, J., dissenting in part.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Carl C. Coon and Fred C. Zeismer were convicted of grand theft and of petty theft, and they appeal.

Affirmed.

Rehearing granted January 19, 1940, as to Zeismer only.

Joseph L. Fainer, of Los Angeles, for appellant Coon.

Arthur C. Verge and Walter Q. Loehr, both of Los Angeles, for appellant Zeismer.

Earl Warren, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

Appellants were charged jointly in an indictment containing two counts with the crime of grand theft, and were found guilty by the court sitting without a jury of the crime of grand theft and also of the crime of petty theft (a lesser offense than that charged in count one of the indictment but necessarily included therein). These appeals are prosecuted separately by the appellants from the judgments of conviction and appellant Zeismer also appeals from the order by which his motion for a new trial was denied.

The main point presented by the briefs of appellants is that the evidence is insufficient to sustain the judgments in that there is no evidence of any unlawful intent.

The record reveals that appellant Coon was a member of the Santa Monica fire department, having been employed as such for a continuous period of over nine years; that appellant Zeismer was a police officer of the city of Santa Monica, and the defendant Powers was employed by the Santa Monica police department as a painter of pedestrian crossings. On Wednesday, November 23, 1938, a brush fire was raging in the hills close to the Roosevelt Highway in the Malibu district north of Santa Monica, and during the afternoon of that day the fire jumped across the highway and destroyed several cabins along the waterfront, including a cottage occupied by one Parmenter, and another occupied by two young airplane hostesses, Thelma Weld and Kathleen Kay. On the day following the fire—Thanksgiving Day, certain personal belongings of Mr. Parmenter, which the trial court found to be of a value of less than $200, and certain personal belongings of the airplane hostesses, which the court found to be of a value of more than $200, were found to be missing. These articles of personal property were returned to the Santa Monica police station on the Monday following the fire and the three named defendants were charged with their theft.

The record further reveals the undisputed fact that the personal property charged to have been removed from the cottages which were destroyed by fire was taken by appellants Coon and Zeismer, defendant Powers and one Kenneth Hubbard, a sergeant of police of the Santa Monica police department, on the evening of November 23, 1938, loaded into Coon's car and driven away; also that a certain automatic refrigerator was taken from one of the cottages by appellant Coon and defendant Powers and placed near a cafe known as "Mike's Place" operated by the witness Trujillo. Later that night this refrigerator was moved from that place by appellant Coon and defendant Powers and placed in the kitchen of the latter's home. Most of the property taken consisted of wearing apparel and bedding, including a fur coat and a fur rug, and after he had removed it from the scene of the fire, appellant Coon was directed by the chief of police of Santa Monica, Charles Dice, to "take the stuff to the life guard station". Appellant Coon complied with this direction, but an hour or so later he returned and took it away from the said station, put it in his bluish green La Salle sedan and took it to his home where he placed it in a pile on the floor of the living room therein. That night, at the request of Kenneth Hubbard, who was appellant Zeismer's superior officer, appellant Zeismer called at appellant Coon's house and took some of the property away with him.

The next day, which was Thanksgiving Day, when appellant Coon was asked by the owners of the property what had become of it, he answered that he had brought it back to the scene of the fire and placed it in an overstuffed chair, apparently implying that it had been destroyed by the fire. On Sunday morning at the scene of the fire, he made the same statements to the owners of the personal property, and on Sunday afternoon he asked Mr. Trujillo to take the stuff back. Some time between Wednesday and the following Monday, appellant Coon and defendant Powers rented a garage and stored therein certain articles of the said personal property.

While it is earnestly contended by appellant Coon that he had legal possession of the articles which were taken from a hazardous place for the purpose of protecting them from the ravages of fire and that he never had any intention of keeping them as against the rightful owners, the facts above narrated are more compatible with the theory of guilt than of innocence. Moreover, such facts corroborate the statements made by appellant Coon to the officers to the effect that he and his codefendants intended to keep the property and divide it among them, although these statements were repudiated by him in his testimony at the trial. It must be concluded, therefore, that the evidence is sufficient to support the finding of the trial court that appellant Coon intended, at some time after he took the property and before it was returned, to appropriate it to his own use.

[1,2] A review of the evidence introduced at the trial in the light most favorable to appellant Zeismer shows that he arrived at the fire on November 23, 1938, in company with his superior officer, sergeant Kenneth Hubbard of the Santa Monica police department. After most of the goods had been removed from the two cabins occupied by Mr. Parmenter and the two airplane hostesses, appellant Zeismer and sergeant Hubbard entered one of the cabins and Zeismer removed therefrom two bags or suitcases which he placed in the police car in which he had arrived at the scene of the fire, and from which he later removed them to the Coon car because they interfered with the two-way radio in the back of the police car. Appellant Zeismer remained at the scene of the fire until late that day, returning to his home in the evening. Around 8:30 o'clock that night, sergeant Hubbard called him and asked him to go over to Coon's house to pick up the articles which said Zeismer and Hubbard had taken out of the fire. Appellant Zeismer at that time did not know where appellant Coon lived and Hubbard obtained the address for him, whereupon he proceeded to Coon's house and picked up some of the property and returned with it to his home, where sergeant Hubbard later met him and checked the items which were then in Zeismer's automobile and instructed him to take them to the detective bureau. Appellant Zeismer went back on duty later that night and worked until five o'clock the next morning, when he went home and slept until approximately noon, had dinner about 2:30 o'clock on Thanksgiving Day and later visited his mother in Los Angeles returning around 10:30 o'clock when he retired. The next day—Friday, was his day off duty, and he went to Los Angeles and attended to some business affairs, and on Saturday, when he again reported for duty, he took with him and left at the detective bureau certain articles which he had taken from the fire and had stored in his garage.

Appellant Zeismer contends that the foregoing resume of facts reveals (1) that he did not intend to appropriate any of the property which was salvaged from the houses of either Mr. Parmenter or the two airplane hostesses; (2) that the property was taken with the consent of the owners and was held for safekeeping and was turned over to the detective bureau at the first reasonable opportunity to do so; (3) that he was at no time guilty of any felonious appropriation of any property; and (4) that there is no evidence that the property which came into his possession, irrespective of felonious appropriation, was of a value in excess of $200.

[3] While it is true that the evidence shows that the two suitcases or bags which appellant Zeismer removed from the scene of the fire contained articles of little value, there is evidence to the effect that he had in his possession and under his control during the time in question other personal property belonging either to Mr. Parmenter or to the two airplane hostesses, and that the personal property which was missing after the fire had an aggregate value greatly in excess of $200. It was further shown that, although it seemed to have been generally known among members of the police and fire departments of the city of Santa Monica that a search was being made for the personal belongings of Mr. Parmenter and the two young women, appellant Zeismer did not make the slightest effort either to turn over to the proper authorities any of the property, which he had in his possession or under his control, or to apprize them of its whereabouts until several days had elapsed after the fire. It was not until the Monday morning following the fire that the personal property here involved was returned to its rightful owners. Lou Stedman, a motorcycle officer of the city of Santa Monica, testified that between nine and ten o'clock on the Sunday night (following the Wednesday when the fire occurred and the property was removed from the cabins), appellant Zeismer came to his house and said that "they had left some of this stuff over in his garage and what was he going to do about it"; and that "they" referred to officer Coon and Mr. Powers. Officer Stedman further testified:

"I told him I didn't want anything to do with it and I didn't know anything about it and for him to take the stuff to the Chief just as quick as he possibly could, if he had any of it in his garage. * * * He said that they had put some stuff in his garage but I don't recall whether he said they were bags, suitcases or what. * * *

"Q. You told him as you have related here that you did not want anything to do with it? A. Yes.

"Q. Did he say anything else after that? A. No, he said something about he did not want to be a stool pigeon or something, and so at that time I told him, 'Well, the only thing I can tell you to do is that you lay your cards on the table and get that stuff back where it belongs'."

On cross-examination, when questioned with reference to the foregoing conversation, officer Stedman testified:

"Q. And did you not say to him: 'Well, you fixed it up fine, the only thing I can tell you is to go and get the stuff and take it to the Chief and lay your cards on the table.'? A. Yes, sir, to that effect. * * *

"Q. And he said: 'I have some stuff in the garage', and you said 'What stuff?' and he said 'That stuff that came from the fire.'? A. Yes, that is right."

Taking into consideration all the facts and circumstances presented by the record before this court, there is sufficient evidence to support the finding of the trial court that there was criminal intent on the part of appellant Zeismer to deprive the rightful owners of their personal property.

For the reasons stated, the judgments and the order appealed from are, and each of them is, affirmed.

I concur: DORAN, J.

WHITE, Justice (concurring and dissenting).

I concur in the judgment affirming the conviction as to appellant Carl C. Coon, but I dissent from the judgment affirming the conviction of appellant Zeismer. As I view the record in this case, the evidence as to appellant Zeismer is extremely unsatisfactory as to either the issue of felonious intent or the value of the goods which came into Zeismer's possession being more than $200. The evidence clearly shows that appellant Zeismer arrived at the fire about 4 o'clock Wednesday afternoon, in company with his superior officer, Kenneth Hubbard, a sergeant of police of the Santa Monica police department. The fire was burning at that time and Zeismer and Hubbard carried out some articles of personal property, placing the same in a police radio car, from which, as was heretofore detailed, they were later removed and placed in appellant Coon's car, to be transported to the lifeguard station. Thus we see that the goods with which appellant Zeismer later became connected were transferred from the police car into the custody and keeping of appellant Coon. Later on the same evening Sergeant Hubbard called appellant Zeismer on the telephone and directed him to go to appellant Coon's house and pick up the articles which Zeismer and Hubbard had taken out of the fire earlier in the day. Appellant Zeismer was unacquainted with appellant Coon's address, whereupon Sergeant Hubbard obtained the address and Zeismer proceeded to the home of appellant Coon, picked up the property as directed by his sergeant, and returned the property to Zeismer's home, where Sergeant Hubbard later met appellant Zeismer and checked the items which were then in Zeismer's garage, after which he directed Zeismer to take them to the detective bureau. Sergeant Hubbard testified that when he checked the articles at the home of appellant Zeismer he found there all the property taken by him and Zeismer and noted the same as accounted for. In fact, it appears from the record that when Sergeant Hubbard went to Zeismer's home and asked the latter if all the property taken by Zeismer and Hubbard was there present, Zeismer answered in the affirmative, but asked Sergeant Hubbard to check the same, which the latter did. It appears from the testimony that the detective bureau at Santa Monica was not open at night, and that the following day, Thanksgiving Day, Zeismer was not on duty in the police department, nor was he on duty the day following, on which latter day he came to Los Angeles to attend to some business. It is at once apparent that there was no attempt at secrecy on the part of appellant Zeismer. He was at all times aware that his superior officer, Sergeant Hubbard, knew that the goods in question were at Zeismer's home. On Saturday, the first day after taking the goods upon which appellant Zeismer worked, he arrived at the police station with his automobile containing the articles in his possession and delivered the same to the office of Captain Lingo, where they remained until Monday, when they were delivered to the owners.

It cannot be gainsaid in the present case but what the original taking of the property by appellant Zeismer and his superior officer was lawful and done for the purpose of protecting the same from the fire. It was therefore incumbent upon the prosecution to show a subsequent appropriation or conversion of the property before appellant Zeismer could be convicted. This the prosecution, in my opinion, under the facts hereinabove outlined, failed to do. I am impressed with the fact that the evidence in this case is not even open to two equally reasonable conclusions, viz., one of guilt and one of innocence, but preponderates in favor of innocence, showing as it does a course of conduct not at all compatible with the ordinarily surreptitious activities of a thief. It is true, as stated in the main opinion, that it seemed to be generally known among members of the police and fire departments of the city of Santa Monica that a search was being made for the personal belongings of Mr. Parmenter and the two airplane hostesses, but in that connection it should be pointed out that appellant Zeismer was not on duty during the succeeding two days following the fire and he was apprized of the fact that his superior, Sergeant Hubbard, knew where the articles in question were located.

We come now to a consideration of the value of the articles which came into possession of appellant Zeismer, and which formed the basis of count two upon which appellant Zeismer was found guilty of grand theft. A search of the record by me for any testimony establishing the value of these articles proves fruitless. It is true that there is testimony in the record to the effect that all of the property lost by one of the airplane hostesses, Miss Weld, was reasonably worth $1,000, and there is evidence that the property belonging to Miss Kay which came into possession of appellant Zeismer was worth less than $50, but there is no testimony to show that the articles which came into possession of appellant Zeismer were worth $200 or any other sum in excess thereof.

The record is barren of any substantial evidence to show the existence of a conspiracy into which appellant Zeismer joined. The evidence falling far short of the quantum required in criminal cases to prove a felonious intent or appropriation on the part of the appellant Zeismer, or to establish that the value of the goods exceeded $50, the conviction as to him, in my judgment, should be set aside.

As to appellant Zeismer, in my opinion, the judgment and the order denying his motion for a new trial should be reversed and the cause remanded.

36 Cal.App.2d 503

EHRHART v. BOWLING et al.

Civ. 6233.

District Court of Appeal, Third District, California.

Jan. 10, 1940.

Hearing Denied March 8, 1940.

1. Mines and minerals 🔑38(22)

In unlawful detainer suit for wrongful taking of gold from mine, whether there had been a discovery by plaintiff and whether claim had been abandoned were for jury.

2. Mines and minerals 🔑18

Where locator in good faith and without injury to any one includes an excessive area within his lines, location is voidable only as to the excess.

3. Mines and minerals 🔑38(22)

In unlawful detainer suit by mine locator for wrongful taking of gold, locator's good faith in extending claim was for jury.

4. Mines and minerals 🔑27(1)

The distance of side lines from center line of a lode claim may be considered in connection with evidence of insufficient marking of lines, in determining whether a junior locator had notice of a senior location.

5. Trial 🔑296(1)

An instruction which is prejudicially erroneous is not cured by correct one if giving of the two must have misled jury.

6. Trial 🔑243

In unlawful detainer suit by mine locator for wrongful taking of gold, instruction that stakes and stone monuments at each corner of claim and at center of each end line is sufficient marking of boundaries was not erroneous as inconsistent with following instruction that where country is broken and obstructed it is necessary to blaze trees along lines or cut away brush and set more stakes at such distances that they may be seen from one to another.

7. Mines and minerals 🔑27(3)

Junior locators who passed senior locator's claims very often on way to place where junior locators were employed, and who knew that senior locator was endeavoring to develop lode claims, could not attack locations on technical grounds.

8. Mines and minerals 🔑26

One who has actual knowledge of claims of another to mineral lands cannot in good faith relocate land because of technical defect in making of location.

9. Mines and minerals 🔑51(5)

Where damages are sought for trespass upon mining property, amount to be awarded depends upon whether wrongful act was done willfully and with knowledge of violation of another's rights, or innocently and through wrongdoer's mistaken belief as to his right, in first case cost of extracting minerals being allowed as deduction.

10. Trial 🔑296(2)

In mine locator's action for forcible entry and unlawful detainer, instruction that in determining lawfulness of entry or subsequent holding of possession by defendant question of good or bad faith should not enter into consideration was not erroneous in view of other instructions showing how to determine amount of recovery in view of good or bad faith.

11. Mines and minerals 🔑38(25)

As respects amount of damages recoverable by mine locator suing for forcible entry and unlawful detainer, defendants' good faith in entering upon land and mining it in absence of plaintiff did not depend solely upon defendants' belief.

◆

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

Action in unlawful detainer by T. J. Ehrhart, Sr. against Tom Bowling and another for the wrongful taking of gold from a mine. From a judgment for plaintiff, defendants appeal.

Affirmed.

Charles P. Snyder, George F. Snyder, and Virgil M. Airola, all of San Andreas, for appellants.

Joseph H. Huberty, of San Andreas, for respondent.

DEIRUP, Justice pro tem., delivered the opinion of the court.

Plaintiff located the New Ford Quartz Mine on July 25, 1928, and on January 28, 1931, he extended the claim in an easterly direction by locating the East Extension of the New Ford Quartz Mine. On March 19, 1938, defendants located the Oregon Fraction Claim and proceeded to sink a shaft and take out gold therefrom. Plaintiff brought this suit in unlawful detainer. A jury rendered a verdict in favor of plaintiff for the possession of the land and for damages in the sum of $1,136, this being the amount of gold admittedly extracted by defendants without deduction for the cost of mining. Motions for a directed verdict, for judgment notwithstanding the verdict and for a new trial were denied. Defendants have appealed from the judgment.

The Oregon claim intersects the East Extension diagonally, but as to the part of the lode from which the gold was taken the Oregon is the junior location. No question of failure to do assessment work is involved, for plaintiff had filed his notice of intention to hold the claim for the year 1938–39 as well as for previous years.

[1] Defendants contend that it was proven at the trial that there had been no discovery upon the East Extension and also that the claim had been abandoned. As to these contentions, there was a conflict in the evidence which was resolved in plaintiff's favor by the verdict of the jury. The defendants further contend that the lines were not distinctly marked upon the ground, so that they could be readily traced. They rely not only on the nature of the monuments and markings, but also upon the difficulty in tracing such lines as existed in view of the fact that certain ones were too long. The location notice called for 1,500 feet along the course of the vein and 300 feet on each side, but a survey disclosed that the center, north and south lines were respectively 1,700, 1,615 and 1,970 feet and the end lines 675 and 420 feet.

[2, 3] Where the locator in good faith and without injury to anyone includes an excessive area within his lines, the location is voidable only as to the excess. Gobert v. Butterfield, 23 Cal.App. 1, 136 P. 516. The verdict of the jury is conclusive as to the good faith of the plaintiff, and the portion of the East Extension claim that has been mined by the defendants is near the center line of the claim. Therefore, the fact that an excessive area was included within the lines is not, as such, material.

[4] It has been held, however, that the distance of the side lines from the center line of a lode claim may be considered in connection with evidence of insufficient marking of the lines in determining whether a junior locator had notice of a senior location. Madeira v. Sonoma Magnesite Co., 20 Cal.App. 719, 130 P. 175, 178. In that case it is said:

"It does not follow that the location is invalid where the locator includes within the boundaries of his claim more than the law permits. 'He is entitled nevertheless to hold to the limit which the law authorizes within the limits laid out, and only the territory embraced within his boundaries which is in excess of these limits is to be rejected.' McElligott v. Krogh, 151 Cal. 126, 90 P. 823. This rule presupposes a location which 'injures no one at the time it is made, and where it has been made in good faith.' Lindley on Mines, § 362. The mere fact, then, that, in establishing his exterior boundaries, the locator has marked out too great a quantity of land, does not necessarily invalidate his location. Where, however, the locator relies upon the corners he has established or has attempted to mark as indicia of the location of the lode or ledge, a different question may arise and a different rule may govern. If the courses are so widely separated from where they ought to be as to bear no apparent relation to the lode, i. e., are so remote as to justify a reasonable inference by one seeing the corners that they were not intended to apply to the lode in question, they would add little, if any, force to the claim that the law had been complied with. And this would be especially true if the notice once posted at the discovery point had disappeared or the lode line was not distinctly marked. 'If the preliminary notice is wanting, there would be nothing to guide the subsequent locator, and the excessive location should be held worthless for any purpose.' Ledoux v. Forester (C.C.) 94 F. 600.

"A subsequent locator coming on the ground and finding an uncertain marking of the discovery point and lode line, and yet sufficient to arouse inquiry and require examination for exterior boundaries, would not be required to go much, if any, beyond the lateral limits to look for corners or other markings of the boundaries; and certainly he would not be charged with notice where the markings of the corners were so far from where they properly belonged; so obscure and lacking in permanency as in the present instance, and in a country densely covered with chaparral, and where the corners were not indicated by blazing of trees or cutting out of brush or otherwise marking their location."

Defendants contend that the facts in the present case are similar to those in the one last cited in respect to the excessive area within the lines, the nature of the markings and the character of the terrain, and that the trial court committed prejudicial error in giving the following instructions to the jury:

"The mining statutes do not prescribe any particular or designated manner in which a location shall be marked; but it is settled that any visible marking on the ground whether by stakes, monuments, mounds or written notices claim marked can be readily traced is sufficient."

"You are further instructed that stakes and stone monuments at each corner of the claim and at the center of each end line is a sufficient marking of the boundaries and is all that the law requires for a complete compliance with the statute in this respect."

"Where the country is broken and the view from one corner to the other is obstructed by intervening gulches and timber and brush, it is necessary to blaze trees along the lines or cut away the brush and set more stakes at such distances that they may be seen from one to another, or dig the ground up in a way to indicate the lines so that the boundaries may be readily traced."

The third instruction quoted was offered by the defendants, but they contend that it is inconsistent with the second, that the second is erroneous (Taylor v. Middleton, 67 Cal. 656, 8 P. 594) and that the jury may be presumed to have been misled.

[5, 6] It is true that an instruction which is prejudicially erroneous is not cured by one which is correct if the giving of the two must have misled the jury. Pittam v. City of Riverside, 128 Cal.App. 57, 16 P.2d 768; Buttrick v. Pacific Electric R. Co., 86 Cal.App. 136, 260 P. 588; Torvend v. Patterson, 136 Cal.App. 120, 28 P.2d 413; Starr v. Los Angeles Ry. Corp., 187 Cal. 270, 281, 201 P. 599. But we cannot see how the jury could have been misled to the prejudice of the defendants by the giving of the instructions, for one cannot read the three without realizing that the third explains and qualifies the rule stated in the first and second.

[7, 8] There is, however, a clear distinction between the facts in the present case and the ones under discussion in the case of Madeira v. Sonoma Magnesite Co., supra. In that case the senior locator had done no work upon the claim up to the time of the junior location. There was nothing to indicate to the junior locator that there existed a senior location other than the monuments, and the appellate court affirmed the judgment of the trial court in view of the peculiar circumstances of the case. Here the plaintiff had worked on the claim for years, though not to a great extent. He had resided for some months each year in a cabin on his New Ford claim, close to the East Extension. The defendants had passed his claims very often on the way to the place where they were employed and were well acquainted with plaintiff. They knew that he had located and was endeavoring to develop both lode claims. Having this actual knowledge they could not attack the locations on technical grounds. It is well settled that one who has actual knowledge of the claims of another to mineral land cannot, in good faith, relocate the land because of technical defects in the making of the location. Stock v. Plunkett, 181 Cal. 193, 183 P. 657; Kramer v. Sanguinetti, 33 Cal.App.2d 303, 91 P.2d 604; Dennis v. Barnett, 30 Cal.App.2d 147, 85 P.2d 916; Kern Oil Co. v. Crawford, 143 Cal. 298, 76 P. 1111, 3 L.R.A.,N.S., 993. It is true, as counsel for the parties point out, that there is a conflict in the evidence in respect to the good faith of the defendants in relocating the land but we are bound by the implied finding of the jury on this point.

[9] Plaintiff brought this action for forcible entry and unlawful detainer and asked for treble damages. In awarding as damages the value of the gold proven to have been taken from the property without deducting the cost of mining and milling, the jury, in effect, awarded punitive damages. Lightner Mining Co. v. Lane, 161 Cal. 689, 120 P. 771, Ann.Cas.1913C, 1093. The great weight of authority is to the effect that in such actions as this, where damages are sought for trespass upon mining property, the amount to be awarded depends upon whether the wrongful act was done wilfully and with knowledge of the violation of another's rights, or innocently and through the wrongdoer's mistaken belief as to his rights. In the one case the cost of extracting the mineral is allowed as a deduction; in the other case it is not. Lightner Mining Co. v. Lane, supra; Union Oil Co. v. Reconstruction Oil Co., 20 Cal.App.2d 170, 66 P.2d 1215; 18 R.C.L. 1256; Pittsburgh & W. Va. Gas Co. v. Pentress

Gas Co., 84 W.Va. 449, 100 S.E. 296, 7 A. L.R. 901, and note.

[10] The following instruction was given the jury by the trial court: "I instruct you that in determining the lawfulness or unlawfulness of the entry, if any, or the subsequent holding of possession, if at all, by the defendant, that the question of their good faith or their bad faith should not enter into your consideration because good or bad faith is of no concern and does not constitute an element of defense or affect plaintiff's right, if any, to recover."

In Lightner Mining Co. v. Lane, supra, it is said [161 Cal. 689, 120 P. 779, Ann.Cas. 1913C, 1093]: "Instruction 9 was to the effect that 'the right of the plaintiff to recover is not at all affected by the fact that the trespass was not willful.' This would be technically correct if it meant only that the plaintiff could recover compensatory damages for a trespass not wilfully made. The right to recover exemplary damages would be affected by the fact that the trespass was willful, if by a willful trespass is meant a fraudulent or malicious trespass. But the right to recover compensatory damages is not affected by the fact that the trespass was not willful. Maye v. Yappen, 23 Cal. 306. Hence the giving of the instruction could be prejudicial only with regard to punitive damages included in the verdict, and the error can be sufficiently cured by reducing the judgment to the amount of damages allowed as compensation."

Defendants contend that the instruction which we have quoted had the same effect as the one in the Lightner case and constituted prejudicial error, in view of the fact that the jury did award punitive damages. However, this instruction was given among other instructions that had to do with the right of the plaintiff to recover possession, while in the Lightner case the only issue involved was one of damages. In reference to the amount which the jury might award the plaintiff the following instruction was given:

"You are instructed that if you should find from the evidence in this case that the plaintiff, Ehrhart, was, at all times mentioned in said complaint, the owner and entitled to the possession of the property in question and that the defendants, without right, converted such property to their own use to the damage and detriment of plaintiff, then I instruct you that the general rule of damages with reference to such circumstances is that the plaintiff is entitled to recover the amount which will compensate him for all the injury or detriment proximately caused by such conversion and appropriation.

"And in this connection, you are instructed that the measure of damages, if any, which are to be awarded shall be governed by the following rule: If you should find that the plaintiff, Ehrhart, was the owner of such mine, and that the same was invaded by the defendants, Smith and Bowling, as the result of an honest mistake and inadvertence, the measure of damages would be the value of the mineral extracted from the ore, less the cost of production, but if you should find that such invasion, if any, was intentional and with knowledge of plaintiff's rights, then I instruct you that the measure of damages would be the value of the mineral extracted from the ore, without any deduction for expenses of mining, milling or production."

The jury could not have been misled by the instructions which we have quoted. The first one correctly states in effect that the plaintiff's right to recover is irrespective of good or bad faith, while the second shows clearly how to determine the amount of the recovery, in view of the good faith or the bad faith of the defendants, as the case might be.

[11] It was for the jury to determine whether or not the defendants acted in good faith. It may be that defendants believed that the East Extension, which they admittedly knew was claimed by plaintiff, had not been located in such a manner as to comply with the mining laws. But their good faith in entering upon the land and mining it in the absence of the plaintiff does not depend solely upon their belief. As was said in the case of Pittsburgh & W. V. Gas Co. v. Pentress Gas Co., supra (84 W.Va. 449, 100 S.E. 298, 7 A.L.R. 901]: "Why should one be treated as acting in good faith when dealing with property as his own, when he knows all of the facts which constitute his claim, as well as the claim of his adversary, which facts, when properly construed, give him no title to the land? Such a holding would make every man a judge of the law in his own case, instead of being bound by the law as interpreted by those charged with that duty. We must therefore conclude that the defendants, when they drilled the wells on

these lands, were willful trespassers, just as much so as though there had been no question but that the plaintiffs had the superior right. They could not decide the disputed question in their own favor, and then proceed with the hope that their acts would be characterized by this court as in good faith, even though their judgment upon the law of the case should not be approved."

Our conclusion is that the judgment is supported by sufficient evidence and that the record is free from reversible error.

The judgment is affirmed.

We concur: THOMPSON, Acting P. J.; TUTTLE, J.

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36 Cal.App.2d 586

PEOPLE v. RASMUSSEN.

Cr. 1702.

District Court of Appeal, Third District, California.

Jan. 16, 1940.

Appeal and error 🔑770(1)

Where appellant who was granted 15 days' time within which to file opening brief failed to file brief within required time, cause was submitted upon the record.

◆

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Proceeding by the People of the State of California against Arthur O. Rasmussen. From a judgment for plaintiff, defendant appeals.

Affirmed.

A. J. Carlson, of Modesto, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

PER CURIAM.

This cause was ordered placed upon the December, 1939, calendar for hearing and submission. There being no appearance of counsel and no brief on file for appellant at the time for the hearing, the court directed that the said appellant be granted fifteen days' time within which to file an opening brief herein. The cause was submitted upon the record upon the failure of appellant to file the said brief within the required time.

We have, however, made a careful examination of the record and find no merit in the appeal. The judgment is, therefore, affirmed.

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36 Cal.App.2d 403

WEST v. GREAT WESTERN POWER CO. OF CALIFORNIA et al.

Civ. 6145.

District Court of Appeal, Third District, California.

Jan. 2, 1940.

Rehearing Denied Feb. 1, 1940.

Hearing Denied Feb. 29, 1940.

1. Limitation of actions 🔑99(1)

The right to relief against fraud after expiration of three years from time when fraud was committed is an exception to the general statute and cannot be asserted unless the plaintiff brings himself within terms of the exception. Code Civ.Proc. § 338, subd. 4.

2. Limitation of actions 🔑177(3)

The failure to discover the facts constituting fraud until within three years prior to commencing action for relief therefrom is an element of plaintiff's right of action and must be affirmatively pleaded by him when action is commenced after expiration of three years from time that the fraud was committed. Code Civ.Proc. § 338, subd. 4.

3. Limitation of actions 🔑199(2)

"Discovery" and "knowledge" are not convertible terms, and whether there has been a "discovery" of facts constituting fraud within statute providing that cause of action for relief from fraud shall not accrue until "discovery" thereof is a question of law to be determined by the court from the facts pleaded. Code Civ.Proc. § 338, subd. 4.

[Ed. Note.—For other definitions of "Discovery" and "Knowledge," see Words & Phrases.]

4. Limitation of actions ⚷179(2)

One seeking equitable relief from fraud after expiration of three years from time fraud was committed must do more than merely aver that he did not discover the fraud until within three years prior to commencing action but must aver the facts from which the conclusion follows. Code Civ. Proc. § 338, subd. 4.

5. Limitation of actions ⚷179(2)

One seeking equitable relief from fraud after expiration of three years from time when fraud was committed must do more than merely aver that he was ignorant of the facts at time of their occurrence and had not been informed of them until within three years prior to commencing action but must show that the acts of fraud were committed under such circumstances that he would not be presumed to have had any knowledge of them and must show the circumstances under which the facts constituting the fraud were brought to his knowledge so that court may determine whether discovery of the facts was within time alleged. Code Civ. Proc. § 338, subd. 4.

6. Limitation of actions ⚷100(13)

Means of knowledge are equivalent to knowledge, and hence if it appears that one seeking equitable relief from fraud after expiration of three years from time when fraud was committed had prior to expiration of the period, the notice or information of circumstances which would put him on inquiry which, if followed, would lead to knowledge, or that the facts were presumptively within his knowledge, he will be deemed to have had actual knowledge so as to be precluded from maintaining the action. Code Civ.Proc. § 338, subd. 4.

7. Limitation of actions ⚷100(13).

Whether one seeking equitable relief from fraud after expiration of three years from time fraud was committed had knowledge of sufficient facts to excite inquiry so as to preclude maintenance of action after expiration of the three years depends on the circumstances. Code Civ.Proc. § 338, subd. 4.

8. Limitation of actions ⚷100(13)

The means of knowledge which were available to one who seeks equitable relief from fraud after expiration of three years from time fraud was committed must have been available and of such character that a prudent man might have been expected to take advantage of them and circumstances that are dubious are not sufficient to take the place of actual notice so as to preclude maintenance of action. Code Civ.Proc. § 338, subd. 4.

9. Notice ⚷6

It is only when inquiry becomes a duty that knowledge of facts will in law put a person on inquiry to ascertain the ultimate facts of which he is presumed to have notice. Civ.Code, § 19.

10. Limitation of actions ⚷199(2)

Whether one has notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact and whether, by prosecuting such inquiry, he might have learned of such fact in time to bring action for relief from fraud within required three year period, are questions of fact for jury or trial court. Code Civ.Proc. § 338, subd. 4; Civ.Code, § 19.

11. Appeal and error ⚷989

Where it was alleged that evidence was insufficient to support court's findings that fraud in sale of stock was not discovered until within three years prior to bringing action, the District Court of Appeal was required to scrutinize the record in light of rule that it is only when sufficiency of evidence is presented as a question of law that the court will examine the evidence and that when it is satisfied that substantial evidence supports verdict or finding, examination will cease. Code Civ.Proc. § 338, subd. 4.

12. Limitation of actions ⚷100(13)

One who was induced to purchase stock by fraudulent representations had no duty by reason of his status as a stockholder to inspect books of the corporation, so as to be precluded, by reason of his failure to do so, from maintaining action for damages after expiration of three years from time that fraud was committed but within three years of alleged discovery thereof, in absence of facts which would have caused him to make such inquiry. Code Civ.Proc. § 338, subd. 4.

13. Limitation of actions ⚷100(13)

The alleged fact that one who was fraudulently induced to purchase stock in canal company subsequently signed contracts with company reciting that shares would be transferred rather than issued to him did not charge purchaser with knowledge that company was not controlled by land-owning water users as represented so as to preclude maintenance of action for damages after expiration of three years from that date. Code Civ.Proc. § 338, subd. 4.

14. Limitation of actions ⚷197(2)

In action for damages from alleged fraudulent representations inducing purchase of stock, evidence sustained finding that purchaser did not discover the alleged fraud until within three years prior to bringing action, so that he was not barred by limitations from maintaining the action, though it was commenced after expiration of three years from commission of the fraud. Code Civ.Proc. § 338, subd. 4.

15. Fraud ⚷22(1)

Whenever a positive representation of fact is made, the party receiving it is in general entitled to rely and act upon it and need not verify it by an independent investigation.

16. Fraud ⚷58(4)

Where a representation is made of facts which are or may be assumed to be within knowledge of the party making it, the knowledge of the receiving party concerning the real facts which shall prevent his relying on and being misled by it must be clearly and conclusively established.

17. Limitation of actions ⚷99(1)

A positive representation of certain facts by sellers would preclude application of limitations as bar to maintenance of action by buyer for damages from alleged fraudulent representations in sale of stock, notwithstanding expiration of three years from time fraud was committed. Code Civ. Proc. § 338, subd. 4.

18. Constitutional law ⚷249

In action for damages from alleged fraudulent representations in sale of stock, finding that sellers had knowledge of the falsity of their representations whereas buyer did not have such knowledge would not deny equal protection of the law though means of knowledge were alleged to have been equally available to both parties. U.S.C.A.Const. Amend. 14, § 1.

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Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Action by R. V. West against Great Western Power Company of California and another for damages from alleged fraudulent representations in sale of stock. Judgment for plaintiff denied plaintiff's right to recover interest on interest payments made by plaintiff, and defendants and the plaintiff appeal.

Reversed and cause remanded for retrial on issue of the amount of damages due.

Thos. J. Straub, W. R. Dunn, and Eustace Cullinan, all of San Francisco, Jerome D. Peters, of Chico, and Geo. F. Jones, of Oroville, for appellants and respondents.

Ware & Ware, of Chico, for respondent and appellant.

PER CURIAM.

This is an action to recover damages arising out of alleged fraudulent representations made by defendants with respect to the sale of shares of stock. The issues were tried before the court, findings were duly entered in favor of plaintiff upon all of such issues, and judgment was rendered against defendants in the sum of $1,653.66. The appeal is taken from the judgment.

Plaintiff also appeals from "that part and portion of said judgment in which the trial court found, determined and adjudged that plaintiff was not entitled to recover interest from defendants on interest payments, from the respective dates of payment, paid by plaintiff and received by defendants on account of the purported purchase of stock of defendant Western Canal Company".

This case is companion to Goodspeed et al. v. Great Western Power Company et al., 33 Cal.App.2d 245, 91 P.2d 623, 92 P.2d 410, decided by this court on the 8th day of June 1939. It arises out of the same general situation, and presents the same issues, with the exceptions hereinafter noted. We refer to that opinion for a statement of facts. We also adhere to that opinion upon all questions expressly disposed of or necessarily involved therein. Only questions not raised in that case will receive our attention here.

The questions of the *right* of plaintiff to recover, generally, upon substantially the same record, and the right to interest, are fully disposed of in her favor in the Goodspeed case mentioned above, with the sole exception of the contention here made that such recovery is barred by the statute of limitations. Since the argument of this cause and with the permission of the court, defendants have also filed a "statement of constitutional grounds for not following the Goodspeed case", in which case, however, that question was not presented for our consideration.

It is the contention of defendants that this action is barred by the provisions of subdivision 4, section 338 of the Code of Civil Procedure, which reads as follows: "An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

[1-6] The fraudulent representations which constitute the gravamen of the action were all made on or prior to January 1, 1925, while the action was not commenced within November 14, 1932. It thus appears that the complaint was not filed until the three-year period designated by the statute quoted above. The general rule governing such a situation is stated in the case of Lady Washington C. Co. v. Wood, 113 Cal. 482, 45 P. 809, 810, to be as follows:

"The right of a plaintiff to invoke the aid of a court of equity for relief against fraud, after the expiration of three years from the time when the fraud was committed, is an exception to the general statute on that subject, and cannot be asserted unless the plaintiff brings himself within the terms of the exception. It must appear that he did not discover the facts constituting the fraud until within three years prior to commencing the action. This is an element of the plaintiff's right of action, and must be affirmatively pleaded by him in order to authorize the court to entertain his complaint. 'Discovery' and 'knowledge' are not convertible terms, and whether there has been a 'discovery' of the facts 'constituting the fraud,' within the meaning of the statute of limitations, is a question of law to be determined by the court from the facts pleaded. As in the case of any other legal conclusion, it is not sufficient to make a mere averment thereof, but the facts from which the conclusion follows must themselves be pleaded. It is not enough that the plaintiff merely avers that he was ignorant of the facts at the time of their occurrence, and has not been informed of them until within the three years. He must show that the acts of fraud were committed under such circumstances that he would not be presumed to have any knowledge of them,—as that they were done in secret, or were kept concealed; and he must also show the times and the circumstances under which the facts constituting the fraud were brought to his knowledge, so that the court may determine whether the discovery of these facts was within the time alleged, and, as the means of knowledge are equivalent to knowledge, if it appears that the plaintiff had notice or information of circumstances which would put him on an inquiry which, if followed, would lead to knowledge, or that the facts were presumptively within his knowledge, he will be deemed to have had actual knowledge of these facts."

[7-9] The following appears in 46 C.J., pages 546-547, with reference to the application of the foregoing rule:

"As to what will be a sufficiency of facts to excite inquiry no rule can be very well established. Each case depends upon its own facts or circumstances. There is a great inconsistency in the cases upon this point. A few guiding principles, however, have been recognized by the courts, and are here discussed. It may be premised that the means of knowledge must be available and of such character that a prudent man might be expected to take advantage of them. There must appear in the nature of the case such a connection between the facts discovered and the further facts to be discovered that the former may be said to furnish a reasonable and natural clue to the latter. Circumstances that are dubious or equivocal are not sufficient to take the place of actual notice. But a notice sufficient to put a person on inquiry need not contain complete information on every fact material to his knowledge. The circumstances must be such that the inquiry becomes a duty, and the failure to make it a negligent omission. It is only when inquiry becomes a duty that knowledge of facts will in law put a person on inquiry to ascertain the ultimate facts of which he is presumed to have notice. The rule applies when the circumstances of the case impose the duty of a reasonable inquiry, even though it is not required by the express mandate of the statute. The knowledge which one obtains, and the possession of which is urged as being sufficient, to require further inquiry by such person, must be directly related to the ultimate knowledge in question; to charge a party with notice of a fact which could have been ascertained by inquiry, the circumstances known to him must have been such as ought reasonably to have suggested inquiry, and led him to inquire. The rule imputes notice only of those facts that are naturally and reasonably connected with the fact known, and of which the known fact or facts can be said to furnish a clue. It does not impute notice of every conceivable fact and circumstance however remote which might come to light by exhausting all possible means of knowledge."

It is also the law that "he who practices bad faith ought not to be permitted to invoke the doctrine of constructive or imputed notice in aid of his wrongdoing, unless negligence on the part of the injured party has supervened". 46 C.J. p. 545. It has been held in this state that "the circumstances must be such that the inquiry becomes a duty, and the failure to make it a *negligent omission*". (Italics ours.) Tarke v. Bingham, 123 Cal. 163, at page 166, 55 P. 759, at page 760. "The known facts must be such that to a person of ordinary care and prudence further inquiry would not only be suggested but *imperatively demanded*, to the end that the truth with reference to the main fact may be disclosed." (Italics ours.) Zeller v. Milligan, 71 Cal. App. 617, page 624, 236 P. 349, at page 352. The general rule laid down above is but a declaration of the equitable rule enunciated in section 19 of the Civil Code, as follows: "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact." Tarke v. Bingham, supra.

The trial court found that the action was not barred by the provisions of subdivision 4, section 338 of the Code of Civil Procedure. It further found more specifically upon the matter of discovery of the fraud as follows:

"That plaintiff never learned that any of the representations made by defendants, as herein found, were untrue and had no knowledge of the fact that either of said stock purchase contracts was invalid, unlawful or void or that defendants were public utilities, acting together in the furnishing of water for irrigation, as herein found, or that either of them was such public utility, until after December 21, 1931, and the facts, circumstances and reasons under and because of which plaintiff remained so in ignorance, and the circumstances under which plaintiff finally discovered the truth regarding said representations were and are as follows: That plaintiff, as contracting purchaser of stock in said Canal Company, or otherwise, never had any notice, or knew of the time of any stockholders' meeting of said Canal Company, and no report as to the condition or affairs of said Canal Company was ever made to plaintiff, or to any other stockholder, contracting purchaser of stock, water-user or land owner; that only four stockholders' meetings of said Canal Company were ever held since its incorporation in the year 1915; that plaintiff never attended any stockholders' meeting of said Canal Company, and the only business ever transacted at any stockholders' meeting of said Canal Company was the election of directors and adoption of by-laws of said Company; that the total issued shares of capital stock of said Canal Company was 200,000 shares; that plaintiff never was a director or an officer of either of said defendants; that plaintiff never examined or was informed concerning any of the books, records, contracts or business of either of said defendant corporations, save as herein expressly found, and had no knowledge of the contents or character thereof, and had no reason or cause to think or suspect that said Canal Company was not a separate and independent corporate entity and a mutual water company, or that any examination of the records of said Canal Company would or could reveal that said company was not a mutual company, or that any of said representations so made by defendants were untrue; that the officers and directors of the Canal Company as such occupied a relationship of special trust and confidence in relation to plaintiff, at all times after the execution of the first of said contracts, and that as such contracting purchaser of stock, plaintiff reposed, and had a right to repose in said officers and directors special trust and confidence, and relied upon all of the acts and representations made by them; that the said representations and statements so made, as herein found, were made by and through directors and officers and agents of said Canal Company, and that plaintiff wholly believed said representations to be true, and that there was no fact or circumstance that plaintiff knew, or that came to his knowledge, notice or attention that caused him, or that would or should have caused him, or any person of ordinary prudence, to believe or suspect that any of said representations or statements made, as herein found, were untrue in any respect, until the time of the discovery of the true facts in regard thereto, as hereinafter found; that the articles of incorporation of said Canal Company at all times declared that it was a mutual water company; that the by-laws of said Canal Company at all times so pretended and asserted; that all of its stock certificates, stock purchase contracts and other official documents, communications and representations at all times and continuously represented and averred that it was a mutual water company; that said representations were at all times well known to plaintiff, and were widely made and disseminated to the general public and to many other individuals situated similarly to plaintiff and to all persons served by defendants with water for irrigation, and were generally and universally accepted and believed by all of the same to be true, all of which was well known to plaintiff, and plaintiff believed the same to be true, and never doubted or suspected the truthfulness thereof until plaintiff discovered, as hereinafter found, that said representations and statements made by defendants were not true. That on March 31, 1930, a complaint was filed before the Railroad Commission of the State of California in the matter entitled, Sarah E. Ludy, complainant, v. Great Western Power Company of California, and Western Canal Company, defendants, being case No. 2847; that on December 21st, 1931, said Railroad Commission therein duly gave, made and entered its decision No. 24321, wherein and whereby it duly adjudged, determined and decreed that defendants herein were, and at all times in plaintiff's complaint mentioned have been public utilities for the furnishing of water for irrigation upon lands embracing and including said lands of plaintiff, and that defendant Canal Company, was not, and never had been a mutual water company, but had been, at all times, a public utility, and the wholly dominated and controlled subsidiary and the water transporting agency of defendant, Power Company, in the transportation and distribution of water of said Power Company for irrigation, as hereinbefore found; that plaintiff first learned of said proceedings and said determination of said Railroad Commission by hearing accounts thereof in street conversation shortly after said decision; that plaintiff was in no way a party to, or represented in said proceedings; that throughout said proceeding defendants continuously averred, pretended and claimed that each and all of said representations were true; that said decision and determination by said Railroad Commission on December 21st, 1931, was the first determination by said Commission, or by any commission, board or court, that said defendants were in truth and in fact public utilities, or that either of them was, a public utility in the distribution of water for irrigation; that shortly after plaintiff learned of said determination of said Railroad Commission, and because thereof, and in the month of February, 1932, he consulted Ware and Ware, the attorneys who represented him herein, relative to his rights as contracting stock purchaser in said Canal Company; * * * that plaintiff never learned or received notice, actual or imputed, of any circumstance or fact that would, could or did cause him, or any person of ordinary prudence, to believe or suspect that any of the representations and statements of the defendants, as herein found, were untrue in any respect, until the discovery of the facts concerning them after December 21, 1931, as herein found. That said attorneys informed plaintiff of all of the facts in reference to the relation of defendants and as to their status and operations as public utilities, all as alleged in plaintiff's complaint;"

[10] "Whether one has notice of 'circumstances sufficient to put a prudent man upon inquiry as to a particular fact', and whether, 'by prosecuting such inquiry, he might have learned such fact', are themselves questions of fact to be determined by the jury or the trial court." 20 Cal.Jur., p. 240. And as stated in Northwestern Portland Cement Co. v. Atlantic P. C. Co., 174 Cal. 308-312, 163 P. 47, 49: "Whether a party has notice of 'circumstances sufficient to put a prudent man upon inquiry as to a particular fact,' and whether 'by prosecuting such inquiry, he might have learned such fact' (Civ.Code, § 19), are themselves questions of fact to be determined by the jury or the trial court. Brewster v. Sime [42 Cal. 139], supra; Thompson v. Toland [48 Cal. 99], supra; Renton, Holmes & Co. v. Monnier, 77 Cal. 449, 456, 19 P. 820. Findings of ultimate facts are binding upon appeal, not only when there is a direct conflict regarding the probative facts, but when those facts are fairly susceptible to opposing inferences."

[11] Defendants contend that the evidence is insufficient to support the findings mentioned above. We must therefore scrutinize the record in the light of the rule that: "It is only when the question is presented to this court as one of law under the contention that the evidence is insufficient to support the verdict or finding that this court will examine the evidence to this sole end, and, when it is satisfied that substantial evidence exists to support the verdict or finding, its examination ceases at once." Estate of Moore, 162 Cal. 324, 326, 122 P. 844, 845.

[12] Defendants point out several circumstances which they contend had the effect of putting plaintiff upon inquiry in respect to its fraudulent scheme. The first is the fact that plaintiff was a stockholder in the Western Canal Company, a corporation. As such, they state, it was his duty to inspect the books of the company where the minutes would have shown the control of the Bankers' Trust Company through the Power Company. They further state that *if* plaintiff had visited the offices of the Western Canal Company in San Francisco prior to 1930, it "would have shown that they were in the offices of the Power Company (the name of the Western Company not even appearing at the entrance). Those dealing with the Western Company there had to go to the Power Company." It is at once apparent that there are no facts brought home to plaintiff which would put plaintiff upon such an inquiry. They are facts which if known, might charge him with constructive notice of fraud. But it is not claimed that plaintiff *knew* the above facts, and there is a total absence of any facts or circumstances known to plaintiff which would have caused him to go to the office of the Western Company in San Francisco. As to the duty of plaintiff to examine the corporate books of the Canal Company, the same observation applies. Why should he examine the books? If facts were proven to show that he had information which would, under the rule, compel such examination, a different situation would have been presented. As to the duty of a stockholder to examine the books of a corporation under such circumstances, the rule in the case of Lady Washington C. Co. v. Wood, (cited above), and relied upon by defendants, is radically curtailed in Prewitt v. Sunnymead Orchard Co., 189 Cal. 723, 209 P. 995, 998, and is there limited to those cases where the question of *estoppel* is concerned. In the latter case, Cook on Corporations is thus quoted:

> "It is said in Cook on Corporations (7th Ed.) § 731, p. 2620, referring specifically to actions by a stockholder against a corporation, that—'It is not incumbent upon the stockholder to keep himself informed as to the various acts of the corporation. He is not chargeable with knowledge merely because he might have ascertained the facts by an examination of the corporate books.'"

It is clear from the holding in the Prewitt case, that defendants' statement of the law on this question has no application to a case of this character.

[13] The next fact relied upon as constituting a "discovery", within the meaning of the statute of limitations, was that he signed contracts with the Canal Company which recited that the latter would, upon payment made, "cause to be transferred" the specified number of shares, instead of providing that the Company would "issue" the stock. This, they urge, imparted knowledge to plaintiff that the stock had been issued to somebody else—otherwise, it would have been provided that the Canal Company would issue the stock to him. It would also, they state, charge plaintiff with knowledge that the Canal Company was not controlled by land-owning water-users exclusively. We fail to see how this legalistic quibble would put any layman upon such inquiry. Certainly, a failure to act upon it would not amount to a negligent omission.

[14] The instances mentioned above, and relied upon as calling for a finding that plaintiff had constructive notice of fraud are the only ones which have any semblance of merit. Several others are mentioned by defendants, but we do not deem them worthy of discussion. Considering all of them, we cannot say that as a matter of law plaintiff had constructive notice of the fraud practiced upon him, and we are of the opinion that the findings mentioned have substantial support in the record.

It may be observed from the opinion in the Goodspeed case that indicia of fraud are numerous and varied in these cases. A number of them, when considered separately, would not point to a fraudulent act. Under such circumstances one of such badges of fraud would not give constructive knowledge of the whole fraudulent scheme to operate a public utility under the guise of a mutual water company and sell stock in the latter under the representation that it was a lawful mutual company.

[15-17] There is another reason why the statute of limitations does not apply here where fraudulent representations of fact constitute the cause of action, and where, as the trial court found, there was a positive representation of certain facts by defendants. The rule governing such a situation is thus expressed in Teague v. Hall, 171 Cal. 668, page 670, 154 P. 851, at page 852:

"Similarly in Pomeroy, Equity Jurisprudence § 896, it is said that: 'Whenever a positive representation of fact is made, the party receiving it is, in general, entitled to rely and act upon it, and is not bound to verify it by an independent investigation. Where a representation is made of facts which are or may be assumed to be within the knowledge of the party making it, the knowledge of the receiving party concerning the real facts, which shall prevent his relying on and being misled by it, must be clearly and conclusively established by the evidence. The *mere existence of opportunities* for examination or of sources of information is not sufficient, even though by means of these opportunities and sources, in the absence of any representation at all, a constructive notice to the party would be inferred; the doctrine of constructive notice does not apply where there has been such a representation of fact.' This view of the law has been repeatedly declared in the decisions in this state. In Ruhl v. Mott, 120 Cal. [668], 676, 53 P. [304], 307, the court says: 'It is true that where one is justified in relying, and in fact does rely upon false representations, his right of action is not destroyed because means of knowledge were open to him. In such a case no duty in law is devolved upon him to employ such means of knowledge.' The same doctrine is declared in Bank of Woodland v. Hiatt, 58 Cal. 234; Wenzel v. Schultz, 78 Cal. 221, 20 P. 404; Morris v. Courtney, 120 Cal. 63, 52 P. 129; Dow v. Swain, 125 Cal. 674, pp. 683, 684, 58 P. 271; Maxon-Nowlin Co. v. Norswing, 166 Cal. 509, 512, 137 P. 240; Eichelberger v. Mills L. & W. Co., 9 Cal.App. 628, 100 P. 117."

The same rule was applied to constructive notice by this court in the case of Edwards v. Sergi, 137 Cal.App. 369, 30 P.2d 541.

[18] With permission of the court defendants have filed a "statement of Constitutional grounds for not following the decision of Goodspeed v. Great Western Power Co." (that case is cited above). No authorities are cited upon the precise question, except section 1 of article XIV of the amendments to the Constitution of the United States, U.S.C.A. This is the first time that such a question has been presented in this case and the companion cases before this court. It was not raised in the Goodspeed case at all. The matter has never been briefed. It is contended that equal protection of the law was denied defendants, in that the trial court found that they had knowledge of the falsity of their representations, while it also found that plaintiff did not have such knowledge. They state that the only possible finding justified by the record would be that both parties had equal knowledge, where means of knowledge was equally available to each party. The second point urged also has to do with a matter of evidence. No authority has been cited which holds that a finding against one litigant, and necessarily against the other, constitutes, under such circumstances, a violation of the constitutional provision mentioned above, guaranteeing the equal protection of the law. Assuming that the contention can be raised at this time, we are of the opinion that it lacks substantial merit.

The appeal of appellant West is based upon the contention that the trial court should have allowed him interest upon interest payments made on the fraudulent contracts. That question was fully disposed of in his favor in the Goodspeed case.

Upon the authority of the Goodspeed case, and in view of what we have here held, it is ordered that the judgment be, and it is hereby reversed, and that the cause be remanded for retrial, upon the sole issue of the amount of damages due, in accordance with the views expressed, each party to pay his own costs on appeal.

36 Cal.App.2d 416

DOYLE v. GREAT WESTERN POWER CO. OF CALIFORNIA et al.

Civ. 6141

District Court of Appeal, Third District, California.

Jan. 2, 1940.

Rehearing Denied Feb. 1, 1940.

Hearing Denied Feb. 29, 1940.

1. Limitation of actions ⚿100(13)

One who had worked for corporation nine years prior to purchasing stock of wholly owned subsidiary was not charged with constructive notice that subsidiary was a public utility rather than a mutual water company as represented to him at time of purchase, so as to be barred by limitations from maintaining action for damages within three years after alleged discovery of the fraud though more than three years had elapsed since commission thereof. Code Civ.Proc. § 338, subd. 4.

2. Limitation of actions ⚿197(2)

In action for damages from alleged fraudulent representations inducing purchase of stock, evidence sustained finding that discovery of the fraud was not made until within three years prior to bringing action so that action was not barred by limitations, though not commenced until after expiration of three years from time fraud was committed. Code Civ.Proc. § 338, subd. 4.

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Action by Leo W. Doyle against the Great Western Power Company of California and another for damages from alleged fraudulent representations in the sale of stock. Judgment in favor of plaintiff denied recovery of interest on interest payments made by plaintiff, and defendants and plaintiff appeal.

Reversed and cause remanded for retrial on issue of the amount of damages due.

Thomas J. Straub, W. R. Dunn, and Eustace Cullinan, all of San Francisco, Jerome D. Peters, of Chico, and George F. Jones, of Oroville, for appellants and respondents.

Ware & Ware, of Chico, for respondent and appellant.

PER CURIAM.

This is an action to recover damages arising out of alleged fraudulent representations made by defendants with respect to the sale of shares of stock. The issues were tried before the court, findings were duly entered in favor of plaintiff upon all of such issues, and judgment was rendered against defendants in the sum of $3,484.11. The appeal is taken from the judgment.

Plaintiff also appeals from "that part and portion of said judgment in which the trial court found, determined and adjudged that plaintiff was not entitled to recover interest from defendants on interest payments, from the respective dates of payment, paid by plaintiff and received by defendants on account of the purported purchase of stock of defendant Western Canal Company."

This case is companion to Goodspeed et al. v. Great Western Power Company et al., 33 Cal.App.2d 245, 91 P.2d 623, 92 P.2d 410, decided by this court on the 8th day of June, 1939. It arises out of the same general situation, and presents the same issues, with the exceptions hereinafter noted. We refer to that opinion for a statement of facts. We also adhere to that opinion upon all questions expressly disposed of, or necessarily involved therein. Only questions not raised in that case will receive our attention here.

The questions of the *right* of plaintiff to recover generally, upon substantially the same record, and the right to interest and damages, are fully disposed of in the Goodspeed case mentioned above, with the sole exception of the contention here made that such recovery is barred by the statute of limitations. Since the argument of this cause and with the permission of the court, defendants have also filed a "Statement of Constitutional grounds for not following the Goodspeed case", in which case, however, that question was not presented for our consideration. The latter question is disposed of in the West case, West v. Great Western Power Co., Cal.App., 97 P.2d 1014, and reference is made to that case for an extended discussion.

It is the contention of defendants that the action is barred by the provisions of section 338, subdivision 4 of the Code of Civil Procedure, in that the evidence is insufficient to support the findings to the effect the *discovery* of the fraud upon the part of plaintiff was made within three years prior to the commencement of the action. The law relating to this matter is set forth in the opinion in the case of West v. Great Western Power Company et al., 97 P.2d 1014, a companion case, filed this day, and it is unnecessary to discuss it further here. Most of the brief upon this question in this action is a reprint from the opening brief of appellants in the West case, but certain additional facts are relied upon here as constituting constructive notice of fraud, and we shall proceed to discuss them.

The findings in this case are substantially the same as those in the West case, and reference is made to that case for a full statement thereof. The court found here that the action was not barred, as contended by defendants, by the provisions of section 338, subdivision 4 of the Code of Civil Procedure. As in the West case, the action was commenced more than three years after the commission of the fraudulent acts. It is the contention of plaintiff that the findings referred to are supported by the record, and that the *discovery* of the fraud was made within three years prior to the commencement of the action.

[1] The first fact which is relied upon as constituting constructive notice is that plaintiff worked for the Power Company in 1915. He testified that he then knew that Mr. Fleishhacker was financially interested in both the Power Company and the Canal Company, and was selling his stock interest to the Power Company. On the other hand plaintiff testified that the first knowledge he had of the true corporate character of the Canal Company was when a friend visited him in Reno, Nevada (where he had resided since 1928), and in the early part of 1932 informed him that the state railroad commission had held that the Canal Company was in fact a public utility. It is also urged by defendants that plaintiff knew that the Power Company was going to furnish water to the Canal Company. This is sufficient, defendants state, to put plaintiff upon inquiry, and to charge him with notice that the Canal Company was really operating fraudulently as such, and was actually a public utility. We do not believe that such facts imperatively demand that plaintiff make further inquiry to ascertain further facts. Especially is this true when such facts came to his knowledge some nine years prior to the purchase by him of the stock in the Canal Company, which is the subject of this litigation. Being then a stranger to the defendants in the matter of interest as a stockholder, it is not reasonable to suppose that he was then particularly interested in the true corporate character of the Canal Company.

[2] Several other circumstances are pointed out by defendants as being sufficient to put plaintiff on inquiry, but we do not regard them as having sufficient merit to justify further discussion.

Under the authorities set forth in the West case, we hold that the findings questioned are supported by substantial evidence. It will be observed that none of the *specific* findings is attacked. The only points raised are facts which it is contended, in effect, constitute constructive notice as a matter of law. It is our opinion that they do not.

The appeal of appellant Doyle is based upon the contention that the trial court should have allowed him interest upon interest payments made on the fraudulent contracts. That question was fully disposed of in the Goodspeed case.

Upon the authority of the Goodspeed and West cases, and in view of what we have here held, it is ordered that the judgment be, and it is, hereby reversed, and that the cause be remanded for retrial, upon the sole issue of the amount of damages due, in accordance with the views herein expressed, each party to pay his own costs on appeal.

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36 Cal.App.2d 742

ROSE et al. v. GREAT WESTERN POWER COMPANY OF CALIFORNIA et al.

Civ. 6144.

District Court of Appeal, Third District, California.

Jan. 2, 1940.

Rehearing Denied Feb. 1, 1940.

Hearing Denied Feb. 29, 1940.

Limitation of actions ⚷197(2)

In action for damages from alleged fraudulent representations in sale of stock, evidence sustained finding that discovery of the alleged fraud was not made until within three years prior to commencement of action, so that action was not barred by limitations though brought more than three years after commission of the alleged fraud. Code Civ. Proc. § 338, subd. 4.

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Action by C. E. Rose and others against the Great Western Power Company of California and another, for damages from alleged fraudulent representations in sale of stock. Judgment for plaintiffs denied recovery of interest on interest payments made to defendants, and defendants and plaintiffs appeal.

Reversed and cause remanded for retrial on issue of amount of damages.

Thomas J. Straub, W. R. Dunn, and Eustace Cullinan, all of San Francisco, Jerome D. Peters, of Chico, and George F. Jones, of Oroville, for defendants, appellants and respondents.

Ware & Ware, of Chico, for plaintiffs, respondents and appellants.

PER CURIAM.

This is an action to recover damages arising out of alleged fraudulent representations made by defendants with respect to the sale of shares of stock. The issues were tried before the court, findings were duly entered in favor of plaintiffs upon all of such issues, and judgment was rendered against defendants in the sum of $32,326.02. The appeal is taken from the judgment.

Plaintiffs also appeal from "that part and portion of said judgment in which the trial court found, determined and adjudged that plaintiffs were not entitled to recover interest from defendants on interest payments, from the respective dates of payment, paid by plaintiffs and received by defendants on account of the purported purchase of stock of defendant Western Canal Company".

This case is companion to Goodspeed et al. v. Great Western Power Company et al., 33 Cal.App.2d 245, 91 P.2d 623, 92 P.2d 410, decided by this court on the 8th day of June, 1939. It arises out of the same general situation, and presents the same issues, with the exceptions hereinafter noted. We refer to that opinion for a statement of facts. We also adhere to that opinion upon all questions expressly disposed of or necessarily involved therein. Only questions not raised in that case will receive our attention here.

The questions of the *right* of plaintiffs to recover generally, upon substantially the same record, and the right to interest and damages are fully disposed of in the Goodspeed case mentioned above, with the sole exception of the contention here made that such recovery is barred by the statute of limitations. Since the argument of this cause, and with the permission of the court, defendants have also filed a "statement of constitutional grounds for not following the Goodspeed case", in which case, however, that question was not presented for our consideration. The latter question is disposed of in the West case, West v. Great Western Power Co., Cal.App., 97 P.2d 1014, and reference is hereby made to that case for an extended discussion.

It is the contention of defendants that the action is barred by the provisions of section 338, subdivision 4 of the Code of Civil Procedure, in that the evidence is insufficient to support the finding to the effect the *discovery* of the fraud upon the part of plaintiffs was made within three years prior to the commencement of the action. The law relating to this matter is set forth in the opinion in the case of West v. Great Western Power Company et al., Cal.App., 97 P.2d 1014, a companion case, filed this day, and it is unnecessary to discuss it further here. Most of the brief upon this question in this action is a reprint from the opening brief of appellants in the West case, but certain additional facts are relied upon here as constituting constructive notice of fraud, and we shall proceed to discuss them.

The findings in this case are substantially the same as those in the West case, and reference is made to that case for a full statement thereof. The court found here that the action was not barred as contended by defendants, by the provisions of section 338, subdivision 4 of the Code of Civil Procedure. As in the West case, the action was commenced more than three years after the commission of the fraudulent acts. It is the contention of plaintiffs that the findings referred to are supported by the record, and that the *discovery* of the fraud was made within three years prior to the commencement of the action.

The facts relied upon to establish constructive notice are substantially the same as those involved in the West case, and are therefore insufficient, as a matter of law, to establish such notice. The findings are supported by adequate evidence.

The appeal of plaintiffs is based upon the contention that the trial court should have allowed interest upon interest payments made on the fraudulent contracts. That question was fully disposed of in their favor in the Goodspeed case.

Upon the authority of the Goodspeed and West cases, it is ordered that the judgment be, and it is, hereby reversed, and that the cause be remanded for retrial upon the sole issue of the amount of damages due in accordance with the views expressed, each party to pay his own costs on appeal.

36 Cal.App.2d 422

MARSHALL v. GREAT WESTERN POWER CO. OF CALIFORNIA et al.

Civ. 6147.

District Court of Appeal, Third District, California.

Jan. 2, 1940.

As Modified on Denial of Rehearing

Feb. 1, 1940.

Further Rehearing Denied

Mar. 2, 1940.

Hearing Denied March 30, 1940.

1. Fraud 🔑58(1)

In action for damages from alleged fraudulent representations in sale of canal company stock, evidence that canal company credited on stock purchase contract amount paid by purchaser to acquire a right of way sustained finding that amount paid for right of way was in fact paid as a part of the purchase price for the stock so as to authorize recovery of such amount as a part of the damage sustained.

2. Fraud 🔑58(1)

In action for damages from alleged fraudulent representations in sale of canal company's stock, evidence that stock purchase contract acknowledged receipt, as part of the purchase price, of amount paid by purchaser to acquire a right of way sustained finding that amount was paid upon execution of the contract so as to justify allowance of interest from that date.

3. Fraud 🔑59(1)

In action for damages from alleged fraudulent representations in sale of stock, where notation in records of defendants showed that a certain amount was applied to principal, trial court properly held that such payment on the stock purchase contract should be applied to principal rather than to interest, particularly in view of fact that no interest was due when payment was made, notwithstanding that chattel mortgage out of which sum was realized provided that any such sum should first be applied to interest and then upon principal.

4. Trial 🔑404(1)

Findings must be construed in a manner to uphold the judgment rather than to vitiate it.

5. Appeal and error 🔑1071(6)

In action for damages from alleged fraudulent representations in sale of stock, where court found that purported stock purchase contract was void for want of consideration and that claim for damages had not been waived or relinquished, no reversible error was presented because of alleged lack of a specific finding with respect to cancellation of stock purchase contract accompanied by release which allegedly estopped buyer from maintaining action.

6. Fraud 🔑35

Where original stock purchase contract was void, sellers were not entitled to retain any amount paid to them thereunder, and release by buyer of all their obligations under the contract and relinquishment by buyer of right to all moneys paid under the contract was without consideration so that release did not estop buyer from subsequently seeking recovery of damages.

7. Limitation of actions 🔑195(5)

One seeking recovery for fraud more than three years after commission thereof must prove facts from which court can conclude that he is within provision of statute permitting action to be brought within three years after "discovery" of the fraud, but such burden is simply one of detailing all facts connected with the transaction and if there is nothing in the facts creating imperative duty to make further inquiry within period of three years after commission of the fraud, the courts may properly find that the limitation cannot be invoked. Code Civ. Proc. § 338, subd. 4.

8. Appeal and error 🔑1008(1)
Limitation of actions 🔑197(2)

Where one seeks relief from fraud more than three years after commission thereof although allegedly within three years after its discovery, his denial of constructive knowledge of facts requiring further inquiry within period of three years after commission may be insufficient to establish such lack of knowledge, but after all surrounding facts are fully proven, whether he had constructive notice is a question of fact for the trial court. Code Civ.Proc. § 338, subd. 4.

9. Appeal and error ⚷1008(1)

Facts which in one case would constitute constructive notice of fraud may not be sufficient in another due to varying conditions and it is only where such notice appears to be established as a matter of law that an appellate court can interfere with a finding that notice of fraud was not acquired until within three years prior to bringing action. Code Civ.Proc. § 338, subd. 4.

10. Limitation of actions ⚷199(2)

Knowledge acquired by purchaser of stock within three years after purchase that stock was sold at various prices to water users did not as a matter of law compel him to make further inquiry to determine true corporate character of canal company so as to preclude him from bringing action to recover damages for fraud, based on false representation that company was a mutual water company, within three years after alleged discovery of the fraud though more than three years after commission thereof. Code Civ.Proc. § 338, subd. 4.

11. Limitation of actions ⚷197(2)

In action for damages from alleged fraudulent representations in sale of stock, evidence sustained finding that discovery of fraud was not made until within three years prior to commencement of the action so that action was not barred though brought more than three years after commission thereof. Code Civ.Proc. § 338, subd. 4.

◆

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Action by De Witt T. Marshall against the Great Western Power Company of California and another for damages from alleged fraudulent representations in sale of stock. Judgment for plaintiff, and defendants appeal.

Reversed and cause remanded for retrial upon the sole issue of the amount of damages.

Thomas J. Straub, W. R. Dunn, and Eustace Cullinan, all of San Francisco, Jerome D. Peters, of Chico, and George F. Jones, of Oroville, for appellants.

Ware & Ware, of Chico, for respondent.

PER CURIAM.

This is an action to recover damages arising out of alleged fraudulent representations made by defendants with respect to the sale of shares of stock. The issues were tried before the court, findings were duly entered in favor of plaintiff upon all of such issues, and judgment was rendered against defendants in the sum of $1,586.36. The appeal is taken from the judgment.

This case is companion to Goodspeed et al. v. Great Western Power Company et al., 33 Cal.App.2d 245, 91 P.2d 623, 92 P.2d 410, decided by this court on the 8th day of June, 1939. It arises out of the same general situation, and presents the same issues, with the exceptions hereinafter noted. We refer to that opinion for a statement of facts. We also adhere to that opinion upon all questions expressly disposed of or necessarily involved therein. Only questions not raised in that case will receive our attention here.

The questions of the *right* of plaintiff to recover generally, upon substantially the same record, and the right to interest and damages are fully disposed of in the Goodspeed case mentioned above, with the sole exception of the contention here made that such recovery is barred by the statute of limitations. Since the argument of this cause and with the permission of the court, appellants have also filed a "Statement of Constitutional grounds for not following the Goodspeed case", in which case, however, that question was not presented for our consideration. The latter question is disposed of in the West case (mentioned later) and reference is made to that case for a more extended discussion.

It is the contention of appellants that the action is barred by the provisions of section 338, subdivision 4 of the Code of Civil Procedure, in that the evidence is insufficient to support the finding to the effect the discovery of the fraud upon the part of plaintiff was made within three years prior to the commencement of the action. The law relating to this matter is set forth in the opinion in the case of West v. Great Western Power Company et al., Cal.App., 97 P.2d 1014 (a companion case) filed this day, and it is unnecessary to discuss it further here. Most of the brief upon this question in this action is a reprint from the opening brief of appellants in the West case, but certain additional facts are relied upon here as constituting constructive notice of fraud, and we shall proceed to discuss them.

The findings in this case are substantially the same as those in the West case, and reference is made to that case for a full statement thereof. The court found here that the action was not barred, as contended by appellants, by the provision of section 338, subdivision 4 of the Code of Civil Procedure. As in the West case, the action was commenced more than three years after the commission of the fraudulent acts. It is the contention of respondent that the findings referred to are supported by the record, and that the *discovery* of the fraud was made within three years prior to the commencement of the action.

[1, 2] In this case the record shows that when the matter of supplying water to respondent's lands was discussed, it appeared that it would be necessary to secure a right of way for an irrigation ditch from Dodge Land Company, the owner of the property which was traversed by the right of way. It was agreed that respondent should pay $500 for such right of way. When the stock purchase contract in question here was executed, it contained the following provision: "The sum of $500.00 has been paid on account of said stock, the receipt of which is hereby acknowledged." It is conceded that the $500 mentioned in the contract is the amount expended by respondent for the right of way. The trial court found that this sum was paid upon the purchase price of the stock, and that respondent was therefore entitled to recover it as part of the damage sustained. Appellants contend that the right of way became appurtenant to the property of respondent, and that they should not be charged with the amount. The evidence shows, that pursuant to the contract mentioned above, defendant Canal Company credited respondent with the payment of said sum upon his stock purchase contract. We are of the opinion that the evidence is sufficient to warrant a finding to the effect that this amount was in fact paid as part of the purchase price for the stock. The trial judge was also correct in allowing interest from the date of the credit, as respondent testified that he thought the amount was paid when the contract was executed, and the contract acknowledges receipt of the sum. This is sufficient to sustain a finding to the effect that the amount was paid upon the execution of the contract.

[3] It is next contended that the trial court erred in the matter of holding that a payment of $440 made by respondent upon the stock purchase contract should be applied to the principal due. They contend that it should have been applied upon interest then due. They point out the terms of a chattel mortgage out of which said sum was realized, providing that any such sum should first be applied to interest due, and then upon the principal sum due on the stock purchase. It appears, however, that the interest was not due at the time. Furthermore, from appellants' own records the following notation appears: "November 17, 1928, payment on account (stock purchase contract) principal $440.63." The point is obviously without merit.

[4-6] We are next concerned with effect of a cancellation of the stock purchase contract executed by both parties. This was done about one year from the date of its execution. It is contended by appellants that as the trial court did not specifically find in respect to the cancellation, reversible error was committed, and that said release stands now unimpaired, with the legal effect of estopping plaintiff from maintaining this action. The agreement reads as follows:

"Know All Men by These Presents: That that certain contract to sell water made and entered into by and between Western Canal Company, a corporation, and DeWitt T. Marshall, a single man, dated March 13th, 1928, and recorded May 14th, 1938, in Book 1 of Official Records, at page 427, Records of Glenn County, California, and which said contract is made appurtenant to the following land situate, lying and being in Glenn County, California, and particularly described as follows, to-wit: Lots One (1) and Two (2) of the Northeast quarter and Southeast quarter of Northeast quarter of Section Three (3), Township Nineteen (19) North, Range 1 West, M. D. B. & M. containing 99.01 acres according to the United States Surveys. Also the Southeast quarter, the East half of the Southwest quarter and Lot Three (3) of the Northwest quarter of Section Three (3) Township Nineteen (19) North, Range 1 West, M. D. B. & M., and containing 269.17 acres. Also Lots Three (3) and Four (4) and the South half of the Northwest quarter of Section Two (2), Township Nineteen (19) North, Range 1 West, M. D. B. & M., is herewith and hereby cancelled, abrogated and declared null and void by the mutual consent of the parties hereto.

"It is specifically understood and agreed, however, that all the monies paid to Western Canal Company, under and pursuant to the terms of said contract, belong to said corporation, and the said DeWitt T. Marshall expressly waives and relinquishes any and all claims thereto, and that said Western Canal Company is released and relieved from all the obligations of said contract on its part to be kept and performed, and the lands hereinbefore described are released from the burden, lien or effect of said contract to all intents and purposes as if said contract had never been entered into.

"In witness whereof the Western Canal Company, a corporation, has caused these presents to be executed on its behalf, and its corporate seal to be hereunto affixed, and the said DeWitt T. Marshall has hereunto set his hand and seal this 2nd day of April A. D. 1929.

"Western Canal Company
"By W. H. Spaulding, President.
"Attest: Chaffee E. Hall,
Secretary.
"DeWitt T. Marshall."

As to the asserted lack of a finding upon the effect of such an agreement, we believe that appellants are mistaken. The rule is that findings must be construed in a manner to uphold the judgment, rather than to vitiate it. The following general finding very definitely states that plaintiff never relinquished his cause of action;

"That plaintiff never received anything of value whatever because of the making of or under or pursuant to said contract for the purchase of capital stock in said Canal Company, as aforesaid, and all of the payments that were made by him pursuant to the terms of said contract, as hereinbefore found, were made without any consideration whatever, and said contract was at all times from and after its purported execution, and ever since has been, and now is, wholly void and of no worth or value whatever; *that plaintiff never assigned, sold, transferred, waived, relinquished or surrendered the claim and cause of action upon which this suit is based, and never transferred, waived or relinquished the right or claim to recover because of the sums of money paid by him to defendants upon said void stock contract.*" (Marshall Findings, paragraph XI, first 16 lines.)

And again, among the conclusions of law: "That plaintiff never assigned, sold, transferred, waived, relinquished or surrendered the claim and cause of action upon which this suit is based and never transferred, waived or relinquished the right or claim to recover because of the sums of money paid by him to defendants upon said void stock contract, and is the owner and holder of said claim and cause of action." (Marshall Conclusions of Law, paragraph IX.)

As the original stock purchase contract was void, we are of the opinion that there was no consideration for the release, and that appellants were not entitled to retain any amount whatever paid to them under the void contract of stock purchase. As stated in Shortell v. Evans-Ferguson Corp., 98 Cal.App. 650, 277 P. 519, 521, where the factual structure is very similar to this case: "Release from or cancellation of an illegal or void contract can never be a valid consideration, since the party 'released' has neither been accorded a right which he did not already possess nor excused from the performance of any act which he could have been compelled to perform."

[7–11] It is finally contended that the action is barred by the provisions of section 338, subdivision 4 of the Code of Civil Procedure. This action was more than three years after the commission of the fraudulent acts of defendants, but respondent contends that he did not discover such fraud until a date which was within three years preceding the commencement of the action. The findings on this issue are substantially the same as in the West case, and the same question as to the sufficiency of the evidence to support such findings is involved here. Our legal conclusions applicable to this case and upon that question are fully set forth in the West case, and it is unnecessary to repeat them here. The only matter left for consideration is additional facts which it is urged constituted constructive notice of fraud, and which were known to respondent within three years after the commission of the fraud by appellants.

It is contended that special concessions were made to respondent by the Canal Company, and that he knew that stock was sold at various prices to water-users. He denied that these facts raised any suspicion in his mind as to the true corporate character of the Canal Company, and testified that nothing was brought to his attention which would lead him to believe that the Canal Company was not, in truth and in fact, a mutual water company. It is urged by appellants that one seeking to come within the exception mentioned in subdivision 4 of section 338 of the Code of

Civil Procedure must prove facts from which the court could conclude that he came within it. That is a correct statement of the law. This burden, however, is simply one of detailing all the facts connected with the transaction. If there is nothing in those facts which would place upon respondent the imperative duty of making further inquiry, the trial court may justly and properly find that the bar of the statute of limitations cannot be invoked. In a sense, it involves proof of a negative—that respondent did not have constructive knowledge. His own denial of such notice may not be sufficient, but when all the surrounding facts and circumstances, as here, are fully proven, there is nothing more that respondent can be called upon to do. It then becomes a question of fact for the trial court. Facts which in one case would constitute such notice, may not be sufficient in another, due to varying surrounding conditions and circumstances. It is only where such notice appears to be established as a matter of law that an appellate court can interfere with a finding of this character. We cannot say here that there was no substantial evidence to support the finding under attack. The facts mentioned above might excite the suspicion of an interested party, but we cannot say that they, as a matter of law, would compel him to make further inquiry as to the true corporate character of defendant Canal Company. It is a very simple matter now to look back, *after* it has been decided that the fraud was committed, and point out certain facts which indicated the fraudulent nature of defendants' conduct, but it is a different matter *prior* to that time to say that this act or that act was a badge of fraud. This is particularly true as in this case, when the indicia of fraud are numerous. The combination of many facts and circumstances, brought home to the party sought to be charged with notice, might constitute notice, but an isolated fact or two may be altogether without any fraudulent implications. Such is the nature of the fraud here.

Upon the authority of the Goodspeed and West cases, and this opinion, it is ordered that the judgment be, and it is, hereby reversed, and that the cause be remanded for retrial upon the sole issue of the amount of damages due in accordance with the views expressed.

Each party to pay his own costs on appeal.

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36 Cal.App.2d 430

RAYNSFORD et al. v. GREAT WESTERN POWER CO. OF CALIFORNIA et al.

Civ. 6143.

District Court of Appeal, Third District, California.

Jan. 2, 1940.

Rehearing Denied Feb. 1, 1940.

Hearing Denied Feb. 29, 1940.

1. Limitation of actions 🔑100(13)

The fact that stockholders received more water from canal company than they were entitled to did not charge them with knowledge that company was in fact a utility and not a mutual water company so as to preclude them from maintaining action for damages from fraudulent representations in sale of the stock, more than three years after commission of the fraud but within three years after alleged discovery thereof. Code Civ.Proc. § 338, subd. 4.

2. Limitation of actions 🔑197(2)

In action for damages from alleged fraudulent representations in sale of stock, evidence sustained finding that fraud was not discovered until within three years prior to bringing action so that action was not barred by limitations though not brought until more than three years after commission of the fraud. Code Civ.Proc. § 338, subd. 4.

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Action by Christine Raynsford, as executrix of the last will and testament of C. H. Raynsford, deceased, and another, against the Great Western Power Company of California and another for damages from alleged fraudulent representations in sale of stock. Judgment for plaintiffs denied recovery of interest on interest payments made to defendants, and defendants and plaintiffs appeal.

Reversed and cause remanded for retrial on the sole issue of the amount of damages due.

Thomas J. Straub, W. R. Dunn, and Eustace Cullinan, all of San Francisco, Jerome D. Peters, of Chico, and George F. Jones, of Oroville, for defendants, appellants and respondents.

Ware & Ware, of Chico, for plaintiffs, respondents and appellants.

PER CURIAM.

This is an action to recover damages arising out of alleged fraudulent representations made by defendants with respect to the sale of shares of stock. The issues were tried before the court, findings were duly entered in favor of plaintiffs upon all of such issues, and judgment was rendered against defendants in the sum of $1,470. The appeal is taken from the judgment.

Plaintiffs also appeal from "that part and portion of said judgment in which the trial court found, determined and adjudged that plaintiffs were not entitled to recover interest from defendants on interest payments, from the respective dates of payment, paid by plaintiffs and received by defendants on account of the purported purchase of stock of defendant Western Canal Company."

This case is companion to Goodspeed et al. v. Great Western Power Company et al., 33 Cal.App.2d 245, 91 P.2d 623, 92 P.2d 410, decided by this court on the 8th day of June, 1939. It arises out of the same general situation, and presents the same issues, with the exceptions hereinafter noted. We refer to that opinion for a statement of facts. We also adhere to that opinion upon all questions expressly disposed of or necessarily involved therein. Only questions not raised in that case will receive our attention here.

The questions of the *right* of plaintiffs to recover generally upon substantially the same record, and the right to interest and damages, are fully disposed of in the Goodspeed case mentioned above, with the sole exception of the contention here made that such recovery is barred by the statute of limitations. Since the argument of this cause, and with the permission of the court, defendants have also filed a "statement of constitutional grounds for not following the Goodspeed case", in which case, however, that question was not presented for our consideration. The latter question is disposed of in the West case, West v. Great Western Power Co., Cal.App., 97 P.2d 1014, and reference is made to that case for an extended discussion.

It is the contention of defendants that the action is barred by the provisions of section 338, subdivision 4 of the Code of Civil Procedure, in that the evidence is insufficient to support the finding to the effect that the *discovery* of the fraud upon the part of plaintiffs was made within three years prior to the commencement of the action. The law relating to this matter is set forth in the opinion in the case of West v. Great Western Power Company et al., Cal.App., 97 P.2d 1014, a companion case filed this day, and it is unnecessary to discuss it further here. Most of the brief upon this question in this action is a reprint from the opening brief of appellants in the West case, but certain additional facts are relied upon here as constituting constructive notice of fraud, and we shall proceed to discuss them.

The findings in this case are substantially the same as those in the West case, and reference is made to that case for a full statement thereof. The court found here that the action was not barred, as contended by defendants, by the provisions of section 338, subdivision 4 of the Code of Civil Procedure. As in the West case, the action was commenced more than three years after the commission of the fraudulent acts. It is the contention of plaintiffs that the findings referred to are supported by the record, and that the *discovery* of the fraud was made within three years prior to the commencement of the action.

[1, 2] It is contended that plaintiffs received more water from defendant Canal Company than their entitlement, and that this charged them with knowledge of the fact that said company was in fact a utility and not a mutual water company. Other facts relied upon to prove constructive knowledge are identical with those stated in the West case. Under the rules laid down in the West case and the case of Marshall v. Great Western Power Company et al., Cal.App., 97 P.2d 1025, decided on this date, we are of the opinion that such facts do not establish constructive notice as a matter of law, and that there is ample evidence to support the findings under attack, which were adverse to defendants on the question of the statute of limitations.

The appeal of plaintiffs is based upon the contention that the trial court should have allowed them interest upon interest payments made on the fraudulent contracts. That question was fully disposed of in their favor in the Goodspeed case.

Upon the authority of the cases mentioned, it is ordered that the judgment be, and it is, hereby reversed, and that the cause be remanded for retrial upon the sole issue of the amount of damages due in accordance with the views expressed, each party to pay his own costs on appeal.

36 Cal.App.2d 419

WESTERN CANAL CO. v. McRAE et al.

Civ. 6146.

District Court of Appeal, Third District, California.

Jan. 2, 1940.

Rehearing Denied Feb. 1, 1940.
Hearing Denied Feb. 29, 1940.

1. Waters and water courses ⚷258

Where water service contract revealed intent that lien could only be imposed upon water-stocked land, and stock purchase contract which was only basis for water-stocking the land was void, lien for payment of irrigation water was properly denied.

2. Limitation of actions ⚷197(2)

Evidence sustained finding that counterclaim for damages from alleged fraudulent representations in sale of stock was asserted within three years after discovery of the fraud and hence was not barred by limitations. Code Civ.Proc. § 338, subd. 4.

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Action by the Western Canal Company against Archie McRae and others to recover an amount alleged to be due for irrigation water furnished under a contract between the parties, wherein the named defendant filed a counterclaim for damages arising out of fraudulent representations in sale of stock. Judgment was in favor of plaintiff on his counterclaim but recovery of interest on interest payments was denied, and plaintiff and named defendant both appeal.

Reversed and cause remanded for retrial on sole issue of the amount of damages.

Ware & Ware, of Chico, for appellant, defendant and respondent.

Thomas J. Straub, W. R. Dunn, and Eustace Cullinan, all of San Francisco, Jerome D. Peters, of Chico, and George F. Jones, of Oroville, for respondent, plaintiff and appellant.

PER CURIAM.

This is an action brought to recover the sum of $1,232 alleged to be due for irrigation water furnished under a contract between the parties. The court is also asked to enforce a lien for the payment of said sum against the lands of defendant. Defendant filed a counterclaim for $3,500, damages, arising out of fraudulent representations made in respect to the sale of stock to plaintiff company to him. The allegations of this counterclaim are substantially the same as those of the complaint in the case of Goodspeed et al. v. Great Western Power Company et al., 33 Cal.App.2d 245, 91 P.2d 623, 92 P.2d 410, and decided by this court on the 8th day of June, 1939. Reference is made to the latter case for a full statement of such allegations. The same observation also is made in respect to the findings in this case. The trial court, as in the Goodspeed case, found against plaintiff canal company on the issue of fraud, refused to impose the lien, but gave credit to plaintiff, in fixing the amount of damages, for the full amount of its demand for water furnished to defendant. The amount of the judgment is $1,647.22, and plaintiff appeals from such judgment.

Plaintiff also appeals from "that part and portion of said judgment in which the trial court found, determined and adjudged that plaintiff was not entitled to recover interest from defendants on interest payments, from the respective dates of payment, paid by plaintiff and received by defendants on account of the purported purchase of stock of defendant Western Canal Company".

The question of the right of defendant to recover upon his counterclaim, upon substantially the same record, and his right to interest and damages, involved in his appeal, are fully disposed of in the Goodspeed case, which is referred to as authority for a similar ruling here. Only points not adjudicated in the latter case will receive further attention.

The contract for water service was executed on March 3, 1925. The agreement to purchase stock in plaintiff company was also executed on that date. In the Goodspeed case, where the evidence was susbtantially the same, we held that such contracts, under the provisions of section 1642 of the Civil Code, are to be construed together as one transaction. We also held that such a stock purchase agreement was obtained through fraud on the part of this plaintiff, and was therefore void.

[1] It is contended by appellant company that the trial court erred in refusing to impose a lien upon defendant's

lands. It relies upon the following portion of the water service contract in evidence: "That all the covenants and promises herein contained to be performed by the Consumer, including the promise to pay legal expenses and attorney's fees, shall in case of foreclosure, be a lien upon, and bind the water-stocked land hereinabove described, and the Water Company, its successors and assigns, shall have, and is hereby granted, a permanent lien upon said lands of the Consumer and appurtenance as security for the due and punctual payments of all monies due, or to fall due hereunder, and for the faithful performance of said conditions, covenants and promises, such lien to attach upon said water-stocked lands upon the execution thereof, and to be and constitute thereafter a first and prior lien as security aforesaid for the said payments and the performance of said conditions, covenants and promises, and each and all thereof."

We are of the opinion that it was the clear intent of the parties that this lien could only be imposed upon "water-stocked" land. As the stock-purchase contract, which would be the basis for "water-stocking" the land, was void, there could be no "water-stocked" land such as the parties contemplated and intended. The ruling was correct.

[2] It is contended, precisely as in the case of West v. Great Western Power Company et al., Cal.App., 97 P.2d 1014, decided this day, and upon substantially the same facts that the action was barred by the provisions of section 338, subdivision 4 of the Code of Civil Procedure. This question is decided adversely to appellant company, under the authority of that case.

It is also contended that the rulings of the trial court violated section 1, article XIV of the Amendments to the federal Constitution, U.S.C.A., guaranteeing the equal protection of the law. That question was also decided adversely to appellant company in the West case.

The appeal of appellant McRae is based upon the contention that the trial court should have allowed him interest upon interest payments made on the fraudulent contract. That question was disposed of in his favor in the Goodspeed case.

It is therefore ordered that the judgment be, and it is, hereby reversed, and that the cause be remanded for retrial, upon the sole issue of the amount of damages due, in accordance with the views expressed, each party to pay his own costs on appeal.

36 Cal.App.2d 595

LEONARD v. BOARD OF EDUCATION OF SAN FRANCISCO UNIFIED SCHOOL DIST. et al.

Civ. 10945.

District Court of Appeal, First District, Division 2, California.

Jan. 17, 1940.

Hearing Denied March 14, 1940.

1. Schools and school districts 🔑63(1)

The provision in School Code relating to service of notice of dismissal was enacted solely for benefit of probationary employees, and could be waived by such employees. Civ.Code, § 3513; School Code, § 5.681, as amended St.1931, p. 1398.

2. Schools and school districts 🔑63(1)

The vice president and dean of women of San Francisco Junior College, if a probationary employee, waived statutory notice of discharge, by request that no notice be served on her when she was informed that her position was to be abolished and that her services would not be required after the end of the school year. Civ.Code, § 3513; School Code, § 5.502, as amended St.1935, p. 1881; § 5.681, as amended St.1931, p. 1398.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Mandamus proceeding by Eugenie A. Leonard against the Board of Education of the San Francisco Unified School District and others, to compel the defendants to reinstate the plaintiff as vice president and dean of women of the San Francisco Junior College, and to pay her the amount of her compensation for the month of July, 1937. From the judgment, the petitioner appeals.

Affirmed.

Hearing denied; SHENK and CARTER, JJ., dissenting.

Clarence W. Morris and Leonard A. Worthington, both of San Francisco, for appellant.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco (Irving G. Breyer, of San Francisco, of counsel), for respondents.

STURTEVANT, Justice.

The plaintiff applied to the trial court for a writ of mandamus commanding the defendants to reinstate her as vice-president and dean of women of the San Francisco Junior College and to pay her $416.66, the amount of her compensation for the month of July, 1937. The trial court denied the application. From its judgment the plaintiff has appealed.

The plaintiff contends that she was a probationary employee and that the defendants attempted to discharge her without giving her due notice. The defendants controvert both propositions. The trial court made findings that were very full and complete. They are as follows:

"I. It is true as alleged in paragraph I of the amended petition that the petitioner was regularly employed by the Board of Education of the San Francisco Unified School District and the City and County of San Francisco, State of California as an employee in the position of vice president and dean of women at the San Francisco Junior College and in such capacity properly and efficiently performed each and every duty required of her.

"It is not true as alleged in paragraph I of the amended petition that she was employed as a probationary employee.

"II. It is true as alleged in paragraph II of the amended petition that the respondents C. Harold Caulfield, Mrs. Edwin R. Sheldon, Philip Lee Bush, Charles A. Derry, Richard E. Doyle, Mrs. Lloyd W. Dinkelspiel and William F. Benedict are the duly appointed, elected, qualified and acting commissioners and members of the Board of Education of the San Francisco Unified School District of the State of California and as such constitute the Board of Education of the San Francisco Unified School District.

"III. It is true as alleged in paragraph III of the amended petition that during all of the times therein mentioned, petitioner has been and now is the holder of legal certificates, towit: Certificate of administration and a general secondary certificate in full force and effect and on file in the office of the Superintendent of Schools in the County of San Francisco by virtue of which petitioner was appointed to the position of vice president and dean of women of the San Francisco Junior College in July, 1935, and has served in said capacity until June 30, 1937; and that during said time said petitioner was paid a salary of Five Thousand Dollars ($5,000.00) per year which was the salary approved and established by the Board of Education as being attached to said position.

"It is not true as alleged in paragraph III of the amended petition that the petitioner was employed as a probationary employee.

"IV. It is not true as alleged in paragraph IV of the amended petition that the petitioner served in said capacity until the end of the school term ending June 1937 without having received proper notification of her dismissal or severance from the said position and was thereby automatically reelected to serve in said capacity for the ensuing term.

"V. It is true as alleged in paragraph V of the amended petition that on or about the eleventh day of June, 1937, the Board of Education notified the petitioner that on and after June 20th, 1937, the position of vice president and dean of women in the Junior College division of the San Francisco Unified School District would be abolished and that her services as said vice president and dean of women would be discontinued June 30, 1937.

"VI. It is not true as alleged in paragraph VI of the amended petition that prior to the eleventh day of June, 1937, the petitioner had received no notification whatsoever of the discontinuance of her services. It is true that petitioner received no written notification of the discontinuation of her services prior to the eleventh day of June, 1937, but it is true that on or about the third day of May, 1937, that petitioner was notified by the Superintendent of Schools that her services would be discontinued and the position abolished at the conclusion of the school year 1936–1937, and that the petitioner requested the Superintendent of Schools not to have respondents take formal action at said time by giving her a written notice of their intention inasmuch as it would injure said petitioner in procuring another position.

"VII. It is true as alleged in paragraph VII of the amended petition that the petitioner is the real party in interest therein and that she has no plain, speedy or adequate remedy in the ordinary course of law.

"It is not true as alleged in paragraph VII of the amended petition that petitioner is entitled to restoration to her former position at her former salary.

"VIII. It is true as alleged in paragraph VIII of the amended petition that subsequent to the receipt of said notice, petitioner made a demand upon the Board of Education for reinstatement and for a return to her former position but that said request was denied by the Board of Education.

"It is not true as alleged in paragraph VIII of the said petition that petitioner has been deprived of the right and privilege of continuing in her former capacity inasmuch as the said position was properly abolished upon the conclusion of the school year 1936–1937.

"IX. It is not true as alleged in paragraph IX of the amended petition that on August 1, 1937, or at any other date, the petitioner became entitled to the sum of Four Hundred Sixteen and 66/100 Dollars or any other sum on account of salary due her for the month of July, 1937, or for any other period of service.

"It is true as alleged in paragraph IX of the amended petition that demand has been made upon the said respondents for the payment thereof but that said respondents have refused and still refuse to pay the same or any portion thereof to the petitioner herein.

"X. It is true as alleged in respondents' separate, special and affirmative defence that on or about the eighth (8th) day of June, 1937, by resolution of the Board of Education, the position of vice president and dean of women of the San Francisco Junior College was abolished effective June 30, 1937, and that said Board of Education further resolved on said date that the said petitioner be given notice that her services would be discontinued effective June 30, 1937; that said petitioner was notified of said resolution by registered mail on or about the eleventh (11th) day of June, 1937; that said position was abolished on June 30, 1937 and has continued at all times to remain and still is abolished."

The appellant claims she was a probationary employee and as such that she was entitled to the statutory notice before she could be dismissed except for cause. School Code, sec. 5.681, St.1931, p. 1398. The trial court found the facts against her on both claims. The record discloses that she did no classroom work. The defendants assert she had no tenure either under the provisions of the School Code, section 5.502, St. 1935, p. 1881, or under the provisions of section 135 of the charter of San Francisco. Unruh v. Piedmont High School Dist., 4 Cal.App.2d 390, 392, 41 P.2d 212. The contention is not without merit, but in the view we take of the record it is not necessary to pass on the point.

[1, 2] Assuming solely for the purposes of this case that the plaintiff was a probationary employee, we think her contention that she did not receive a legal notice as required by the provisions of the School Code, section 5.681, is not well founded. In its findings the trial court found the facts against her. The probative facts supporting those findings were not conflicting. Section 5.681 was enacted solely for the benefit of probationary employees. Any one may waive the advantage of a law intended solely for his benefit. Civ.Code, sec. 3513. On May 3, 1937, the plaintiff was informed that her position was to be abolished and that her services would not be required after the end of the school year. She thereupon requested that no notice to that effect be served on her. She clearly waived the service of the written notice mentioned in said statute.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

36 Cal.App.2d 587

HARRIS et al. v. LARTER et al.

Civ. 2461.

District Court of Appeal, Fourth District, California.

Jan. 16, 1940.

Hearing Denied March 14, 1940.

1. Specific performance 🔑121(7)

Clear and satisfactory proof of the terms and making of an alleged oral contract under which husband conveyed property to wife who was to take a living out of the property and make provision so that upon her death the balance of the property would be divided equally between husband's family and wife's family was necessary if agreement was to be specifically enforced. Civ.Code, § 3390.

2. Specific performance 🔑28(1)

Where husband and wife allegedly agreed that husband should convey property to wife who was to make provision that upon her death remainder of property should be equally divided between families of husband and of wife, and it was not shown that parties intended that property should go only to legal heirs in respective families to exclusion of relatives who were not legal heirs or in what proportion the property should go to the legal heirs or that wife was bound to treat all of her husband's legal heirs alike, alleged agreement was too indefinite to be specifically enforced. Civ.Code, § 3390; Probate Code, § 108.

3. Trusts 🔑66

Where alleged oral agreement under which husband allegedly conveyed property to wife who was to take living from property and provide that on her death property should be divided equally between the families of the husband and of the wife, was too indefinite to be specifically enforced, heirs of the husband could not recover share of the property, on the theory that property was impressed with a "resulting trust" in their favor as heirs at law of the husband. Civ.Code, § 3390.

[Ed. Note.—For other definitions of "Resulting Trust," see Words & Phrases.]

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Suit by Albert E. Harris and others against Donald Larter, administrator of the estate of Maria L. Harris, deceased, and others for specific performance of an oral contract. From a judgment for the defendants, plaintiffs appeal.

Affirmed.

W. M. Greathouse and C. E. McDowell, both of Los Angeles, and O. A. Jacobs, of Santa Ana, for appellants.

R. Y. Williams and Chas. D. Swanner, both of Santa Ana, for respondents.

BARNARD, Presiding Justice.

R. T. Harris and Maria L. Harris each possessed some separate property at the time of their marriage in 1888. Pursuant to an agreement made during the early years of their marriage most, if not all, of the property then owned and subsequently acquired by them was placed in some form of joint ownership. From time to time R. T. Harris withdrew funds from a joint bank account which was established and used the same in purchasing parcels of real property which he later conveyed to Maria L. Harris. He died intestate in 1911 and Maria L. Harris died intestate in 1933. In connection with the distribution of her estate a dispute arose between her heirs and the heirs of R. T. Harris, the latter claiming that most of the estate had come to Maria L. Harris as a gift from her husband and should be distributed to them. Upon appeal (Estate of Harris, 9 Cal.2d 649, 72 P.2d 873) the Supreme Court passed upon the rights of the parties as affected by the joint tenancy which had existed between them and by the conveyance of the respective properties to Mrs. Harris. The court also stated that the appellant in that case had attempted to establish an agreement whereby Mr. Harris had agreed to give Mrs. Harris all of his property and she had agreed that after she had taken a good living out of it she would divide it equally between his relatives and her relatives. The court held that such a contention must be litigated in a court of equity and expressed the opinion that such an oral agreement, if entered into prior to the amendment requiring it to be in writing, would be valid if it could be established.

Thereafter, this action was brought. The plaintiffs are the heirs at law of R. T. Harris, being his brother, sisters and the children of his deceased brothers and sisters. The defendants are the heirs at law of Maria L. Harris, being her sister and brothers. The complaint alleges that during the year 1904 Mr. and Mrs. Harris entered into an oral agreement whereby it was agreed that he would convey to her all property held or acquired by him, and that after his decease and during her lifetime she would take a good living therefrom and divide the balance of said property so that "upon her death said property would be owned equally by the family and next of kin of the said R. T. Harris and the family and next of kin of the said Maria L. Harris". Performance of the agreement on his part and nonperformance on her part is alleged, and the prayer is for specific performance of the terms and provisions of said agreement.

Laura J. Robinson, a sister of R. T. Harris, testified as to what was said by Mr. and Mrs. Harris on a day in 1904, as follows: "After lunch—Dick wasn't feeling well that day—and he told us, he said, he spoke of the spells he was having with his heart, and he said his condition was such that he was worried about it, he thought he might pass out at any time, and he said, 'I am giving Maria all of my property and we have agreed that she shall take a good living out of the property, and other than that it shall be divided equally between her people and my people,' and Maria said she thought the agreement was very fair to all concerned, and it was all right with her."

Her husband's memory was equally good, although thirty-four years had elapsed, and he repeated this conversation in practically identical language. A nephew of R. T. Harris testified that in 1904 the Robinsons told him that Mr. Harris was turning his estate over to Mrs. Harris, that she was to use it during her lifetime, and that it was then to be divided equally among the heirs of Mr. Harris and Mrs. Harris. On cross-examination he testified that he was not sure the word "heirs" was used, that it may have been "people", and that nothing was said as to the proportion or amount that anyone was to get. Another nephew testified to the same effect except that he said he could not remember whether the words used were "heirs" or "families" or "people". Two other witnesses testified that Mrs. Harris had told them that there was such an agreement that at her death all property "was to be divided equally between the two families."

On behalf of the defendants there was evidence that none of the plaintiffs had informed any of the defendants of the claimed existence of such an oral agreement prior to the hearing of the petition for final distribution in the estate of Maria L. Harris; that Maria L. Harris had claimed all of the property as her own at the time of a contest of her final account as administratrix of the estate of her husband, which contest was filed by a sister of R. T. Harris and one of the plaintiffs here; that Maria L. Harris had treated the property as her own following the death of her husband in 1911; that she made a will in 1915, in which she provided small legacies for several of her relatives and several of her husband's relatives, and then gave over $200,000 to various religious and charitable institutions; and that between that time and her death she made gifts in excess of $200,000 to various colleges and religious organizations. Laura J. Robinson admitted, on cross-examination, that Maria L. Harris had given her $50 a month from shortly after the death of R. T. Harris up to the time of Mrs. Harris' last illness, that she considered these as gifts, and that when a will was filed for probate, in which Mrs. Harris gave the bulk of her estate to religious organizations, the witness filed an approval and a request that the will be sustained.

The court found that during the year 1904 Maria L. Harris and R. T. Harris entered into an oral agreement whereby it was agreed that R. T. Harris would convey to Maria L. Harris all of his interest in any property held or acquired by either of them and that after his death and during her lifetime the said Maria L. Harris "would take a good living out of said property and make provisions so that upon her death the balance of said property would be divided fifty-fifty between his relatives and her relatives". The court then found that this oral agreement was too indefinite and uncertain to be specifically enforced. Judgment was entered in favor of the defendants and the plaintiffs have appealed.

The appellants contend that the term "relatives", as used in this oral agreement, means blood relatives or heirs at law, that under section 108 of the Probate Code the use of this term vested the property in the legal heirs of Mr. Harris and the legal heirs of Mrs. Harris, and that the court erred in holding that the agreement was too indefinite and uncertain to be specifically enforced.

It may be first observed that although this agreement was entered into before the adoption of the statute requiring such a contract to be in writing there is no evidence showing that Mr. Harris made any part performance by conveying any property to Mrs. Harris before the law was so amended as to require a written contract. Before that amendment an agreement to leave property by will could be enforced in equity only upon clear, definite and satisfactory proof. Long v. Rumsey, 12 Cal.2d 334, 84 P.2d 146. In Monsen v. Monsen, 174 Cal. 97, 162 P. 90, after pointing out the manifest danger of fraud in permitting the course of disposition of a decedent's property to be altered by parol testimony, the court said: "While the cases which we have cited declare the propriety of an enforcement, in equity, of contracts to make a particular disposition of property upon the death of the promisor, they all agree that enforcement will not be decreed except upon the conditions applicable to all demands for specific performance. One of these is that the terms of the agreement must be definite and certain. Section 3390 of the Civil Code, in enumerating the obligations which cannot be specifically enforced, concludes: '(6) An agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable.' In Owens v. McNally [113 Cal. 444, 45 P. 710, 33 L.R.A. 369], the court used this language: 'Where a contract such as this, resting in parol and sought to be enforced after the death of the other party to it, comes before a court of equity for review, it is scrutinized, and should be scrutinized, with particular care, and only upon a satisfactory showing that it is definite and certain and just will it be enforced. The proofs of the contract should be clear, and the acts of the claimant referable alone to the contract.'"

Not only is clear and satisfactory proof of the making of such a contract required but, since specific performance is involved, it is also essential in an action of this nature to establish the terms thereof in order that these terms be enforced. Civ. Code, sec. 3390.

In Notten v. Mensing, 3 Cal.2d 469, 45 P.2d 198, 202, reciprocal wills executed by a husband and wife contained identical provisions for the collateral kindred of the two spouses, and the effect of an oral agreement, that upon the death of either spouse all their property should go to the survivor and upon his or her death should go to certain designated relatives of the parties, was involved. The court held that the complaint stated a cause of action but pointed out that in such a case a plaintiff must be able to show clearly the terms of the contract and that "on the trial on the merits, the burden rests on the plaintiff to prove the oral agreement by full, clear, and convincing evidence". After trial on the merits another appeal was taken in that case. Notten v. Mensing, 20 Cal.App.2d 694, 67 P.2d 734, 735. In that case, in support of an oral agreement between the spouses, a witness testified that she had heard the wife say, in the presence of her husband, that she and her husband had agreed to will the properties one to the other and for the use of the survivor during the latter's life, and that the survivor was to make a will at his or her death and will the property equally between the families of the spouses. In that case, as in the case now before us, the parties to the oral agreement had living brothers and sisters and also nephews and nieces, some of whom were legal heirs and some of whom were not. After pointing out that there was no evidence of any agreement as to how the property was to be apportioned among the numerous heirs of the parties and none to indicate that either of the parties desired his or her brothers and sisters to be treated equally, or his or her nephews and nieces to be thus treated, the court said: "He who contends there was such an agreement has the burden of proving it and the scope thereof." The court in effect held that such an agreement, if made, was not one that could be enforced in a court of equity, citing cases in support of the rule that such a contract must be certain and definite in all of its parts.

[1] The only agreement established here was that Mrs. Harris should take a living out of the property in question, after which it was to be divided equally or fifty-fifty between her people and his people, or, as found by the court, between his relatives and her relatives. Section 108 of the Probate Code provides that a testamentary disposition to "heirs" or "relatives", when such terms are used as words

of donation, vests the property in the legal heirs. The agreement here in question was not a testamentary disposition, and the terms "families" or "people" were not presently used as words of donation. It is contended not that a will was actually made but that there was an agreement to later make certain testamentary provisions, which agreement is sought to be specifically enforced. In such a case, the rules pertaining to agreements and to the specific enforcement thereof must control, and under the code section an agreement cannot be specifically enforced unless its terms are sufficiently certain to make the precise act which is to be done clearly ascertainable.

[2] Assuming that it sufficiently appears that these parties agreed that upon the death of Mrs. Harris the remainder of the property should be equally divided between the two families, it neither appears that the parties intended it to go only to the legal heirs in the respective families, to the exclusion of relatives who are not legal heirs, nor, if so, that they intended that the legal heirs of each should share equally in such property. It is perfectly natural in such a case to desire and wish to provide that when the surviving spouse is through with the property a part of it shall go to the family of the original owner rather than all of it going to the family of the one to whom it was conveyed in the expectation that she would be the survivor. The real intent of such an agreement would naturally be to secure such a division between the two families and not to limit the surviving party's right to dispose of the share that is to go to her family in accordance with her desires. She might desire to give more to a needy sister than to a wealthy brother or more to a niece than to a nephew, regardless of the fact that one was an heir and the other was not. It would be unreasonable to assume that the parties had any other intention unless it was clearly expressed. However, if the appellant's contention is correct Mrs. Harris had no such right in this case. Moreover, with respect to the other half of the property, she was similarly bound to treat all of her husband's legal heirs alike and could make no provision for those of his relatives who were not legal heirs. Undoubtedly a contract could be made in the manner here contended for by the appellants, but the contract in question is not sufficiently complete or definite to clearly disclose such an intention.

As far as appears from the contract here shown the only expressed provision is that the remainder of the property is to be equally divided between the two families or sets of relatives. No provision is made as to which members of the respective families shall share therein nor as to the proportionate share that anyone shall take. As far as here appears, Mrs. Harris could have complied with the contract found by the court to have been made, by giving half of the remainder of this property to one of her husband's heirs, by dividing it between his heirs and one of his relatives who is not an heir, or by making any one of a number of other dispositions thereof. Under the agreement here shown it cannot be said that any of the appellants is entitled to any particular share of the remainder of the property or to any share at all. The court correctly held that the agreement in question is too indefinite and uncertain to be specifically enforced.

[3] The appellants further contend that where property is conveyed upon a particular object or trust and the purpose fails on account of an uncertain designation of beneficiaries there is a resulting trust, and that if this agreement is too indefinite to be enforced it should be held that they are entitled to the property in question by reason of its being impressed with a resulting trust in their favor as heirs at law of R. T. Harris. If it could be said that any resulting trust here appears, it cannot be said that any particular property is impressed with a trust in favor of any one of the appellants. The appellants are claiming under a contractual right and if the contract under which they claim cannot be enforced there is no way to fix or ascertain their rights as a basis for impressing any particular property with a trust. Aside from any other consideration the same uncertainty and indefiniteness which applies to the contract would prevent a recovery under the trust theory.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

36 Cal.App.2d 567

In re FLETCHER'S ESTATE.

JENSEN v. MARTIN et al.

Civ. 2374.

District Court of Appeal, Fourth District, California.

Jan. 12, 1940.

1. Executors and administrators 🔑314(8)

On petition for partial distribution of legacy under will bequeathing stated sum to petitioner if he was in testatrix' employ at time of her death, evidence *held* to warrant jury's finding that petitioner was in testatrix' employ at such time.

2. Principal and agent 🔑166(1)

To ratify agent's previously unauthorized acts, principal must have full knowledge of all facts, particularly of agent's acts, and of principal's rights in matter, which implies knowledge of legal effect of such acts.

3. Principal and agent 🔑166(1)

To ratify agent's previously unauthorized acts, principal must be acquainted with what has actually been done, and he is not bound by approval made under misapprehension of real nature of facts.

4. Principal and agent 🔑166(1)

A principal's ratification of agent's previously unauthorized acts is void, unless all circumstances were made known to principal.

5. Executors and administrators 🔑314(12)

In proceeding for partial distribution of legacy under will bequeathing stated sum to petitioner if he was in testatrix' employ at time of her death, refusal of instructions that petitioner's discharge as testatrix' chauffeur by officer of bank, with which she had account, before her death was effective for all purposes, though such officer was not properly authorized to discharge petitioner, if testatrix' subsequent acts and conduct with knowledge of discharge reasonably tended to show intention to ratify it, and that ratification of agent's act is implied when acts and conduct of principal, having full knowledge of facts, are inconsistent with any other supposition than previous authority to perform or intention to abide by agent's act, *held* not prejudicial error.

6. Executors and administrators 🔑315(1)

An order, directing executors to pay legatee sum bequeathed to him by will after payment of inheritance taxes or filing of state comptroller's written consent to such distribution or to deduct and pay state inheritance taxes out of legacy or collect amount of such taxes from legatee, was not erroneous as made before payment of such taxes and comptroller's consent to distribution and being in alternative regarding manner of securing payment of tax, as order protected executors, who were justified in making distribution to legatee by deducting from sum distributed amount sufficient to satisfy inheritance taxes against his share. Probate Code, §§ 1001, 1024; Code Civ.Proc. § 1669.

Appeal from Superior Court, San Diego County; Hon. Edward J. Kelly, Judge.

In the matter of the estate of Hattie A. Fletcher, deceased. From a judgment, granting a petition by Gilbert Jensen for partial distribution of a legacy to him by deceased's will over objections by Marie Martin and another, an order of partial distribution before final settlement, and orders denying the objectors' motion to dismiss the petition and motions for a directed verdict, judgment notwithstanding a jury's verdict for petitioner, and a new trial, objectors appeal.

Affirmed.

Stanford & Yale and Don L. Yale, all of San Diego, for appellant Martin.

Lindley & Higgins, of San Diego, for appellant Smith.

Thomas Whelan and Vincent Whelan, both of San Diego, for respondent.

GRIFFIN, Justice.

Hattie A. Fletcher died testate on the 17th day of November, 1937. Thereafter her will was admitted to probate and Sumter B. Smith and Marie Martin were appointed executors thereof. Her will provided in part as follows:

"Second: I hereby declare that I have a dog named 'Teddy'. If my dog Teddy survives me * * *

"I give, devise and bequeath to my executor, Sumter B. Smith, * * * the sum of Ten Thousand Dollars ($10,000.00) * * * as trustee * * * for the best care and comfort of my dog Teddy during the life of my said dog. * * *

"Upon the termination of this trust by the death of my dog, I then provide that the corpus of the trust shall go to Marie Martin, my residuary legatee.

"Third: I hereby give, devise and bequeath to my chauffeur, Gilbert Jensen, the sum of Ten Thousand Dollars ($10,000.00) provided that he is at the time of my decease in my employ. Should, however, the said Gilbert Jensen not be in my employ at the time of my death, I then provide that this bequest shall go to my residuary legatee. * * *

"Fourteenth: All the rest, residue and remainder of my property, of whatsoever nature, and wheresoever situated, I give, devise and bequeath to Marie Martin, of 4441 Forty-seventh Street, San Diego, California."

On September 10, 1938, Gilbert Jensen filed a petition for partial distribution of the legacy to him, alleging that he was in the employ of Hattie A. Fletcher at the time of her decease. Sumter B. Smith, as one of the executors, filed what was denominated "Answer to Petition for Partial Distribution" and Marie Martin, as one of the executors and as residuary legatee, filed her "Resistance to Petition for Partial Distribution". Both the answer of Smith and the resistance of Marie Martin denied that Jensen was in the employ of Hattie A. Fletcher at the time of her decease. The trial was had before a jury, to whom the interrogatory "Was Gilbert Jensen in the employ of Hattie A. Fletcher on November 17, 1937" was submitted. The jury replied "Yes". A judgment on the verdict in open court was thereupon entered and thereafter the court made an "order and decree of distribution prior to final settlement", which ordered that the executors "pay and deliver to the said Gilbert Jensen the whole portion of said estate to which he is entitled, to-wit, the sum of Ten Thousand Dollars ($10,000.00), together with interest thereon at the rate of 7% per annum from November 17, 1938, upon the condition that there be first paid all inheritance taxes upon said legacy or that there be filed the written consent of the State Controller to said distribution; otherwise that said executors deduct and pay out of said legacy of $10,000.00, any inheritance taxes due the State of California, thereon or to collect from said devisee the amount of the said tax".

The objectors made a motion to dismiss the petition for partial distribution which was in the nature of a motion for a nonsuit at the close of petitioner's case, a motion for a directed verdict, a motion for a judgment notwithstanding the verdict, and a motion for a new trial. All these motions were denied by the court.

[1] Respondent entered the employ of the deceased, Hattie A. Fletcher, and of her sister Alice Amidon, in August of 1934. Alice Amidon died in September of 1936. Thereafter, respondent Jensen continued to work for the decedent Hattie A. Fletcher. Mrs. Fletcher made a will on November 23, 1936, appointing Marie Martin as executrix, a stranger in blood, and made her residuary legatee thereunder. The executrix was a nurse who had cared for Mrs. Amidon during her last illness and had also cared for Mrs. Fletcher during an illness in 1935. After the death of Mrs. Amidon, Marie Martin continued on friendly terms with Mrs. Fletcher, visiting her frequently. For two or three years prior to the death of Hattie A. Fletcher, she attended a course in business law conducted by an attorney; Miss Martin recommended this attorney to Mrs. Fletcher to prepare a new will for Mrs. Fletcher. On May 4, 1937, Miss Martin accompanied Mrs. Fletcher to the attorney's office and introduced Mrs. Fletcher to him. He then prepared the will executed by Mrs. Fletcher which was admitted to probate.

Relations between respondent Jensen and decedent, his employer, were most friendly. She gave him a yearly birthday party, sometimes referred to him as her son, interested herself in his personal affairs by expressing a wish that he should marry the girl whom he later married. About September 29, 1937, Mrs. Fletcher became ill and on that date, at her instance, Gilbert Jensen called Marie Martin to come to the home of Mrs. Fletcher to take care of her. Jensen came daily to the home of Mrs. Fletcher and performed his usual duties until November 1, 1937. During this period of her illness, Mrs. Fletcher was alone in the house with Marie Martin, except for the visit of two or three friends. Mrs. Fletcher's treatment of Jensen up to November 1, 1937, had not differed from her earlier treatment of him. It is claimed by Marie Martin, the residuary legatee, that on November 1, 1937, she was called by Mrs. Fletcher to her room and there told: "Go down to the bank to Mr. Smith and ask him if he will take and do me a favor of discharging Jensen. He is becoming too presuming, he is entering into all of my private affairs. He is asking me personal questions and if I try to do it, he is going to argue with me." The Mr. Smith referred to was Sumter B. Smith, manager of one of the branches of the Security Trust & Savings Bank of San Diego, with which bank Mrs. Fletcher had an account. Shortly before the time of this claimed conversation, Gilbert Jensen was at this bank where he had gone to make a deposit at the request of Mrs. Fletcher. Upon Jensen's return from the bank Marie Martin went to the bank and told Mr. Smith she had been asked by Mrs. Fletcher to have Mr. Smith inform Mr. Jensen that his services were no longer required *at that time*. She requested Mr. Smith to phone for Jensen to come to the bank but to wait until she had time to return to the Fletcher home before phoning. Smith then asked the privilege of phoning Mrs. Fletcher to find out if the communicated order was authentic and he was told by Miss Martin that Mrs. Fletcher "was not able to come to the phone". The evidence indicates that she could have gone to the phone but with some difficulty. Mr. Smith, later that day, requested Jensen, by phone, to come to the bank where Smith told him that his "services were not any longer required *at this time*". There is confusion in the record as to whether or not these conversations contained the words above italicized. Smith's thought was that the cessation of services was for the time being. However, he also testified that he didn't have a right to say that it was for the time being only, as he did not know.

Jensen returned to the Fletcher home where he was with Mrs. Fletcher for about a half hour and told her that Mr. Smith had said that Jensen was temporarily released "on account of the estate could not afford expenses at this time", and Mrs. Fletcher told Jensen: "Well, they can't do that to me." "There is one thing they can't do, Jensen, they can't take you out of my will." He left the house at 5 o'clock that evening when Mrs. Fletcher said to him to be sure and come back every day.

On the 2d day of November, Sumter Smith again called Jensen to the bank, where Smith made some inquiries concerning Mrs. Fletcher's condition. Because of a request made by Marie Martin, Jensen did not return to the Fletcher home on November 2d, but on that date, Arthur Dorval, Mrs. Fletcher's friend of five and a half years' standing, called on her, and she told him that she didn't know why they took Jensen from her, and that she needed him more than ever right now; and asked Dorval to tell Jensen to come and see her. The next day Jensen called on Mrs. Fletcher, when she stated that she hoped that she would soon be up so that conditions would be back to normal. Neither then nor ever did she say anything to him about terminating his employment. Thereafter Jensen paid several visits to the home, but was refused admittance by Marie Martin. After November 1, he did not seek work, but thought that after a temporary layoff he would be recalled. Mrs. Fletcher died about 2 a. m. on November 17, 1937, leaving an estate of about $40,000.

The evidence is conflicting, and from the testimony produced by appellants, it indicates that Jensen made a statement to one witness repeatedly that "he had been discharged a few weeks before she died and that she had called him in and told him she was sorry to let him go". The evidence further discloses that on November 1, 1937, Jensen accepted a check for his last two weeks' services which was paid in advance, and that he then removed his belongings from the Fletcher home. However, from the record of the evidence we are convinced that the jury could (1) have disbelieved, in its entirety, the evidence of Marie Martin, and considered that the purported discharge of Gilbert Jensen, so far as it was claimed that Mrs. Fletcher authorized it, was a fraudulent device upon the part of the residuary legatee, or (2) the jury must have found from the evidence that the oral directions communicated to Smith and to Jensen, even though they originated from Mrs. Fletcher, were the basis of merely a temporary cessation of services and not a permanent and complete discharge.

In re Estate of Cowell, 170 Cal. 364, 149 P. 809, in construing a similar bequest made to certain employees "now working for said firm", the court held, in reference to certain employees who had been temporarily suspended from a particular work of the company in which they had been engaged, that they were within the employ of the company during such temporary suspension for the purpose of receiving the devise. See also, Hovey v. Grier et al., 324 Mo. 634, 23 S.W.2d 1058; Cole v. Cole, [1919] 1 Chancery 218, 223; Herbert v. Reid, 16 Vesey Junior, 481, 33 Eng.Reprint, 1067; cited with approval in Cole v. Cole, supra; Abbott v. Lewis, 77 N.H. 94, 88 A.

98; In re Mitchell's Estate, 114 Misc. 370, 186 N.Y.S. 666, at page 668; Anderson v. Stone, 281 Mass. 458, 183 N.E. 841, 843; Boyle v. Howe, 126 Fla. 662, 171 So. 667.

The uniform attitude of the courts of various jurisdictions displayed in the foregoing decisions, are all favorable to the employee, and if applied to the evidence which the jury must have believed in the present case, disposes of the first contention of the appellants.

[2-5] The following instruction was requested by appellants and was by the court refused:

"You are further instructed that even though you find from the evidence that Sumter Smith did not have proper authorization to discharge Gilbert Jensen, still if you find that he actually did discharge Gilbert Jensen on November 1, 1937, and if you find that the acts and conduct of Hattie A. Fletcher thereafter, with knowledge of the discharge, reasonably tended to show an intention to ratify the discharge and were inconsistent with any supposition other than that of a previous authorization or an intention to abide by the fact, though unauthorized, you must find that the discharge of Gilbert Jensen by Sumter Smith was effective for all purposes."

"You are instructed that ratification of the acts of an agent is implied whenever the acts and conduct of the principal having full knowledge of the facts, are inconsistent with any other supposition than that of previous authority, or an intention to abide by the act, though it was unauthorized. It is not essential that it be shown that there was assent to and confirmation of the transaction expressed in words. Ralphs v. Hensler, 97 Cal. 296, 32 P. 243. A ratification of the acts of one assuming to be an agent may be implied from conduct on the part of the principal reasonably tending to show an intention to ratify the acts. Union Trust & Realty Co. v. Best, 160 Cal. 263, 116 P. 737."

No other instruction on ratification was given.

Appellants contend that the failure and refusal to give this instruction was prejudicially erroneous. Ratification of the previously unauthorized acts of an agent requires that the principal have full knowledge of all of the facts, particularly of the acts of the person claiming to act as agent. The principal must also have full knowledge of his rights in the matter, which implies a knowledge of the legal effect of the acts, and to constitute a ratification the principal must be acquainted with what has actually been done, and he is not bound by an approval made under a misapprehension of the real nature of the facts. Unless all the circumstances are made known to him, the ratification is void. Ballard v. Nye, 138 Cal. 588, 72 P. 156; Dean v. Bassett, 57 Cal. 640; Golinsky v. Allison, 114 Cal. 458, 46 P. 295; Munroe v. Fette, 1 Cal.App. 333, 82 P. 206; Brown v. Rouse, 104 Cal. 672, 38 P. 507; King v. Lagrange, 50 Cal. 328, 332; 1 Cal.Jur., p. 777, sec. 69.

From the evidence and authorities cited we are convinced that the refusal to give the proffered instruction was not prejudicial error.

[6] The remaining point involved pertains to the order of partial distribution. It is claimed that the court erred in making the order for partial distribution when there had been no payment of inheritance tax and no consent to the distribution by the State Controller, and that the order made is erroneous in that it is in the alternative with regard to the manner in which payment of the inheritance tax should be secured. Appellants contend that the amendment to section 1001 of the Probate Code in 1937 changed the procedure that theretofore obtained so as to make the cases of In re Estate of Ross, 187 Cal. 454, 202 P. 641; In re Estate of Hill, 94 Cal. App. 113, 270 P. 708; and In re Estate of Johnson, 218 Cal. 501, 23 P. 2d 1012, inapplicable. There is no more force in the provisions of section 1001, as amended, than in section 1024 of the Probate Code, which was in effect at the time the order appealed from in the Estate of Johnson, supra, was made. Such provision was also in the statutes as section 1669 of the Code of Civil Procedure at the time the order was made which was appealed from in Re Estate of Hill, supra. The cases cited together with the case of In re Estate of Cohn, 20 Cal.App.2d 550, 67 P.2d 362, adopting the rule therein stated, sufficiently determine the sole point as to which the appellants have any interest on this appeal, that is, whether they are, as executors of the last will and testament of Hattie A. Fletcher, deceased, protected by the order. Obviously, they are justified in making the distribution to petitioner by deducting from the sum to be distributed, an

amount sufficient to satisfy the inheritance taxes against his share.

The judgment and orders from which this appeal has been perfected are affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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36 Cal.App.2d 515

PEOPLE v. NELSON.

Cr. 392.

District Court of Appeal, Fourth District, California.

Jan. 10, 1940.

1. Statutes 🔑231

Penal Code provision that an unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false should be read in connection with provision that "perjury" consists of the willful statement under oath of matters as true which party knows to be false. Pen.Code, §§ 118, 125.

[Ed. Note.—For other definitions of "Perjury," see Words & Phrases.]

2. Criminal law 🔑254

A trial judge who has heard a case without a jury, in passing on motion for a new trial, must consider sufficiency of evidence, including question whether or not defendant's guilt has been established beyond a reasonable doubt.

3. Criminal law 🔑1186(4)

Under constitutional provision, it would be a "miscarriage of justice" to refuse a new trial where a judge trying case without jury was of opinion that reasonable doubt rule had not been complied with, or that an element of the offense had not been established. Const. art. 6, § 4½.

[Ed. Note.—For other definitions of "Miscarriage of Justice," see Words & Phrases.]

4. Criminal law 🔑911, 1156(1)

A trial court is vested with a wide discretion in passing on a motion for a new trial in a criminal case, which discretion will not be disturbed by reviewing court except for a manifest abuse of discretion.

5. Criminal law 🔑1158(1)

When a trial judge, in a criminal case, is not convinced to a moral certainty and beyond a reasonable doubt that evidence is sufficient to justify a conviction, a reviewing court cannot say as a matter of law, that the granting of a new trial constituted an abuse of discretion.

6. Criminal law 🔑1158(1)

Reviewing court will not disturb an order granting a new trial unless record discloses no evidence conflicting with that upon which verdict rests, and action of trial court in granting a new trial where there is a substantial conflict in evidence is conclusive unless an abuse of discretion clearly appears.

7. Perjury 🔑3

The element of willfulness necessary to establish "perjury" is as essential in the case of an unqualified statement of that which one does not know to be true as in the case of a statement of that which one knows to be false. Pen.Code, §§ 118, 125.

8. Criminal law 🔑254

In perjury prosecution of maker of check for stating that at time he executed check he placed written notation thereon, which statement was conclusively shown to be false, trial court, trying case without a jury, did not abuse its discretion in granting defendant's motion for a new trial in view of conflicting evidence as to willfulness of defendant's misrepresentation. Pen.Code, §§ 118, 125.

◆

Appeal from Superior Court, Riverside County; V. N. Thompson, Judge.

H. Frank Nelson was convicted of perjury and the People appeal from an order granting defendant's motion for a new trial. Affirmed.

Earl Warren, Atty. Gen., Eugene M. Elson, Deputy Atty. Gen., and Earl Redwine, Dist. Atty., and William O. Mackey, Deputy Dist. Atty., both of Riverside, for appellant.

David D. Sallee and Oliver O. Clark, both of Los Angeles, for respondent.

BARNARD, Presiding Justice.

The defendant was charged with perjury alleged to have been committed by testifying to a certain fact in a prior civil action. The court, sitting without a jury, found the defendant guilty and thereafter granted his motion for a new trial from which order the People have appealed.

It appears from the evidence that one Fred E. Pierce had sued the respondent for some $2,000 for services in making an audit. The respondent claimed an agreement that the work should be done for $250 and that a certain check for $50 was the final payment thereon. At the trial of the civil action he introduced in evidence a check for $50 given by him to Pierce on July 28, 1938, which contained on its face the words "Total balance for audit". These words were written by the respondent but in ink of a color different from that used in the rest of the check. The respondent testified in the civil action that he wrote the check with his own pen, that after starting to hand the check to Mr. Pierce he took a pen from the desk of his attorney and wrote on the check the words we have quoted, and that he then delivered the check to Pierce. Thereafter a photostatic copy of this check, taken by a Los Angeles bank at the time the check went through for payment, was introduced in evidence. This copy did not contain the words we have quoted, which rather clearly establishes the fact that these words were placed upon the check after it went through the bank.

The appellant contends that the court abused its discretion in granting the motion for a new trial. It is argued that it conclusively appears from the evidence that false testimony was given which was material in the former action; that wilfulness on the part of the respondent may be inferred from the general circumstances, including the fact that the words in question were written upon the check by the respondent after the check had been cleared through the bank; and that the fact that false testimony had been given appears without contradiction. It is further argued that where a case is tried by the court without a jury the reasonable doubt rule applies at the time the court is deciding on the guilt or innocence of the defendant, that the reasonable doubt rule has no application when the court is thereafter considering a motion for a new trial, and that in such a situation, under article VI, section 4½, of the Constitution, a new trial cannot be granted unless the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

[1-3] Perjury, as defined by section 118 of the Penal Code, includes the element of wilfulness on the part of one who states as true a material matter which he knows to be false. While section 125 of that code provides that an unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false, that section is to be read in connection with section 118. People v. Von Tiedeman, 120 Cal. 128, 52 P. 155. Although it here appears that the respondent's testimony in the prior action, to the effect that the words in question were written upon the check before it was delivered to Pierce, is not in accordance with the fact, the question still remains whether the respondent knew at the time that the evidence he was giving was false, or whether he then wilfully and intentionally made an unqualified statement of a fact which he did not know to be true. While wilfulness might be inferred here from the facts appearing in evidence the question remains whether such wilfulness conclusively appears or whether the trial judge was free to arrive at a different conclusion on that point. Moreover, a trial judge who has heard a case without a jury, in passing upon a motion for a new trial, is under the duty of considering the sufficiency of the evidence, including the element of whether or not the guilt of the defendant has been shown beyond a reasonable doubt. If it be assumed that article VI, section 4½, of the Constitution has any application in this connection, it must still be true that it would be a miscarriage of justice to refuse a new trial where such a judge was of the opinion that the reasonable doubt rule had not been complied with, or that an element of the offense had not been established as required by that rule.

[4-6] It is well settled that a trial court is vested with a wide discretion in passing upon a motion for a new trial in a criminal case (People v. Bihn, 93 Cal.App. 566, 269 P. 939), and that an appellate court will not disturb an order granting a new trial unless the record discloses a manifest abuse of that discretion. People v. Ferlin, 203 Cal. 587, 265 P. 230. When a trial judge, in a criminal case, sitting as he does as a thirteenth juror, is not convinced to a moral certainty and beyond a reasonable doubt that the evidence is sufficient to justify a conviction, an appellate court is hardly in a position to say, as a matter of law, that the granting of a new trial constituted an abuse

of discretion. People v. Westcott, 93 Cal. App. 216, 269 P. 724. Moreover, an order granting a new trial will not be upset unless the record discloses no evidence which conflicted with that upon which the verdict rested. People v. Brooks, 90 Cal. 174, 27 P. 72. Where there is any substantial conflict in the evidence the granting of a new trial rests so completely in the discretion of the trial court that its action is conclusive unless it clearly appears that this discretion has been abused. People v. Dixon, 16 Cal. App.2d 56, 60 P.2d 140.

While it clearly appears that the respondent misstated a fact in the trial of the prior action, a question remained as to whether he intentionally and knowingly did so. In People v. Von Tiedeman, supra, the court said [120 Cal. 128, 52 P. 157]: "A witness who, without qualification, testified that John Smith was at a designated point upon last Saturday night, would not be guilty of perjury if he was honestly mistaken as to the fact. * * * Yet, if he was honest in his statement, if he fully believed that he was telling the truth when he made the statement, certainly he committed no perjury. It is not the purpose of the law to send such men to the prisons of the state, and this section was not framed to deal with that class of persons."

[7] And further: "* * * but the 'willful' element in his testimony is quite as essential to the crime in the case of an unqualified statement of that which one does not know to be true as in the case of a statement of that which one knows to be false."

In People v. Knutte, 111 Cal. 453, 44 P. 166, it is said: "Nor does it affect the question that the evidence in the case may have a legal tendency to prove all the material facts. Guilt is to be established beyond a reasonable doubt; and, while there may be some evidence to support each fact, this does not signify that it is necessarily such as to satisfy the conscience of the judge that a case is made which warrants conviction."

[8] In the instant case, the testimony upon which the charge of perjury is based was given eight months after the check was delivered. The respondent testified that when he stated in the prior action that the notation in question was upon the check when he delivered it to Pierce he believed this testimony to be true and that this was, at the time, his best recollection of what had occurred. His testimony was in part corroborated by the testimony of the attorney in whose office the check was written and delivered to Pierce, who testified that the respondent started to hand the check to Pierce and then took it back and taking another pen from the desk wrote something, although this witness did not see what was written or that it was written upon the check. In brief, the respondent explained that "the only thing that could have happened" was that he took the check back from Mr. Pierce and taking some cards from his pocket wrote a notation on the card of the number and amount of the check and what it was for. There is also evidence that the date and amount of the check with the notation "total balance for audit" was entered upon the stub of the respondent's check book, and that this notation was later scratched out with a red pencil by Mr. Pierce during his audit of respondent's books. While it would appear likely that one who wrote a notation upon a check after the check had been paid by the bank would remember that fact, it is conceivable that one who wrote such a notation on a separate card immediately before delivering a check might believe, months later, that he had written it on the check itself. In our opinion, a question of fact was presented which was for the trial court. The respondent testified that he knew at the time of the transaction here in question that certain Los Angeles banks took photographs of all out-of-town checks which cleared through these banks. The trial judge may have entertained a serious doubt as to whether one who had knowledge of this practice would intentionally misrepresent a fact which could thus easily be established.

The matter in question was one which was within the discretion of the trial court and no abuse of that discretion appears.

The order appealed from is, therefore, affirmed.

We concur: MARKS, J.; GRIFFIN, J.

36 Cal.App.2d 490

LEO v. BOARD OF MEDICAL EXAMINERS.

Civ. 12279.

District Court of Appeal, Second District, Division 2, California.

Jan. 10, 1940.

1. Physicians and surgeons ⚷2

In general, subjects covered by statute concerning qualifications of an applicant whose application to take examination for a physician's certificate is based on diploma issued by approved foreign medical school are proper matters for legislative regulation under police power. St.1937, p. 1263, § 2193(c).

2. Constitutional law ⚷48

In construing legislative enactments, court must adopt a construction, if possible, which will harmonize the enactments with constitutional limitations upon legislative power.

3. Evidence ⚷20(1)

When Medical Practice Act was amended with respect to qualifications of applicants whose applications to take examination for a physician's certificate are based on diplomas issued by approved foreign medical schools, it was common knowledge that American citizens were prohibited from practicing any profession in many foreign countries, particularly those of Europe. St. 1935, pp. 1839, 1841; St.1937, p. 1263, § 2193(c).

4. Physicians and surgeons ⚷4

It could not be assumed that Legislature intended that section of Medical Practice Act respecting qualifications of applicants whose applications for leave to take examination for a physician's certificate are based on diplomas issued by approved foreign medical schools should be construed in such manner that would result in favoring alien applicants over American applicants. St.1935, pp. 1839, 1841; St.1937, p. 1263, § 2193(c).

5. Physicians and surgeons ⚷4

The subdivision of Medical Practice Act, requiring an applicant whose application for leave to take examination for a physician's certificate is based on a diploma issued by an approved foreign medical school to furnish documentary evidence that applicant has been admitted or licensed to practice in country where institution in which applicant has pursued his medical course is located, was intended to apply only to alien applicants. St.1935, pp. 1839, 1841; St.1937, p. 1263, § 2193(c).

6. Statutes ⚷189

A statute may be construed contrary to its literal meaning when a literal construction would result in injustice and absurdity or inconsistency.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Mandamus proceeding by Sidney David Leo against the Board of Medical Examiners of the State of California to compel the Board to permit petitioner to take an examination for a physician's and surgeon's certificate. From a judgment granting a peremptory writ of mandate, the Board appeals.

Affirmed.

Earl Warren, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for appellant.

Finlayson, Bennett & Morrow and Henry L. Knoop, all of Los Angeles, for respondent.

PER CURIAM.

The Board of Medical Examiners has taken this appeal from a judgment of the trial court granting a peremptory writ of mandate requiring the board to permit petitioner, Sidney David Leo, to take the examination for a physician's and surgeon's certificate at the earliest available date.

Petitioner regularly filed his application with the board for permission to take the examination for a physician's and surgeon's license. The application was rejected by the board solely for the reason that it failed to comply with section 2193(c) of the Business and Professions Code, St. 1937, p. 1263, in that it did not appear that petitioner had been admitted or licensed to practice medicine and surgery in Switzerland, where the university from which petitioner received his degree of doctor of medicine is located. Petitioner, who sought to be examined as an applicant from a foreign medical school approved by the board, was at all times a citizen of the United States and for a number of years had been a resident of the state of California. His grammar school and high school education was completed in the public schools of the city of New York.

Thereafter he fulfilled the requirements of a regular four-year college course in New York University and received the degree of bachelor of science. Petitioner then entered the University of Albert-Ludwig in Germany where he received the first year of his medical instruction. Thereafter he entered the University of Basle in Switzerland, where he completed his medical studies. Both medical schools were approved by the board as complying with the requirements of the Business and Professions Code for resident courses of professional instruction in medicine and surgery. After graduating from the University of Basle, petitioner returned to the United States and served eighteen months in residence in the Los Angeles County General Hospital, which is a hospital approved by the board for interneship. It is conceded that petitioner possesses every required educational and moral qualification and that his application fully complied with the requirements of the Business and Professions Code, except as to section 2193(c). The Medical Practice Act, prior to 1935, contained no requirement that applicants from foreign medical schools must be admitted or licensed to practice in the countries in which such schools are located. In 1935, St.1935, pp. 1839, 1841, the Medical Practice Act was amended by adding the license requirement which in 1937 became section 2193(c) of the Business and Professions Code. At that time petitioner had completed all but the last semester of the final year of his medical course. Petitioner's inability to comply with the provisions of section 2193 (c) was due to the fact that he is an American citizen and the laws of Switzerland provide that only citizens of Switzerland can be admitted or licensed to practice medicine in that country.

Section 2193 of the Business and Professions Code provides as follows: "An applicant, whose application is based on a diploma issued to him by a foreign medical school approved by the board, shall furnish documentary evidence, satisfactory to the board, that:

"(a) He has completed a resident course of professional instruction in approved medical schools equivalent to that required in this article for a physician and surgeon applicant.

"(b) Subsequent thereto, he has had issued to him a medical diploma.

"(c) He has been admitted or licensed to practice medicine and surgery in the country where the institution in which he has pursued his medical course of professional instruction, is located.

"(d) He has completed either the senior or fourth or final year in an approved medical school in the United States, or, in lieu of this, that he has served at least one year in residence in a hospital located in the United States and approved by the board for interneship."

[1] It is conceded by the parties that, in general, the subjects covered by the above section as a whole, are proper matters for legislative regulation under the police power. It is contended by the board that the license requirements of the section constitute a reasonable exercise of the police power. Petitioner argues that a requirement that he be admitted to practice medicine in Switzerland is unreasonable, arbitrary and discriminatory and therefore unconstitutional.

[2-4] It is the duty of the court in construing legislative enactments to adopt a construction if possible which will harmonize the enactments with the constitutional limitations upon the legislative power. Wines v. Garrison, 190 Cal. 650, 214 P. 56. 26 A.L.R. 1302. We must decide whether or not the legislature intended that the requirement of subdivision (c) of section 2193 is to be applied to both aliens and American citizens. In 1935, when the license requirement of subdivision (c) was first enacted, it was a matter of common knowledge, virtually authenticated as a historical fact, that American citizens were prohibited from practicing any profession in many foreign countries, particularly those of Europe. The record in the instant case affords evidence that American citizens cannot be admitted to practice medicine in Switzerland, Germany, France, Japan, Mexico and some of the South American countries. If a strict construction of subdivision (c) should be adopted, the result would be absurd and unjust, for it would favor alien applicants over American applicants, the latter being unable to secure the required license in many foreign countries. It is unreasonable to assume that the legislature could have intended such an unjust result.

[5, 6] It may be assumed that the legislature was properly informed on the subject-matter concerning which it enacted the statute in question. Bearing in mind the fact that at the time the section in question was adopted American citizens were unable to obtain the required licenses in many foreign

countries, it is reasonable to hold that subdivision (c) of section 2193 was intended to apply only to alien applicants. If the subdivision be construed in this way, it has a reasonable and just application and more fully accords with the intention of the legislature. The legislative intent will control a literal construction which leads to injustice and absurdity. "A statute may be construed contrary to its literal meaning when a literal construction would result in an absurdity or inconsistency." Carpy v. Dowdell, 129 Cal. 244, 61 P. 1126, 1127.

Judgment affirmed.

I concur in the judgment: McCOMB, J.

36 Cal.App.2d 583

Ex parte CHANDLER.

Cr. 3308.

District Court of Appeal, Second District, Division 1, California.

Jan. 15, 1940.

1. Courts 🔑1

"Jurisdiction" is the power to hear and determine the matter in controversy.

[Ed. Note.—For other definitions of "Jurisdiction (Of Courts)," see Words & Phrases.]

2. Divorce 🔑290

Superior court hearing a divorce action had no jurisdiction to order a father to bring his children from another state for purpose of determination as to their custody, where children were in the exclusive custody of the father for several months prior to commencement of divorce action by wife, and had been moved to the other state before commencement of the action. Civ.Code, §§ 138, 213.

3. Divorce 🔑290

If children are within a superior court's jurisdiction at time a divorce action is commenced, the superior court has power to determine their custody.

4. Divorce 🔑305

If a superior court makes an authorized order affecting the custody of children in a divorce action, it is then empowered to punish as a contempt the refusal of the husband to produce the children in conformity with an order as to their custody.

Proceeding in the matter of the application of Shelby Lee Chandler for a writ of habeas corpus to be discharged from custody.

Petitioner discharged.

T. T. Hawkins and Bates S. Himes, both of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

WHITE, Justice.

Petition for a writ of habeas corpus. The facts are uncontroverted, and so far as pertinent hereto are that during November, 1938, petitioner and his wife separated, and by mutual consent petitioner took custody of their three minor children. At the time of the separation petitioner, his wife and children were all residents of the county of Los Angeles in this state. After retaining exclusive possession of the children until about July 2, 1939, petitioner changed their domicile to the state of Texas, but retained his own residence in California. Since the marital separation petitioner has been the sole support of such children. He avers that at the time he removed the children to Texas he was unaware that his wife contemplated bringing an action for divorce. However, on July 17, some two weeks after petitioner had changed the domicile of said children, his wife filed an action against him for divorce in the superior court of the county of Los Angeles. In this action the wife sought custody of the children and money for her and their support.

On the day the divorce action was filed the superior court, pursuant to the provisions of section 138 of the Civil Code, issued an order directing petitioner to appear before such court to show cause why, among other things, his wife should not have custody of the children pendente lite. Pursuant to such order, petitioner appeared in court, and following a hearing at which it was established that the children were residing in Texas since a date prior to the filing of the divorce action and were being supported by petitioner, objection was made to the superior court's making any order in re custody of children on the ground that the latter at all times prior to and at the time of the institution of the divorce action resided outside the state of California, and that the superior court of Los Angeles county was without jurisdiction to make any order concerning their custody. Following the submission of this issue, the court, on August 28, 1939, made an order requiring petitioner to bring said children from the state of Texas and produce them in the Los Angeles superior court on or before September 18, 1939. For his disobedience of this order petitioner was adjudged in contempt of court, and on November 17, 1939, was committed to the county jail until such time as he "returns the children to the jurisdiction of said court".

This factual situation squarely presents to us the question as to whether the superior court of the state of California is possessed of jurisdiction to order a father to bring his children from a foreign jurisdiction into the jurisdiction of the court hearing a divorce action, for the purpose of a determination as to their custody, when such children were in the exclusive custody of such father for several months prior to the commencement of such divorce action and where prior to the filing of such divorce action, at the time of its filing, and at all times thereafter, such children were residing outside the jurisdiction of the court hearing the divorce action.

[1-4] Jurisdiction has been defined as being the power to hear and determine the matter in controversy. The particular matter here in controversy was the custody of the minor children of the parties to a divorce action. Did the superior court have jurisdiction to determine the custody of children lawfully domiciled outside the state of California at the time of the commencement of the divorce action? Respondent concedes that it is well settled that our courts have no authority to award custody of children not within their territorial jurisdiction (9 Cal.Jur. 786, and cases therein cited); but it is argued that when the court obtained jurisdiction of the parties it had the right to order one of the parties to bring the children from without to within the jurisdiction. We think not. Petitioner was not before the court on any order to show cause why he should not bring the children into the jurisdiction of the superior court of California. Indeed, no such order is authorized by section 138 of the Civil Code. The petitioner was before the court on an order to show cause in re custody of children, and the court was without jurisdiction to determine such custody. Where, as here, the domicile of the children was by the husband legally and lawfully changed from California to Texas (Civ.Code, sec. 213) prior to the commencement of the divorce action, the court is without power to punish such husband for the doing of such legal and lawful act. With the father under commitment of confinement in jail until he returns the children from Texas, what an anomalous situation would arise if the courts of Texas in whose jurisdiction the children concededly now are should determine, as they have a right to do, in the exercise of such jurisdiction, that the best interests and welfare of the children would be served by their remaining in Texas. If the children were within the jurisdiction of the California court at the time the action was commenced, thereby vesting such court with power to determine their custody, or if the court had made an authorized order affecting such custody, it would then be empowered to punish as a contempt the refusal of the husband to produce such children in conformity with the order as to their custody.

Under the American philosophy of government, the child is not the creature of the state; and where the father, as he had a right to do in this case, determined to domicile his children in the state of Texas, it does not lie within the power of any court of this state to send him to jail for doing that which he was legally and lawfully entitled to do, nor to require him to go outside of this state to undo such lawful act.

The petitioner is discharged from custody.

We concur: YORK, P. J.; DORAN, J.

36 Cal.App.2d 599

PEOPLE v. SANTOS et al.

Cr. 1715.

District Court of Appeal, Third District, California.

Jan. 17, 1940.

1. Criminal law ⟹1202(3)

Certificates of the clerk of the state board of prison directors of California showing fact of incarceration at San Quentin and at Folsom, and certificates of the respective wardens, under seal, showing that the card indexes, photographs, and fingerprints of the prisoners were true, together with certified copies of the commitments and of the discharges of accused, were admissible to show prior convictions. Pen.Code, § 969b; Code Civ.Proc. § 1918, subd. 6.

2. Criminal law ⟹274, 586, 1149, 1151

The granting of a continuance and permitting withdrawal of pleas of not guilty to charge of prior convictions are in trial court's discretion, and, in absence of anything in the record to show an abuse of that discretion, convictions will not be reversed for alleged error with respect thereto.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Anthony Santos and Thomas Moran, whose true name is Tony Souza, were convicted of burglary, and they appeal.

Affirmed.

Blaine McGowan, of Eureka, and Carl L. Christensen, Jr., of Oakland, for appellants.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

PER CURIAM.

Appellants were convicted on four counts of burglary, and each were found by the jury to have suffered two prior convictions.

From the judgments imposed, this appeal is taken, and as grounds therefor, it is urged that the court erred in admitting certain penitentiary records of prior convictions which appellants claim did not conform to the requirement of section 969b of the Penal Code, and that the court abused its discretion in refusing to grant Santos a separate trial.

[1] Section 969b of the Penal Code provides that: "For the purpose of establishing prima facie evidence of the fact that a person being tried for a crime or public offense under the laws of this state has been convicted of an act punishable by imprisonment in the state prison of this state, and has served a term therefor in any penal institution * * * the records or copies of records of any state penitentiary or reformatory * * * in which such person has been imprisoned, when such records or copies thereof have been certified by the official custodian of such records, may be introduced as such evidence."

Section 1918 of the Code of Civil Procedure, after providing the manner of proving executive acts, proceedings of the legislative branches of government and certain other official documents, states in subdivision 6, "Documents of any other class in this state, by the original, or by a copy, certified by the legal keeper thereof," and subdivision 7 applying to documents in a sister state requires the production of the original, or a copy, certified by the legal keeper thereof, together with the certificate of the secretary of state, or certain other designated officers of such state that the copy is duly certified by the officer having the legal custody of the original.

In the present case the exhibits complained of consisted of certificates of the clerk of the state board of prison directors of California, showing the fact of incarceration at San Quentin and at Folsom, and of certificates of the respective wardens, under seal, showing that the card indexes, photographs and fingerprints of the prisoners were true. Certified copies of the commitments and of the discharges of each appellant were also introduced.

In People v. Howard, 72 Cal.App. 561, 237 P. 780, the court considered the character of the office of warden and clerk and their respective duties and powers, and the exhibits here introduced were in accordance with the rules there laid down.

Appellants seem to rely upon People v. Foster, 3 Cal.App.2d 35, 39 P.2d 271, but there we were considering the authentication of documents from the Louisiana state prison, and in that case, subdivision 7 of section 1918 of the Code of Civil Procedure, supra, and not subdivision 6, was applicable.

[2] The second point, namely, that the court erred in refusing to grant a continuance, and in refusing to permit defendants to withdraw their pleas of not guilty to the

charge of prior convictions, were all matters resting within the discretion of the trial court, and there is nothing in the record to show an abuse of that discretion.

The judgment and order are affirmed.

36 Cal.App.2d 536

In re DOBBINS' ESTATE.

DOBBINS v. TITLE GUARANTEE & TRUST CO. et al.

Civ. 12447.

District Court of Appeal, Second District, Division 2, California.

Jan. 12, 1940.

1. Executors and administrators 🔑295

Under statutes vesting probate court with power to determine who are entitled to estate, and requiring executor to be discharged after he has delivered up property of estate to parties entitled thereto, legatee had no right to possession of assets which he agreed should be distributed to him prior to their distribution by court, and was not entitled to income from such assets during administration in absence of specific provision in such agreement. Probate Code, §§ 1066, 1080, 1081.

2. Courts 🔑200½

A claim asserted by a party adverse to estate will be placed on civil docket for trial.

3. Executors and administrators 🔑314(2)

Under statute providing that probate court shall determine who are entitled to estate, probate court had jurisdiction to make order for distribution for income collected on properties which were to be distributed to legatee pursuant to contract of compromise effected by the parties in the course of probate. Probate Code, § 1081.

4. Executors and administrators 🔑314(2)

Where the whole purpose of proceeding is to determine rights of respective parties, heirs and legatees, contestants and contestees, to the property, the probate court has jurisdiction to determine the issues. Probate Code, § 1081.

5. Executors and administrators 🔑1

The administration of an estate is one indivisible judicial proceeding from the order appointing the administrator until his discharge.

6. Courts 🔑200½

While sitting in probate, superior court can determine validity of contract whereby it is claimed a spouse has been divested of all interest in the estate.

7. Courts 🔑200¼

The fact that superior court is acting in probate when called upon to apply rules in equity or principles of law to decide a question requiring settlement, does not affect such court's jurisdiction to decide such question.

8. Courts 🔑200¼

The superior court, in determining as a probate court the issues arising in administration of an estate, can bring to its aid the full equitable and legal powers with which, as the superior court, the court is invested.

9. Courts 🔑201

The superior court having jurisdiction of subject matter of case falling within either equity or law can hear and determine, in mode provided by law, all questions of law and fact, the determination of which is ancillary to a proper judgment.

10. Courts 🔑201

The superior court, sitting as probate court, has power to hear and determine, in the mode provided by law, all questions of law and fact, the determination of which is ancillary to a proper judgment.

11. Descent and distribution 🔑84

An heir's conveyance during administration of his interest in any part of estate in probate is subject to perils of probate proceeding, and an order of sale of assets of estate may alienate to an utter stranger the property affected by such conveyance.

12. Executors and administrators 🔑295

A contract terminating testamentary trust created for legatee's benefit, and providing that certain assets "shall be distributed" to legatee, was not intended to make a present conveyance of title to assets to legatee but to provide for distribution after probate should have run its course.

13. Executors and administrators ⚷295

A contract directing executors to deliver certain assets to legatee in lieu of legatee's testamentary benefits to begin after distribution, required estate to be kept intact during probate, and income from all assets of estate, including assets to be distributed to appellants, belonged to estate prior to distribution.

Appeal from Superior Court, Los Angeles County; J. W. Mullen, Jr., Judge.

Proceedings in the matter of the estate of Caroline W. Dobbins, also known as C. Wilhelmina Dobbins, deceased, wherein Horace M. Dobbins, legatee, objected to the final account and report of the Title Guarantee & Trust Company, as executor of the last will of Caroline W. Dobbins, deceased. From the judgment, Horace M. Dobbins, legatee, appeals.

Affirmed.

F. Josephine Stevenson and Raymond G. Thompson, both of Pasadena, for appellant.

Alfred G. Allen, of Pasadena, for respondents.

MOORE, Presiding Justice.

Caroline W. Dobbins departed this life January 6, 1935, leaving a numerous posterity and many legatees. By a last will, she provided that the residue of her estate go to the Title Guarantee and Trust Company and her son, Horace Dobbins, as joint trustees, and that from the income derived from the trust estate thereby created, the trustees were to pay the net income from said trust estate to the said Horace during his lifetime and at his death the corpus should go to the California Institute of Technology. The executors, who were also designated trustees, were qualified February 5, 1935.

On August 2d her granddaughter, Florence Lowe Barnes, filed a contest of said will and thereafter presented a claim against the estate for a sum in excess of $500,000. The said claim was rejected by the executors but, before a suit was filed thereon, the numerous legatees, the contestant and claimants, reached an agreement September 10, 1936, for the disposition of all matters in controversy and of the entire estate.

In effect the contract provided that the testamentary trust is terminated and that in lieu thereof certain assets shall be distributed to the said Horace aggregating about $150,000.

Nothing more appears to have been done with reference to distribution until December 6, 1938, when the executors filed their final account and report in which they allege that Horace contends that he is entitled to all of the net income (subject to assignments) from the properties to be distributed to him under said agreement; that the persons entitled to the residue contend that all income received from said properties up to the time of distribution should be distributed as part of such residue.

A trial of the controversy thus created was had before the superior court sitting in probate. The only evidence offered was: (1) said agreement; (2) a judgment in the case of California Institute of Technology and Horace M. Dobbins v. Title Guarantee and Trust Company, terminating the trust provided for in said last will and authorizing the trustees to execute the contract of September 10, 1936; and (3) an order made in said last-mentioned proceeding dated December 1, 1936, authorizing the compromise effected by said contract.

The trial court held that Horace and his successors in interest were not entitled to any interest or income collected on the assets to be distributed to them prior to distribution of the said estate, said collections amounting to the sum of $10,145.57, after deducting taxes and other expenses directly attributable thereto. After hearing, his motion for a new trial was denied.

Upon this appeal, the following questions are presented: (1) Did the probate court have jurisdiction to make an order for distribution of the income collected upon properties which were to be distributed to Horace M. Dobbins pursuant to the contract of compromise effected by the parties, in the course of probate? (2) Was Horace Dobbins entitled to the income from said properties so to be distributed to him?

[1] I. No serious question is raised as to the correctness of the jurisdiction of the probate court to make the order in question. The code provides that any person claiming to be entitled to distribution of any part of the estate may petition the court to determine who are entitled to distribution, Probate Code, sec. 1080; that the court shall hear the petition and any objection and determine who are entitled to distribution and specify their interests. Probate Code, sec.

1081. Since, by said section, the probate court is vested with power to determine who are entitled to the estate and since the executor must be discharged after he has "delivered up * * * all the property of the estate to the parties entitled" (Probate Code, sec. 1066) appellant had no right to the possession of the assets which he agreed should be distributed to him prior to their distribution by the court, and, of course, he was not entitled to the income from said assets during administration in the absence of any specific provision therefor in the agreement.

[2-10] There could be no doubt of the correctness of the jurisdiction. Said section provides that the probate court shall determine "who are entitled to the estate". If the claim of appellant had been one asserted by a party adverse to the estate, it would have found its way to the civil docket for trial. Estate of King, 199 Cal. 113, 248 P. 519. But this proceeding is such as is contemplated by said section 1066 of the Probate Code. In re Burton, 93 Cal. 459, 29 P. 36; Estate of Dodge, 9 Cal.App.2d 650, 50 P.2d 839. Where the whole purpose of the proceeding is to determine the rights of the respective parties, heirs and legatees, contestants and contestees, to the property, the probate court had jurisdiction to determine the issues. Estate of Dodge, supra. The administration of an estate is one indivisible judicial proceeding from the order appointing the administrator till his discharge. Wood v. Roach, 125 Cal.App. 631, 14 P.2d 170. While sitting in probate, the superior court may determine the validity of a contract whereby it is claimed a spouse has been divested of all interest in the estate. Estate of Cover, 188 Cal. 133, 204 P. 583; Estate of Warner, 6 Cal.App. 361, 92 P. 191. The fact that it is acting in probate when called upon to apply rules in equity or principles of law to decide a question requiring settlement, does not affect its jurisdiction to do so. As a probate court in determining issues arising in the administration of an estate, "it may bring to its aid the full equitable and legal powers with which, as the superior court, it is invested". Estate of Bell, 168 Cal. 253, 141 P. 1179, 1180. When the superior court has jurisdiction of the subject-matter of a case, falling within either equity or law, it has power to hear and determine, in the mode provided by law, all questions of law and fact, the determination of which is ancillary to a proper judgment. It has the same power sitting in probate. In any case, it pursued the mode prescribed by statute, but derives its power from the Constitution. Burris v. Kennedy, 108 Cal. 331, at page 336, 41 P. 458.

The authorities cited by appellant are not in point. In the Estate of Polito, 51 Cal. App. 752, 197 P. 976, 978, the probate court declined to offset a claim of the estate against an inheritance of John Polito, a son, for the reason that a judgment lien existed upon his interest in favor of Sarah McCurdy which "was entitled to be satisfied out of the interest of said John L. Polito". In Smith v. Westerfield, 88 Cal. 374, 26 P. 206, the plaintiffs petitioned to have heirship determined within less than four months after the opening of the succession whereas the statute required the lapse of one year. In Buckley v. Superior Court, 102 Cal. 6, 36 P. 360, 41 Am.St.Rep. 135, the order of final distribution of the estate among the devisees had been entered on May 12, 1893. One month later, one of the distributees petitioned the probate court to partition the lands so distributed. The trial court made its order on August 30, directing the partition and appointed commissioners to effect the order. To make such partition would not have been incidental to the probate of the estate but would have been the adjudication of differences among the distributees and was, therefore, prohibited. Curtis v. Schell, 129 Cal. 208, 61 P. 951, 79 Am.St. Rep. 107, was an action in equity to vacate an order authorizing the sale of the lands of the estate to pay a family allowance for the preceding 16 years. During that period the widow executrix had mortgaged her own share for the support of the family. Her children had grown to maturity and her mortgagees had invested in good faith. To sell all the lands would have, in effect, cancelled said mortgages and would, perforce, have perpetrated a fraud upon those who in confidence had loaned the widow their moneys. The judgment vacating said order was affirmed. In the Estate of Howe, 161 Cal. 152, 118 P. 515, the decision upheld the probate court in its refusal to determine the conflicting claims to the interest in certain real property of an heir and his judgment creditors, who had caused his interest to be levied upon and sold during the course of administration. So may the remaining cases cited be similarly distinguished. Estate of Strong, 119 Cal. 663, 51 P. 1078; Estate of Davis, 136 Cal. 590, 69 P. 412; Martinovich v. Marsicano, 137 Cal. 354, 70 P. 459; Estate of Ryder, 141 Cal. 366, 74 P. 993; McGee v. Allen, 7 Cal.2d 468, 60 P.2d 1026.

[11, 12] The contract executed by the executors, legatees, heirs and claimants, under a fair interpretation, provided a method for distributing the estate and settled litigation involving vitriolic controversies. There is nothing in the contract that fairly implies a present conveyance of the assets agreed upon as the portion of appellant. It terminated the testamentary trust created for appellant's benefit and provided that listed assets "shall be distributed" to Horace. The assignments by other heirs and legatees of their interests in the assets "to be distributed to Horace" in no sense suggested that thereby title to such assets was vested in him. Always, when during administration an heir conveys his interest in any part of an estate in probate, such conveyance is subject to the perils of the proceeding. If, for any necessity, a sale of the assets of the estate should be ordered, it might alienate to an utter stranger the very property affected by such conveyance. The purpose of the contract, as preambled, was "in order that said estate be distributed", etc., and to "provide that each of the parties hereto shall receive from said estate * * * the moneys and properties hereinafter provided paid to him", and the clause that "all of the foregoing assets contracted to be distributed unto Horace Dobbins and * * * the other parties * * * authorize such assignment and such distribution:" these passages leave no doubt of the intention of the parties to provide for a distribution, after probate should have run its course.

[13] Finally, when the contracting parties arrive at the point of bringing appellant's consent to the surrender of specific advantages, he joins with the others in directing "that said executors shall deliver and distribute unto Horace Dobbins all of the foregoing assets * * * in complete satisfaction of all moneys payable to him and all rights accruing to him under and by virtue of said will and said Horace Dobbins does hereby agree to accept said assets in lieu of the provisions made for him in said will". Clearly the intention of the latter clause was that Horace accepted the assignment of assets to be delivered at distribution, in lieu of his testamentary benefits to begin after distribution. This meant that the entirety of the estate should be kept intact during probate, thus yielding to the estate all income from all the assets of the estate including those to be distributed to appellant.

For the reasons indicated, the judgment is affirmed.

We concur: WOOD, J.; McCOMB, J.

86

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15 Cal.2d 16

CITY OF LOS ANGELES et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

L. A. 17296.

Supreme Court of California.

Jan. 5, 1940.

1. Dismissal and nonsuit ⚷60(2)

An action instituted in 1931 to enjoin city from maintaining an alleged nuisance wherein the hearing which was secured by plaintiff by motion to set for trial was held in 1932, at which parties were present and oral evidence was introduced, was "partially tried," and hence was not subject to dismissal in 1939 on ground that action was not "brought to trial within 5 years," notwithstanding that injunction which was entered by stipulation at the hearing was characterized as a preliminary injunction. Code Civ.Proc. § 583.

2. Dismissal and nonsuit ⚷60(3)

Where action was instituted in 1931 to enjoin city from maintaining an asphalt plant and, at hearing which was secured by plaintiff in 1932, city stipulated that operation of plant might be enjoined for reason that plant was being dismantled preparatory to installation of new machinery which would take care of offensive dust and smoke, whereupon an injunction characterized as a preliminary injunction pendente lite was entered, denial of motions to dismiss in 1939 for alleged failure to prosecute action with reasonable diligence was not an abuse of discretion. Code Civ.Proc. § 583.

3. Injunction ⚷148(4)

City which stipulated for granting of "preliminary injunction pendente lite" was not entitled to complain seven years later that no bond was filed at time injunction order was entered.

In Bank.

Mandamus proceeding by the City of Los Angeles, and others, against the Superior Court of the State of California in and for the County of Los Angeles, to compel the dismissal of an action. An alternative writ issued and a demurrer to the petition was interposed by the Superior Court.

Demurrer sustained; alternative writ discharged; peremptory writ denied.

Ray L. Chesebro, City Atty., Leon T. David, Asst. City Atty., and Franklin W. Peck, Robert W. Anderson, and Robert A. McMillan, Deputy City Attys., all of Los Angeles, for petitioners.

J. H. O'Connor, Co. Counsel, Douglas DeCoster, Deputy Co. Counsel, and Walter L. Bruington, all of Los Angeles, for respondent.

PER CURIAM.

This is a proceeding in mandamus to compel the dismissal of an action under the provisions of section 583 of the Code of Civil Procedure, on the ground that the cause had not been brought to trial within five years from the time the plaintiff in said action had filed its complaint in the Superior Court, and on the further ground that the plaintiff had failed to prosecute the action with due diligence. An alternative writ issued and a demurrer to the petition was interposed by the respondent Superior Court.

From the petition it appears that on August 5, 1931, Crown Body Corporation, Ltd., a corporation, commenced an action in the Superior Court against the City of Los Angeles, its Board of Public Works and the City Engineer to enjoin and restrain the city from operating an asphalt plant within the City of Los Angeles, which said plant was situated on the opposite side of the street from the plaintiff's place of business, the operation thereof allegedly constituting a nuisance. The defendant's answer was a denial of the material allegations of the complaint. After several continuances, on December 28, 1931, the court ordered the said action off calendar. Pursuant to a second motion by the plaintiff the court set the action for trial, which was continued to January 18, 1932; and at the hearing held on that date the plaintiff appeared in court with several witnesses and proceeded with the introduction of evidence in support of the allegations of the complaint. After one witness—the vice-president of the plaintiff corporation—had testified, and two photographs had been introduced as exhibits, the proceedings in the said action were continued to the following day. When the hearing was resumed on January 19, 1932, and before any further testimony on the part of the plaintiff had been introduced, the defendants in the action suggested that a stipulation be entered into between the parties litigant whereby the action would be continued to a later date for trial and whereby an injunction pendente lite would be issued by the court restraining the city from operating the asphalt plant until a dust collector had been installed therein; from allowing sand and gravel to be deposited in the street on which the plant fronted as well as the plaintiff's place of business; and from allowing or causing to be allowed on said street in front of the plant or the plaintiff's premises more than a single line of trucks and trailers such as theretofore had been used by the city in loading or unloading materials destined to or proceeding from the said plant. Pursuant to such proposal by the defendant's attorneys, a stipulation to the effect hereinbefore outlined was entered into by the parties to the action. Following the execution of the stipulation the court made the following minute order: "Trial of cause resumed with all parties present as before. It is stipulated that an injunction pendente lite issue to enjoin the operation of the asphalt plant in question; that plaintiff may file an amended or supplemental complaint; stating a new cause of action as to the reconstructed plant at the present location; that the injunction limit defendants trucks to one line formation about the premises in the streets; * * *."

An order of the court was thereupon entered which, in substance, followed the provisions of the stipulation. For purposes of trial, the action was continued to April 23, 1932, on which date the cause was again ordered off the calendar,—at which time the court made a minute order which recited that "On *stipulation,* cause is ordered off calendar and the 'preliminary injunction' pendente lite is ordered *in full force and effect* until cause is tried." (Emphasis added.)

[1] Thereafter, the following proceedings took place: On October 20, 1937, the plaintiff filed a motion to set the action for trial. On October 22, 1937, by means of a motion therefor the defendants sought to procure a dismissal of the action specifically under the provisions of section 583, Code of Civil Procedure; on October 23, 1937, the plaintiff filed another motion to set the cause for trial; and on October 27, 1937, the motion to dismiss was denied without prejudice. On November 4, 1937, the defendants filed another motion to dismiss the action, which motion was denied on November 10, 1937. Thereafter, and on February 1, 1938, the action was set for hearing on the pretrial calendar of respondent court and, on February 8, 1938, after a pretrial hearing had been held, the cause was again placed off calendar. On April 28, 1939, a third motion to dismiss the action was made by the defendants therein, which was accompanied by a motion to dissolve the preliminary injunction "on the ground that no bond was ever posted by plaintiff on the granting of the 'preliminary injunction' ". On May 3, 1939, each of those two motions was denied with prejudice. It further appears that on June 28, 1939, the defendants caused to be filed another motion to dismiss the action,—which motion again was based on the specific ground that, within the meaning of the second sentence of section 583, said action was not brought to trial within five years after it had been commenced. The pertinent language of said section is as follows: "* * * Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is *brought to trial* within five years after the plaintiff has filed his action, except where the parties have stipulated in writing that the time may be extended." (Emphasis added.)

Following the denial of the last of said motions the defendants sought a writ of mandate to compel the Superior Court to dismiss the action and to refrain from taking any further steps either therein or in specified contempt proceedings then pending against them in connection therewith.

The principal contention of the petitioners herein is that the action was not "brought to trial" within the five-year period provided for by section 583, Code of Civil Procedure, by reason of the fact that, assertedly,the hearing that was held on the issuance of the "preliminary injunction" did not constitute a trial within the meaning of the provisions of that section. Although in the case of Superior Oil Co. v. Superior Court, 6 Cal.2d 113, 56 P.2d 950, it was ruled that an ordinary hearing on affidavits in connection with an order to show cause as to why a preliminary injunction should not be granted is not a trial within the meaning of the provisions of section 583, Code of Civil Procedure,—in the instant case it is shown by the record that the procedure outlined by statute as incidental to the procuring of a preliminary injunction was not adopted or followed by the plaintiff in the proceedings had in the Superior Court. Nor does it appear that at or prior to the time the proceedings were had on January 18 and 19, 1932, the plaintiff was seeking to procure the issuance of a preliminary injunction, or that the plaintiff intended to do anything other than to proceed to a trial on the merits. The hearing date in the action was secured by means of a motion to set "for trial"; on the date of trial, January 18, 1932, as above has been indicated, the parties were present in court; and several proposed witnesses for the plaintiff likewise were in attendance. Thereupon, the plaintiff proceeded with the production of evidence in support of the allegations of the complaint; and in the course thereof one of its officers gave testimony in connection with which he identified two photographs as exhibits in the case. And although the consent order which was issued by the court on stipulation of the parties was subsequently referred to, by both the court and counsel, as a "preliminary injunction",—as far as the statutory procedure is concerned with respect to procuring the usual preliminary injunction, the order was not made pursuant to such proceedings. Contrary to the situation which prevailed in the case entitled Superior Oil Co. v. Superior Court, in the instant case no hearing was had on an order to show cause. In the cited case no oral evidence was introduced or permitted at the hearing, but the court required the parties to make their showing by affidavits.

The record further shows that it was the contention of the respondent Superior Court that the proceedings held on January 18 and 19, 1932, amounted to a *partial* trial of the action on the merits. In that connection it is argued that the five-year limitation in which an action must be brought to trial after filing of a complaint, as provided for by section 583, Code of Civil Procedure,—except where the parties have stipulated that the time may be extended,—was not applicable to the circumstances shown to have existed in this case and, therefore, that the court's orders denying the motion to dismiss were not improper. Under the authorities to be cited hereinafter, the conclusion which was reached by the trial court must be upheld.

In an action for an accounting, entitled Mussat v. Superior Court, 16 Cal.App.2d 291, 60 P.2d 323, 324, a referee had been appointed to take such accounting; the cause was set for trial and on the date thereof was continued for further trial, at which time the referee's report was offered and he testified as a witness; documentary evidence also was received; but thereafter the appointment of the referee was set aside and his report was rejected. Under those circumstances, it was held that a motion to dismiss the action because of failure to bring it to trial within the statutory period of five years had been properly denied. There the court said: "We are satisfied that these partial hearings were sufficient to take the case out of the statute though it may be conceded that, aside from the documentary evidence received, the proceedings may not have contributed materially to a final determination of the issues because of the subsequent rejection of the referee's report. In Mercantile Investment Co. v. Superior Court, 218 Cal. 770, 774, 25 P.2d 12, it was held that when a case had been partially tried within the five-year period the statute would not require a dismissal. In Miller & Lux, Inc. v. Superior Court, 192 Cal. 333, 342, 219 P. 1006, it was suggested that plaintiff could have avoided the statute by merely having one witness sworn before a continuance was granted beyond the five-year period. Upon these authorities the trial court properly denied the motion to dismiss."

To the same effect is the case entitled Krasnow v. Superior Court, 15 Cal.App.2d 141, 59 P.2d 442, 443, where the petitioner sought a rehearing following the denial of a petition for a writ of prohibition to restrain the superior court from proceeding with the trial of an action, and where the matter was *partially* tried a little less than two years after the complaint was filed. There, also, the court said: "That the question before this court has been squarely decided by the Supreme Court appears from the following excerpt which we take from the opinion in the case of Mercantile Investment Co. v. Superior Court, supra, to wit: 'There is an additional reason, applicable alike to all the petitioners herein, suggesting the denial of a writ of mandate to compel a dismissal. That portion of section 583, supra [Code Civ.Proc.], relied on by petitioners has application to such cases only as are not brought to trial within five years after answer filed. The chronological history of the cause which it is here sought to have dismissed shows that the action was commenced November 5, 1924, and *was partially tried* on April 12, 1926, within two years after its commencement. The mandatory provisions of section 583, supra, are therefore *without application.* * * * The cause which it is here sought to have dismissed was tried, though only partially, within the five-year period. The section is without application to the circumstances with which we are here confronted. It is not our province to read words into the statute in order to cause it to cover a situation where there has been a trial, though incomplete, within five years. * * *' Here the cause has been partially tried within the five-year period, just as was had in the case passed upon by the Supreme Court, supra." (Emphasis added.) See, also, Allyne v. Superior Court, 200 Cal. 661, 254 P. 564; Mercantile Invest. Co. v. Superior Court, 218 Cal. 770, 25 P.2d 12, and Miller & Lux Inc. v. Superior Court, 192 Cal. 333, 342, 219 P. 1006.

[2] With regard to the further contention of the petitioners herein to the effect that even if it be assumed that the case had been partially tried so that the five-year limitation provided for in section 583, Code of Civil Procedure, would not be considered applicable to the circumstances of this case, nevertheless, it should be held that under other provisions of that section, the superior court had abused its discretion in that regard by not ruling that the plaintiff had failed to prosecute the action with reasonable diligence. However, it appears from an excerpt of the proceedings had on January 18, 1932, and which is made a part of the instant petition, that the testimony given by the vice-president of the plaintiff corporation was to the general effect that offensive odors, smoke and dust were emitted during the operation of the plant of the defendants and had entered the plaintiff's place of business to such an extent as to constitute a nuisance; also that the street on which both the asphalt plant and the plaintiff's place of business abutted had been allowed by the defendant city to become congested with automobile trucks used in connection with the asphalt plant to such an extent as to hamper or interfere with the conduct of the plaintiff's business. Following the introduction of that testimony, and when the hearing was resumed on January 19, 1932, counsel for the defendant city stated that the defendants were willing to stipulate that the operation of the asphalt plant might be enjoined,—one of the reasons therefor being that the plant as then equipped was no longer in operation, but was in the course of being dismantled, preparatory to the installation of new machinery or equipment, "for the avowed purpose of taking care of any dust or smoke nuisance that has heretofore occurred in the operation of the plant"; that the defendants were ready and willing to offer evidence to that effect, and were ready to "allow any order of this court to be made enjoining the operation of this plant under its present condition; [or to] abate the thing absolutely as far as its present method of operation is concerned". It was also stated that the city had nothing to gain by trying the action, as it was not then operating the plant, and that it desired to avoid further court costs. In the light of the stipulation that was thereupon entered into by the parties in the superior court action, and considering the various court proceedings that had taken place in the course of the litigation, together with the reasons asserted by the city for desiring that the said stipulation be entered into,—as well as the further fact that the cause then pending before the court was an equitable action,—it cannot be said that the court abused its discretion in denying the motions to dismiss.

[3] Nor is it the opinion of this court that the petitioners may now complain of the fact that no bond was filed at the time the injunctive order was entered. In view of the facts and circumstances which gave rise to the execution of the stipulation, and considering the length of time which had elapsed during which no complaint was made by the petitioners concerning the lack of any bond, they must be deemed to have waived any rights which theretofore they may have had in that regard.

The demurrer is sustained, the alternative writ discharged and a peremptory writ denied.

15 Cal.2d 34

WATERLAND v. SUPERIOR COURT IN AND FOR SACRAMENTO COUNTY et al.

Sac. 5324.

Supreme Court of California.
Jan. 17, 1940.

1. Courts 🔑200½

Title to property cannot be tried in probate proceedings as between estate, or heirs or devisees, and a stranger to the estate.

2. Courts 🔑200½

The superior court, in exercise of its probate jurisdiction, may try and determine, as an incident to final account of executor, title to personalty claimed by executor in his own right adversely to the estate.

3. Executors and administrators 🔑469(2)

Under statute governing procedure relative to resignation of an executor and defining his liability upon resigning, superior court, sitting in probate, retains jurisdiction to settle final account of executor after his resignation, and to determine all questions necessary to be determined as an incident to final settlement of executor's account. Probate Code, § 520.

4. Executors and administrators 🔑33

The provision in statute, governing procedure relative to resignation of an executor and defining his liability, that resignation takes effect upon settlement of his accounts, means that resignation shall not become effective prior to settlement of his accounts. Probate Code, § 520.

5. Executors and administrators 🔑469(2)

A person once having accepted duties and responsibilities and privileges of an executor cannot thereafter, by filing his resignation, oust superior court, sitting in probate, of jurisdiction to hear and settle his final accounts. Probate Code, § 520.

6. Executors and administrators 🔑469(2)

The superior court, sitting in probate, was vested with jurisdiction to try and determine on settlement of accounts of former executor, questions of title to personalty claimed by such former executor, adversely to the estate, and resignation of executor did not divest superior court, sitting in probate, of jurisdiction as long as matter of his accounts remained pending. Probate Code, § 520.

In Bank.

Original proceeding by Tyre H. Waterland against the Superior Court of the State of California, in and for the County of Sacramento, and the Honorable Peter J. Shields, Judge thereof, for writ of prohibition to prevent the Superior Court, sitting as a probate court in the administration of the estate of Laura Antoinette Grafmiller, deceased, from hearing a petition for an order to compel petitioner, as former executor, to account for funds of estate.

Writ denied.

Prior opinion, 90 P.2d 344, rehearing denied in 91 P.2d 220.

Busick & Busick and O. F. Meldon, all of Sacramento, for petitioner.

Johnson & Curtright, P. H. Johnson, C. K. Curtright, Evan J. Hughes, and Charles A. Bliss, all of Sacramento, for respondents.

Evan J. Hughes, of Sacramento, amicus curiæ.

CURTIS, Justice.

The sole question presented upon this application for a writ of prohibition is whether the superior court, sitting in probate, has the jurisdiction to determine, as an incident to the settling of a final account of an executor, who previous to the rendering of said account has filed his resignation as executor, title to certain personal property formerly owned by the decedent, but claimed by the said executor as his own personal property by virtue of the fact that said personal property consists of a fund on deposit in a joint tenancy account in the names of the decedent and the executor. Or to phrase the question differently, does the filing of a resignation by an executor, who claims property in his individual capacity adversely to the estate of which he is executor, divest the superior court sitting in probate of jurisdiction to hear and determine, upon the settlement of his final accounts, title to personal property claimed by the executor, for the purpose of determining whether said executor should be required to account therefor?

The facts which give rise to the present proceeding are as follows:

Laura Antoinette Grafmiller died on the 24th day of March, 1937, leaving an estate in the county of Sacramento, and in the county of Alameda, variously estimated as of the value of about $20,000. On the 12th day of April, 1937, petitioner, Tyre H. Waterland, was appointed the executor of the last will of said decedent, and letters testamentary were issued to him. He thereafter duly qualified as such executor and entered upon his duties as such executor. Thereafter, on May 4, 1937, having become involved in a controversy with the heirs and devisees of said decedent over his claim of ownership in his own right of a bank account in the sum of $9,052.47, on deposit in the Capital National Bank of Sacramento, in a joint tenancy account in the names of himself and the decedent, he filed his written resignation as executor with the court. On the same day, Albert E. Stearns, who had been named as alternate executor in the last will and testament of said decedent, filed a petition for his appointment as executor. At or about the same time, Annie Gertrude Van Tine and Ella May Tuttle, residuary legatees under the last will and testament of decedent, filed a petition in said superior court seeking the removal of said Waterland as executor of said will on the ground of fraud and his asserted adverse interest in said fund. Thereafter, Waterland attempted to recall his resignation as executor, and resisted the application of Stearns and the two residuary legatees for his removal. The probate court refused to revoke the letters testamentary theretofore issued to Tyre H. Waterland, and two appeals were taken from said order. One appeal was taken by Albert E. Stearns from the order failing to appoint him as alternate executor of said will, and the other appeal was taken by Annie Gertrude Van Tine and Ella May Tuttle from the order refusing to revoke the letters testamentary already issued to Tyre H. Waterland. In the opinion of the District Court of Appeal, Third Appellate District, written by Justice Plummer, deciding both appeals (Estate of Grafmiller, 27 Cal.App.2d 253, 81 P.2d 181, 190), the court held that, although under the common law an executor had no right to resign or relinquish his position without having first received permission of the appointing power, by virtue of the enactment of section 520 of the Probate Code, the right to resign was conferred upon an executor, and such resignation became effective without the necessity of its being accepted by the probate court, and was not thereafter subject to withdrawal. The court further held that, a written resignation having been filed by the executor, the only remaining power of the probate court was the power, under said section 520 of the Probate Code, to compel a rendition of an account by said resigning executor and to appoint a successor. The opinion concluded with the following direction to the probate court: "The cause [is] remanded for further proceedings in accordance with this opinion and the provisions of section 520 of the Probate Code relative to enforcing a settlement of his accounts by the respondent Waterland, and the appointment of his successor." During the pendency of the appeal, Waterland had continued to act as executor of the will of the decedent, and on December 29, 1937, had filed an account entitled, "Final Account of Executor and Petition for Final Distribution of Estate." The decision of the Appellate Court was rendered on June 23, 1938, and on August 26, 1938, Albert E. Stearns was appointed executor of the will of Laura Antoinette Grafmiller, deceased. Thereafter on September 30, 1938, Waterland filed a supplemental account, entitled, "Supplemental Account of Tyre H. Waterland, as executor of the estate of Laura Antoinette Grafmiller, deceased." Exceptions to said accounts were filed by Albert E. Stearns. On October 14, 1938, Waterland filed another account entitled, "Account of Tyre H. Waterland, formerly executor of the Estate of Laura Antoinette Grafmiller, deceased." Exceptions to these three accounts were filed by Albert E. Stearns, on October 17, 1938. All the accounts filed by Waterland failed to make any mention of the bank account of $9,052.47 claimed, by the residuary legatees and by Stearns, as executor, to be part of the estate of said decedent. All of the exceptions to the accounts of Waterland specified his failure to account for this sum as one of the grounds for the objections to the accounts. On October 27, 1938, a demurrer to said exceptions and a motion to strike was filed by Waterland, based upon the ground that the probate court was without jurisdiction to determine title to the personal property in controversy. On November 7, 1938, Stearns, as executor, filed another document entitled, "Petition for an Order Requiring Former Executor to Account for Funds of Estate." Thereafter, on December 8, 1938, Waterland filed a demurrer to said petition and motion to strike upon the ground that the probate court was without jurisdiction to determine title to said bank account. On November 12, 1938, a minute order entitled, "Objections to Former Executor's Account—Demurrer to Petition Requiring Former Executor to Account for Funds and Motion to Strike Out, Etc.", was made and entered by the trial court wherein the demurrer was overruled, and the motion to strike out portions of said petition was denied. The minute order ended with the direction that the "question of delivery of certain estate property now in possession of former executor Waterland", be continued to a later date.

On December 21, 1938, Waterland filed his answer to said petition for an order requiring him, as former executor, to account for funds of the estate, theretofore filed by Albert E. Stearns on November 7, 1938. On February 16, 1938, he sought a writ of prohibition to restrain the probate court from proceeding with the hearing of said petition upon the ground that as he is now a stranger to the estate, the superior court, sitting in probate, is without jurisdiction to determine title to this personal property claimed by him in his own right adversely to the estate. No mention of the exceptions to said accounts previously filed by Stearns, as executor, is made by Waterland in his application for the writ of prohibition.

[1] Petitioner's application for said writ of prohibition is based upon the premise that by the filing of his resignation, he immediately became a stranger to the estate, and he relies upon the rule in California that title to property cannot be tried in probate proceedings as between the estate, or heirs or devisees, and a stranger to the estate. It is conceded that this rule is well settled in California. Inghilleri's Estate, 27 Cal.App.2d 664, 81 P.2d 568; McCarthy v. McCarthy, 205 Cal. 184, 270 P. 211; Bauer v. Bauer, 201 Cal. 267, 256 P. 820; Estate of Wenks, 171 Cal. 607, 154 P. 24; Estate of Klumpke, 167 Cal. 415, 139 P. 1062.

[2] Respondents oppose said application for a writ of prohibition upon the premise that the probate court has jurisdiction to settle the final account of an executor and until such account is settled an executor is amenable to the authority of the probate court. Respondents rely upon the rule that the superior court, in the exercise of its probate jurisdiction, may try and determine, as an incident to the final account of an executor, title to personal property claimed by the executor in his own right adversely to the estate. This rule is equally well settled in California. Stevens v. Superior Court, 155 Cal. 148, 99 P. 512; Bauer v. Bauer, supra; Estate of Roach, 208 Cal. 394, 281 P. 607; Estate of Ginsberg, 11 Cal.App.2d 210, 53 P.2d 397; Estate of Vucinich, 3 Cal.2d 235, 44 P.2d 567. Does the fact that the executor, prior to rendering his final account, files his written resignation with the court, change the rule?

[3, 4] We are satisfied that the answer is in the negative. Section 520 of the Probate Code is the section which governs the procedure relative to the resignation of an executor and defines his liability upon resigning. The express language of this code section compels the conclusion that the superior court, sitting in probate, retains jurisdiction to settle the final account of an executor after his resignation as executor. It follows as a necessary concomitant thereto, that the said court retains jurisdiction to determine all questions necessary to be determined as an incident to the final settlement of said executor's account. Section 520 of the Probate Code reads as follows: "An executor or administrator may resign his appointment at any time, by a writing filed in the superior court, to take effect upon the settlement of his accounts. If, however, by reason of any delay in such settlement, or for any other cause, the circumstances of the estate or the rights of those interested therein require it, the court, at any time after the tendering of the resignation, may revoke the letters of such executor or administrator and appoint in his stead an administrator, either special or general, or with the will annexed, in the same manner as is directed in relation to original letters of administration. The liability of the outgoing executor or administrator, or of the sureties on his bond, shall not in any manner be discharged, released, or affected by such resignation or appointment, but shall continue until the executor or administrator has delivered up all the estate to the person whom the court shall appoint to receive the same." The provision that his resignation shall take effect upon the settlement of his accounts, can mean nothing else than that his resignation shall not become effective prior to the settlement of his accounts. It is true that there is language in Estate of Grafmiller, 27 Cal.App.2d 253, 81 P.2d 181, supra, which may be construed to mean that the resignation of an executor becomes effective immediately upon the filing of his written resignation. Having in mind the fact that the question there involved was whether the resignation of an executor required an acceptance by the superior court as a

condition precedent to its becoming effective, and the question of whether the executor retained the right to withdraw his resignation prior to an acceptance by the probate court, it is apparent that the language employed in said opinion merely meant that the filing of the executor's resignation established the fact of his resignation, and deprived him of the power, from said time of filing his resignation, to withdraw his resignation. Said language was not specifically directed to the solution of the problem of the exact time the resignation became effective. If it was intended to imply that the resignation become effective for all purposes at the moment of its filing, such holding is directly contrary to the express language of section 520 of the Probate Code which provides that said resignation is "to take effect upon the settlement of his accounts".

It is also to be noted that the last sentence of said section 520 of the Probate Code provides that the liability of a resigning executor shall not in any manner be discharged, released, or affected by such resignation but shall continue until the executor has delivered up all the estate to the person whom the court shall appoint to receive the same. As an incident to a determination of whether or not the executor is turning over "all the estate" to his successor, it is necessary for the court to determine whether or not the fund claimed by the executor belongs to him in his own right or belongs to the estate. We can see no escape from the conclusion that the probate court is the reasonable and logical forum for the determination of this question.

[5] It may well happen that a resigning executor's active duties as executor may cease immediately upon the filing of his resignation, in which event he would not be entitled to executor's fees for work performed subsequent to the filing of said resignation. But once having accepted the duties and responsibilities, and privileges, of an executor, he cannot thereafter by filing his resignation, oust the superior court, sitting in probate, of jurisdiction to hear and settle his final accounts. By express provision, section 520 of the Probate Code provides otherwise.

As before pointed out, petitioner seeks the writ of prohibition only to restrain the probate court from hearing the petition to compel an accounting filed by Albert E. Stearns, as executor, on November 7, 1938, and wholly ignores the exceptions to said accounts theretofore filed by Stearns, as executor. It is apparent from the answer filed by the respondents that the filing of the petition to compel an accounting by the executor Stearns was a part and parcel of the objections to the final account of said resigning executor and was not intended to initiate a separate proceeding. It is also apparent from the title of the minute order made by the probate court on December 12, 1938, that the probate court was considering said objections to the accounts of Waterland as executor and the petition to compel an accounting by him at one and the same time. The title to said minute order, as previously quoted, is as follows: "Objections to Former Executor's Account—Demurrer to Petition Requiring Former Executor to Account for Funds, and Motion to Strike Out, Etc." This court in determining the merits of the application for the writ of prohibition, is, of course, not bound by the petitioner's statement of the facts when the records show a different state of facts.

[6] To sum up: The superior court sitting in probate, is vested with jurisdiction to try and determine, on the settlement of the accounts of a former executor, questions of title to personal property claimed by such former executor, adversely to the estate, and the resignation or removal of such executor does not divest the superior court, sitting in probate of jurisdiction as long as the matter of said accounts remains pending.

The writ of prohibition is denied.

We concur: WASTE, C. J.; SHENK, J.; EDMUNDS, J.; GIBSON, J.; CARTER, J.

36 Cal.App.2d 292

PEOPLE v. SCHNEIDER.

Cr. 2047.

District Court of Appeal, First District,
Division 1, California.

Dec. 29, 1939.

1. Criminal law 🔑552(1)

A fact relating to accused's guilt may be established by circumstantial, as well as by direct, evidence.

2. Criminal law 🔑745, 1159(2)

The right to draw proper inferences from evidence is a jury function, and if its conclusions do not do violence to reason, a reviewing court may not substitute its finding of the ultimate fact for that reached by the jury.

3. Criminal law 🔑552(4)

Circumstantial evidence may be as conclusive as testimony of witnesses to accused's overt act.

4. Criminal law 🔑1144(13)

In considering sufficiency of evidence, reviewing court must assume in favor of verdict existence of every fact which jury could have reasonably drawn therefrom.

5. False pretenses 🔑49(3)

Evidence authorized conviction of fraudulently passing check, notwithstanding that store salesman to whom accused gave check for radio was not available as a witness, where another salesman who witnessed sale testified, check was indorsed and cashed by first salesman, accused refused to talk about check when arrested, although he told officers they could find radio a few doors from store, and accused did not testify. Pen. Code, § 476a; Const. art. 1, § 13.

6. Criminal law 🔑1159(2)

An appellate court may not invade province of jury to say as a matter of law that any substantial evidence was insufficient to convince reasonable, fair and impartial men of existence or nonexistence of a fact.

7. Criminal law 🔑1159(2)

An appellate court may set aside verdict only where it clearly appears that upon no hypothesis is there sufficient substantial evidence in the record to support verdict.

8. False pretenses 🔑49(3)

The testimony of manager of bank on which accused had drawn check that person whose name was signed thereto had neither account nor credit with bank was prima facie evidence of fictitious character of check. Pen.Code, § 476a.

9. False pretenses 🔑49(4)

In prosecution for fraudulently passing check, evidence authorized inference that accused intended to defraud and knew of fictitious character of check. Pen.Code, § 476a.

10. Criminal law 🔑1036(1), 1037(1), 1044

In prosecution for fraudulently passing check, where record showed that accused did not object to testimony as to other checks allegedly cashed by accused, or move to strike such testimony out when checks were withdrawn, or make any complaint as to conduct of district attorney in connection with checks, question of such conduct could not be raised on appeal. Pen.Code, § 476a.

11. Criminal law 🔑721(1)

An accused could not complain of argument commenting on his failure to testify, in view of constitutional provision expressly permitting such comment. Const. art. 1, § 13.

12. Criminal law 🔑1202(7)

Where trial court sentenced accused merely as a first offender, although jury had found against accused on charge of prior convictions, accused would not be prejudiced by insufficiency of evidence to prove prior convictions.

◆

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Andrew Schneider was convicted of fraudulently passing a check, and he appeals.

Affirmed.

Nathan C. Coghlan, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and F. Walter French, Deputy Atty. Gen., for respondent.

KNIGHT, Justice.

The appellant Andrew Schneider was charged by information with having violated section 476a of the Penal Code, the substance of the charge being that with intent to defraud one Ed Weyel and the Bank of America, he feloniously drew a check on the Bank of America at Burlingame for $10 payable to cash and signed "A. L. Schneider", and delivered the same to Weyel, knowing at the time that he had neither funds in nor credit with the bank to meet the payment of the check. He was charged also with seven prior convictions of felony, and with having served terms of imprisonment therefor in the state penitentiaries, some of which ran concurrently. He pleaded not guilty to the main charge, denied the prior convictions, and upon trial before a jury verdicts were returned against him on each of said charges. Motions for new trial and probation were heard and denied, and appellant was sentenced to imprisonment in the state prison, whereupon he took this appeal from the judgment of conviction and the order denying his motion for new trial. Insufficiency of the evidence and misconduct of the deputy district attorney are urged as grounds for reversal.

[1-4] It appears from the record that Weyel was employed as a salesman in an electrical appliance store at 2640 Mission street in San Francisco, and the prosecution claimed that appellant gave him the check in question in payment for a radio, which appellant purchased from him. At the time of the trial, however, which took place about four months after the sale of the radio, Weyel was not available as a witness, and appellant's main attack upon the sufficiency of the evidence is based upon the fact that there is an absence of direct evidence as to the actual delivery of the check to Weyel. It is well settled, however, that a fact relating to the guilt of an accused may be established by circumstantial as well as by direct evidence; that the right to draw proper inferences from the evidence is a function of the jury, and that as long as its conclusions do not do violence to reason, a reviewing court is not permitted to substitute its finding of the ultimate fact for that reached by the constitutional as well as the statutory arbiter thereof. People v. Latona, 2 Cal.2d 714, 43 P.2d 260; People v. Martinez, 20 Cal.App. 343, 128 P. 952. In other words, as frequently said by the courts, circumstantial evidence may be as conclusive in its convincing force as the testimony of witnesses to the overt act (People v. Nagy, 199 Cal. 235, 248 P. 906; People v. Perkins, 8 Cal.2d 502, 66 P.2d 631), and consequently where the circumstances proved reasonably justify the conclusion of the jury expressed in its verdict, it is beyond the authority of the reviewing court to interfere therewith. People v. Latona, supra. Furthermore, in considering the question of the sufficiency of the evidence, the reviewing court must assume in favor of the verdict the existence of every fact which the jury could have reasonably drawn therefrom. People v. Perkins, supra.

In the present case the evidence shows that the transaction which took place between Weyel and appellant involving the sale of the radio was witnessed by another salesman named Quinn; and he testified positively that he saw appellant enter the store, purchase the radio from Weyel and leave the store with the radio in his possession. It was also shown that on that same day the check in question was endorsed by Weyel and cashed by him at a nearby restaurant; and that when appellant was arrested and asked about the check he refused to talk about it, but told the officers where they could find the radio, at 2664 Mission street, which, as will be noted, was just a few doors distant from the store where he purchased it. Moreover, the state Constitution provides (art. I, sec. 13) that "* * * in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury"; and here the appellant made no attempt whatever to explain or deny any of the incriminating circumstances established against him. He rested his case without offering himself as a witness, and without introducing any evidence whatever in defense of the charge, or to refute the facts established by the prosecution.

[5-7] In view of the foregoing uncontradicted facts and circumstances, and in the state of the record above described, there is no ground upon which it may be reasonably held as a matter of law that the conclusion reached by the jury upon the issue of the delivery of the check is wholly without evidentiary support. As said in People v. Kneiling, 127 Cal.App. 151, 15 P.2d 561, an appellate court may not invade the province of the jury to say as a matter of law that any substantial evidence was insufficient to convince reasonable, fair and impartial men of the existence or nonexistence of a fact. It

has power to set aside a verdict only where it clearly appears that upon no hypothesis whatever is there sufficient substantial evidence in the record to support it (citing People v. Floris, 93 Cal.App. 334, 269 P. 726). But, as will be seen, no such case is here presented.

[8, 9] Answering the two additional points made by appellant relating to the evidence tending to establish guilt, it will suffice to say that the testimony given by the manager of the bank upon which the check was drawn that the person whose name was signed thereto had neither an account with the bank nor any credit therewith, was prima facie evidence of the fictitious character of the check, People v. Thal, 61 Cal.App. 48, 214 P. 296; People v. Roche, 74 Cal.App. 556, 241 P. 279; People v. Walker, 15 Cal.App. 400, 114 P. 1009; People v. Bernard, 21 Cal.App. 56, 130 P. 1063, and that the intent to defraud and appellant's knowledge of the fictitious character of the check might reasonably have been inferred by the jury from all the circumstances shown by the evidence. People v. Roche, supra; People v. Thal, supra; People v. Hamby, 55 Cal.App. 37, 202 P. 907.

[10, 11] For the purpose of showing fraudulent intent the prosecution sought to prove that about this same time appellant drew and cashed two other checks without having sufficient funds in the bank to meet the payment thereof; but after the checks had been produced and marked for identification, they were withdrawn, presumably for the reason that they bore dates subsequent to the one in question here, and were not presented to the bank for payment. Appellant now contends that in thus bringing the matter of these other two checks before the jury, the deputy district attorney was guilty of misconduct. On the other hand, the attorney-general argues that despite the withdrawal of the checks they were admissible in evidence for the purpose for which they were produced, and that consequently no error is shown. Regardless, however, of the question of the competency of the evidence, it appears from the record that at no time during the trial did appellant make any objection to the testimony given in connection with the checks, or move to strike it out when the checks were withdrawn, or make any complaint whatever about the conduct of the district attorney in connection therewith; and that being so, the question of his conduct cannot be raised for the first time on appeal. The remaining assignment of misconduct is based upon the fact that the deputy district attorney commented in his argument to the jury upon the failure of appellant to testify. But, as will be seen, the constitutional provision above quoted, which was enacted subsequent to the rendition of the decisions relied on by appellant, expressly permits such comment.

[12] Appellant further contends that the evidence is insufficient to prove the prior convictions. Regardless, however, of the question of proof, it is apparent that the matter of the prior convictions cannot operate to appellant's prejudice for the reason that the clerk's and the reporter's transcripts alike show that in pronouncing judgment the trial court ignored entirely the matter of prior convictions and sentenced appellant merely as a first offender, and therefore he must be treated as such. People v. Noland, 30 Cal.App.2d 386, 86 P.2d 363; People v. Dawson, 210 Cal. 366, 292 P. 267; People v. Arnest, 133 Cal.App. 114, 23 P.2d 812.

The judgment and the order appealed from are and each of them is affirmed.

We concur: PETERS, P. J.; WARD, J.

36 Cal.App.2d 338

PACIFIC INDEMNITY CO. v. HARGREAVES.

Civ. 12100.

District Court of Appeal, Second District, Division 2, California.

Dec. 29, 1939.

Hearing Denied Feb. 26, 1940.

1. Pleading 🔑129(1)

An allegation in amended complaint was admitted, where not denied by defendant.

2. Principal and surety 🔑190(7)

In indemnity company's action for sum paid by it in settlement of bank receiver's claim on fidelity bond for loss caused by defendant's default in payment of note, executed to bank for money borrowed therefrom by vice president of another bank to accommodate defendant, who was president of lending bank, defendant's testimony that he had no idea where he was going to get money borrowed when he went to see another vice president of such other bank about loan and testimony of maker of note that he testified on defendant's trial for misapplication of bank's funds that it was question whether witness was worth amount of loan unsecured, coupled with facts that he and defendant were subsequently adjudicated bankrupts, were sufficient to support trial court's findings that neither of them was of sufficient financial responsibility to justify loan.

3. Principal and surety ⚷190(9)

In action for money paid by plaintiff in settlement of claim on defendant's fidelity bond as bank president, trial court's finding that bank receiver first learned of loss claimed under bond on or about certain day was finding as to when bank learned of loss.

4. Principal and surety ⚷184

Under statute requiring principal to reimburse surety for amount paid to satisfy principal obligation without legal proceedings, it was unnecessary for indemnity company to wait until bank receiver obtained judgment against such company in his suit on bank president's fidelity bond before paying sum agreed on in settlement of his claim. Civ.Code, § 2847.

5. Insurance ⚷430

A bank officer, knowingly making bank loans for his own private gain through another person, without disclosing fact, is guilty of misapplication of bank's funds, as respects fidelity bond.

6. Insurance ⚷430

Insurance against bank officials' dishonest act is insurance of fidelity and guarantees openness and fair dealing on their part with bank.

7. Insurance ⚷430

A bank president's acts in borrowing money from bank, without directors' knowledge, through one who indorsed bank cashier's check for sum borrowed to such officer, who knew he was not in position to repay loan and that such other person had no intention to pay it, were within provisions of fidelity bond insuring against president's dishonest acts.

8. Witnesses ⚷345(1)

In action for sum paid by plaintiff in settlement of bank's claim on fidelity bond for loss caused by its president's defalcation, record of judgment of president's conviction in criminal case pertaining to transaction involved in action on bond was admissible to impeach president who testified. Code Civ.Proc. § 2051.

9. Appeal and error ⚷926(5)

In action for sum paid by plaintiff in settlement of bank's claim on fidelity bond for loss caused by its president's defalcation, Court of Appeal will presume on appeal from judgment for plaintiff that trial court considered record of judgment of president's conviction of felony only for purpose of impeaching his testimony as witness, in absence of contrary showing. Code Civ.Proc. § 2051.

10. Bankruptcy ⚷426(2)

A bank's ex-president was not relieved, by his discharge in bankruptcy, from liability to indemnity company for money paid in settlement of bank's claim on fidelity bond for loss resulting from his fraud and defalcation while acting in fiduciary capacity. Bankr.Act § 17(4), 11 U.S.C.A. § 35(4).

◆

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the Pacific Indemnity Company against Richard L. Hargreaves to recover a sum paid by plaintiff in settlement of a claim on defendant's fidelity bond as president of the First National Bank of Beverly Hills. Judgment for plaintiff, and defendant appeals.

Affirmed.

George Edward Acret, of Los Angeles, for appellant.

Charles E. R. Fulcher, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover a sum of money paid by plaintiff as principal on a fidelity bond after defendant defaulted, defendant appeals.

The essential facts are:

January 29, 1931, defendant, president of the First National Bank of Beverly Hills, was indebted to the Chase National Bank in the sum of approximately $280,000. He was also indebted to the First National Bank of Beverly Hills in the sum of approximately $40,000. On the aforementioned date defendant communicated with Mr. C. R. Bell, vice-president of the Bank of America, and asked him for an unsecured loan in the sum of $60,000. Mr. Bell told defendant that he would take care of it. However, thereafter Mr. Bell informed defendant that he could only loan him $48,000, whereupon defendant asked how he was to raise the $12,000 more which he needed. Mr. Bell suggested that he borrow it from his own bank, but was informed by defendant that he did not care to increase his liability with his own bank, whereupon Mr. Bell stated that he would have Mr. Ben H. Brown, one of the vice-presidents of the Bank of America, borrow $12,000 from the bank of which defendant was president, as an accommodation to defendant.

A note was then drawn in favor of the First National Bank of Beverly Hills in the sum of $12,000 signed by Mr. Brown, who received a cashier's check for $12,000 which he endorsed to defendant, who gave his unsecured note to the Bank of America for $48,000, receiving a credit slip for this sum and the $12,000 cashier's check endorsed by Mr. Brown. These defendant deposited to his credit in the First National Bank of Beverly Hills, and thereafter he gave to the Bank of America a draft for sixty-one thousand and some odd dollars, which sum in turn was by the Bank of America transmitted to the Chase National Bank. On the same day defendant executed a guarantee to the First National Bank of Beverly Hills of the $12,000 note signed by Mr. Brown. However, the contingent liability register of the bank did not, as was customary, show that the note executed by Mr. Brown was guaranteed by defendant until August 7, 1931. Shortly after the execution of the note by Mr. Brown the loan was approved by the loan committee and the board of directors of the First National Bank of Beverly Hills. Although the other directors were not aware of the fact, Mr. Scantlin, a loan officer of the bank and a director thereof, knew before the loan was approved that defendant was receiving the proceeds thereof.

April 15, 1932, the note was "charged off", which in bank parlance means that the note is taken out of the current or active assets of the bank which make up the actual assets shown on the bank's balance sheet, for the reason that the note was not of sufficient worth to justify its being included as part of the bank's assets.

June 3, 1932, the First National Bank of Beverly Hills was closed and a receiver was appointed for the purpose of handling its affairs.

August 12, 1932, defendant filed a petition in bankruptcy, and in his schedule of liabilities he included the note executed by Mr. Brown, payable to the First National Bank of Beverly Hills, as accommodation paper endorsed by him. February 6, 1933, he was duly discharged from bankruptcy.

June 15, 1933, Mr. Brown filed a petition in bankruptcy and was thereafter duly discharged. April 12, 1934, defendant was convicted in the United States District Court for misapplication of funds while president of the First National Bank of Beverly Hills. Among the transactions involved was the one relative to the $12,000 note executed by Mr. Brown. His conviction was affirmed by the United States Circuit Court of Appeals, Hargreaves v. United States, 9 Cir., 75 F.2d 68, and his petition in certiorari was denied by the Supreme Court of the United States, 295 U.S. 759, 55 S.Ct. 920, 79 L.Ed. 1701.

March 1, 1934, the receiver of the First National Bank of Beverly Hills filed an action against the plaintiff herein on a fidelity bond, which the latter had executed covering defalcations by employees of the bank, to recover the sum of $12,000 which the bank had lost on the note executed by Mr. Brown. Thereafter plaintiff effected a settlement of the claim with the receiver for the bank by paying him $9,000.

Defendant relies for reversal of the judgment on these propositions:

First: The trial court's findings of fact are not supported by the evidence.

Second: The trial court did not make a finding as to when the bank learned of the loss.

Third: The findings of fact do not support the judgment in the following particulars:

(a) They do not establish that the plaintiff paid any loss under legal compulsion.

(b) They do not show compliance with the condition precedent required in the bonds, to-wit, the filing of proof of loss within ninety days and the commencement of suit against the surety within one year

of discovery of the loss by the bank or by any person capable of charging the bank with knowledge of such loss.

(c) They do not establish that the defendant committed any dishonest or criminal act.

Fourth: The trial court committed prejudicial error in admitting in evidence the judgment of defendant's conviction by the federal courts in a criminal case pertaining to the transaction herein involved.

The first proposition is untenable. An examination of the record discloses substantial evidence in connection with the inferences which may be reasonably drawn therefrom to sustain the facts set forth above and each and every finding of fact made by the trial court upon which the judgment in favor of plaintiff is necessarily predicated. For example:

(a) The trial court found as follows: "That on or about October 25, 1933, the plaintiff delivered to the defendant, through his agent and attorney, Willaim H. Neblett, a true and correct copy of said itemized proof of claim, and the said defendant nor his attorney at any time raised or asserted any claim or offered any information or proof that the aforementioned discovery was not made as set forth and alleged in said itemized proof of claim."

[1] Paragraph 2 of the second amendment to the complaint contained an allegation identical with the finding just recited. This allegation was not denied and therefore was admitted.

[2] (b) The trial court found in substance that neither defendant nor Mr. Brown was of sufficient financial responsibility to justify the $12,000 loan to Mr. Brown by the First National Bank of Beverly Hills. Defendant testified that at the time he went to see Mr. Bell, "I had no idea when I went down to see Mr. Bell where I was going to get the money". Mr. Brown testified that when defendant was on trial in the federal court he, Mr. Brown, had testified as to his financial responsibility at the time of the loan as follows: "It is a question of whether I was werth it unsecured." These statements, coupled with the fact that defendant and Mr. Brown were both subsequently adjudicated bankrupts, gives ample support to the trial court's findings of the facts just mentioned. Further discussion of the evidence is unnecessary.

[3] Defendant's second proposition is also untenable. Finding V of the trial court reads in part as follows: "That on or about the 10th day of October, 1933, the said Receiver of First National Bank of Beverly Hills *first learned* of the loss claimed under said bonds, and within ninety (90) days therefrom, to-wit, on the 17th day of October, 1933, made, executed and duly swore to an itemized proof of claim, a copy of which is attached to the second amendment to complaint, marked Exhibit 'A', * * *." (Italics added.)

The finding that on or about the 10th day of October, 1933, the said receiver of the First National Bank of Beverly Hills *first* learned of the loss claimed, etc., is clearly a finding as to when the bank learned of the loss.

Defendant's third proposition is likewise without merit.

[4] (a) If a surety satisfies the principal obligation without legal proceedings the principal is bound to reimburse the surety for what he has disbursed. Civ. Code, sec. 2847. It was therefore unnecessary for plaintiff to wait until the receiver had obtained a judgment against it before paying the claim upon which the receiver's suit was based.

(b) Finding number V, supported by substantial evidence as is heretofore pointed out, expressly found that the receiver of the First National Bank of Beverly Hills *first* learned of the loss on October 17, 1933, and that within ninety days thereafter a sworn proof of loss was filed with the plaintiff. It is uncontradicted that on March 1, 1934, the receiver filed an action against plaintiff to recover according to the terms of the fidelity bond. Hence plaintiff did not have a valid defense against the claim of the receiver predicated upon the theory that the claim had not been filed within ninety days after discovery of the loss nor suit commenced within one year after such discovery, as required in the fidelity bond.

[5, 6] (c) An officer of a bank who knowingly, through another person and without disclosing the fact, makes loans for his own private gain is guilty of misapplication of such funds. Hargreaves v. United States, 9 Cir., 75 F.2d 68, 72. The bond in the instant case covered "any loss through any dishonest or criminal act of any of the employees, including loss of

property through any act of any of the employees wherever any such act may be committed, and whether committed directly or by collusion with others". It is dishonest for the president of a bank to secretly obtain its funds by putting forth others as worthy of credit while concealing from the bank his interest in the transaction. Likewise insurance against dishonest acts is insurance of fidelity. It is intended to and does guarantee openness and fair dealing on the part of the bank's officials with the bank. Maryland Casualty Co. v. American Trust Co., 5 Cir., 71 F.2d 137, 138; Fidelity & Deposit Co. of Maryland v. Bates, 8 Cir., 76 F.2d 160, 166.

[7] In the instant case the acts of the defendant fell clearly within the provisions of the bond insuring against dishonest acts, as defined by the authorities above cited. Defendant without the knowledge of his directors borrowed money from the bank, of which he was president, by a subterfuge, the evidence thoroughly justifying the inference that he know he was not in a position to repay the loan and that Mr. Brown had no intention to pay it for him. Under these facts defendant's conduct did not measure up to the mores in this community or in any other banking community of the United States. He occupied a position of trust and confidence which he secretly betrayed. His acts certainly did not comport with common honesty, as understood by the ordinary business men in this community.

[8, 9] Defendant's final proposition is likewise untenable. Section 2051 of the Code of Civil Procedure reads as follows: "A witness may be impeached by the party against whom he was called, by contradictory evidence or by evidence that his general reputation for truth, honesty, or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, *or the record of the judgment, that he had been convicted of a felony.*" (Italics added.)

Clearly under the foregoing rule of law the record of the judgment that defendant had been convicted of a felony was admissible in evidence, in view of the fact that defendant was called as a witness and testified. It being admissible for the purpose of impeaching the witness, it will be presumed in this court, in the absence of a showing to the contrary (which there is not in the instant case), that the trial court considered such evidence for a proper purpose only, to-wit, that of impeaching the testimony of the witness.

[10] In view of the foregoing, it is evident that defendant's liability to plaintiff was predicated upon fraud and defalcation while acting as an officer in a fiduciary capacity. Therefore, under subsection 4, section 35, United States Code Annotated, he was not relieved from his liability by his discharge from bankruptcy, since the obligation was, as heretofore pointed out, founded upon fraud and defalcation while acting as an officer in a fiduciary capacity.

For the foregoing reasons the judgment is affirmed.

We concur: MOORE, P. J.; WOOD, J.

36 Cal.App.2d 575

BLANTON et al. v. CURRY et al.

Civ. 2430.

District Court of Appeal, Fourth District, California.

Jan. 12, 1940.

Hearing Denied March 11, 1940.

1. Appeal and error 🔑1170(9)

Under statute requiring counsel in jury trial to deliver to trial court before first witness is sworn, all proposed instructions covering law as disclosed by pleadings, failure of trial court to give instructions containing correct statements of the law as applied to matters developed by the evidence rather than disclosed by the pleadings, which were submitted after commencement of trial, would justify reversal if error was prejudicial within meaning of constitutional provisions. Code Civ.Proc. § 607a; Const. art. 6, § 4½.

2. Appeal and error 🔑1170(9)

Under statute requiring submission before any witness is sworn in jury trial of all proposed instructions except those as to questions of law developed by evidence in pedestrian's action against motorist, failure to give instructions submitted after commencement of trial, directing a verdict for pedestrian, if accident resulted from a violation of pedestrian's right of way on an unmarked crosswalk provided he was not contributorily negligent, was reversible error where evidence disclosed that pedestrian was struck on unmarked crosswalk and such fact did not appear in the pleadings. Code Civ.Proc. § 607a; Vehicle Code, §§ 85, 87, 560(a), St.1935, pp. 99, 188.

3. Appeal and error 🔑1170(9)

Under the statute requiring in jury trial submission of proposed instructions before first witness is sworn except as to those on questions of law developed by evidence, failure to give an instruction submitted after first witness had been sworn in pedestrian's action, that failure of motorist to keep lookout at night for persons in roadway which was sufficiently illuminated should be considered in determining question of his negligence was reversible error where matters as to illumination of street and motorist's lookout were presented by evidence and not by pleadings. Code Civ.Proc. § 607a.

4. Trial 🔑252(8)

In action by pedestrian struck at night at unmarked crosswalk by automobile, refusal to submit instruction on doctrine of last clear chance was proper under evidence. Code Civ.Proc. § 607a.

5. Appeal and error 🔑1170(9)

Under the statute requiring submission to trial court before first witness is sworn in jury trial of all proposed instructions except those as to matters of law developed by evidence, failure to submit instructions submitted after first witness had been sworn in pedestrian's action against motorist bearing on motorist's speed at place of accident, was reversible error, where permissible speed at point of accident could not be determined by pleadings. Code Civ.Proc. § 607a.

6. Appeal and error 🔑1170(9)

Action of trial court in waiving as to defendants provisions of the statute requiring submission of proposed instructions in jury trial before first witness is sworn and foreclosing plaintiffs under the same statute from presenting their instructions material to issues and not developed by pleadings, constituted prejudicial error. Code Civ.Proc. § 607a.

7. Appeal and error 🔑110

An appeal will not lie from an order denying a motion for a new trial.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by John Blanton, Jr., a minor, by John Blanton, his guardian ad litem, and John Blanton against Robert Curry and Mrs. A. Keith Koehler to recover damages resulting from an automobile accident. From a judgment for the defendants, and from an order denying plaintiffs' motion for a new trial, plaintiffs appeal.

Reversed and remanded.

Bautzer & Ryan, G. Bentley Ryan, and Gregson Bautzer, all of Hollywood, Flanagan & Sampson and Richard Hunt Sampson, all of Los Angeles (Bernard M. Silbert, of Hollywood, of counsel) for appellants.

Fred A. Wilson and Martin J. Coughlin, both of San Bernardino, for respondents.

GRIFFIN, Justice.

This is an action for damages filed by the plaintiff John Blanton, Jr., a minor of the age of 12 years, through his father as guardian ad litem and against defendant Robert Curry, the driver of the automobile involved, and defendant Mrs. A. Keith Koehler, as owner of the automobile.

The complaint alleged in general terms that on December 12, 1936, at about 5:45 p. m., John Blanton, Jr., was attempting to cross a thoroughfare known as Euclid avenue in the town of Upland, when he was run into by a Buick roadster automobile being operated by the defendant Curry in a negligent manner. In the second cause of action it was alleged that defendant Curry operated the automobile with the express or implied permission of the defendant Koehler; and in a third cause of action it was alleged that the defendant Curry was the agent of the defendant Koehler. The father, John Blanton, by a fourth cause of action, sought to recover for medical expense incurred on behalf of his son. To this complaint and to each cause of action thereof the defendants Curry and Koehler answered denying generally and specifically any negligence on the part of the defendant Curry. The answer further set up a defense of contributory negligence in that the plaintiff John Blanton, Jr., failed to keep a lookout for oncoming automobiles. Upon the issues thus framed the cause proceeded to trial.

The case was tried on November 15 and 16, 1938, the jury reaching a verdict in favor of the defendants and against the plaintiffs. Judgment was entered accordingly. Plaintiffs thereafter filed a motion for new trial on all the statutory grounds and particularly supported their motion, as to the grounds of accident and surprise, and irregularity of proceedings of the court by which plaintiff was prevented from having a fair trial, by the affidavit of one of the attorneys for plaintiffs. This motion was denied. The plaintiffs thereupon appealed from the judgment entered and from the order denying the plaintiffs' motion for new trial.

The principal point raised on this appeal by appellants is the claimed error of the trial court and its claimed abuse of discretion in refusing to give any of the plaintiffs' submitted instructions (with the exception of two instructions on the question of damages). So far as the plaintiffs' case is concerned, his version of the manner in which the accident occurred is as follows: The accident occurred on Euclid avenue, a street running north and south, having a parkway in the center thereof planted to large pepper trees, near the place where Euclid avenue intersects G street. G street is described as a thoroughfare extending east and west but which at its intersection with Euclid avenue does not continue through to the west in a straight or right-angle course but dead-ends at the westerly curb of Euclid avenue. John and his brother Virgil, aged 14, were walking southerly on the sidewalk on the west portion of Euclid avenue a short distance before arriving at G street. They then pursued a course on an angle toward the southeast to cross the west driveway of Euclid avenue and also the parkway above described. It was their intention to cross to the sidewalk of G street on the southeast corner of the intersection. After stepping off the west curb of Euclid avenue at a place described by one witness as within the area which would be encompassed by the prolongation of the south curb line of G street and the sidewalk on the south side of G street, John looked to the south and saw the automobile of the defendant approaching but did not observe any lights on it, and when he was in the center of the west driveway of Euclid avenue, seeing that the car approaching would strike him if he remained in the position he was in when he observed the car for the first time, he darted and attempted to run out of the way of the car but was struck by the right portion of the defendant's automobile. He was rendered unconscious by a severe injury to his head. A car was also approaching about that time from the north on the west side of Euclid avenue with lights, but was not close enough to him to cause any particular concern. Virgil testified that he did not see any lights on the automobile of the defendants until after the car had come to rest, and at that time he did see the lighting shining on the body of his brother which was some 10 feet ahead of the standing automobile. He estimated the speed of the automobile at between "30 and 35 miles at least" when the car passed by approximately a foot or two in front of him.

No witness testified that any horns were sounded prior to the impact. The defendant Curry related that he was operating his car at approximately 20 miles an hour when suddenly there appeared in front of his left headlight the figures of the boys, which he did not see until he was immediately upon them and that he was therefore unable to avoid colliding with them.

We have set forth the factual background in order to properly evaluate the magnitude of the claimed legal error hereinafter presented. The facts must be considered in connection with the instructions offered and refused. The sequence of events leading up to the refusal of the instructions are as follows: The trial commenced on Tuesday, the 15th day of November, 1938, at 10 o'clock a. m. and the court proceeded with the taking of evidence throughout Tuesday and during the morning of Wednesday, the 16th day of November, 1938. At the noon recess on Wednesday the plaintiffs had not yet rested their case. Up to this time plaintiffs' counsel had not been served with any proposed instructions on behalf of defendants. Appellants' counsel, in his affidavit, stated that he had prepared all of his proposed instructions prior to the trial and that he did not hand in the said instructions to the court because no request was made by the court or by any officer of the court, or by anyone for any instructions, and no mention thereof was made by counsel for the defendants; that no mention of instructions was made by defendants' counsel at any time and no instructions were ever served upon him, until he returned to the court room after the noon recess, at approximately 2 p. m., of the afternoon of November 16, 1938, at which time he found, lying on the table in front of his chair, a series of instructions; that he had not yet rested his own case; that immediately upon receiving defendants' instructions he served upon the attorney for the defendants his proposed instructions and secured an acknowledgment of the service thereof on the back of the original instructions; that thereupon affiant delivered plaintiffs' instructions to the court in his chambers. At 2 o'clock p. m. of that day the court then proceeded with the further trial of the action.

Defendants' counsel, at the morning recess, sometime after the first witness was sworn and examined, delivered certain instructions to the court. At the time he had other instructions then prepared which he wished to check over before submitting them to the court. He then submitted these last-mentioned additional instructions at the same time that counsel for the plaintiffs submitted his. These additional instructions of defendants, together with the instructions offered by plaintiffs, were rejected by the court upon the ground that they were not delivered to the court prior to the swearing of the first witness under section 607a of the Code of Civil Procedure, which provides in part as follows: "In every case which is being tried before the court with a jury, it shall be the duty of counsel for the respective parties, before the first witness is sworn, to deliver to the judge or justice presiding at the trial, and serve upon opposing counsel, all proposed instructions to the jury covering the law as disclosed by the pleadings. Thereafter, and before the court has commenced instructing the jury, and before the commencement of the argument, counsel may deliver to such judge or justice, and serve upon opposing counsel, additional proposed instructions to the jury upon questions of law developed by the evidence and not disclosed by the pleadings. * * * Any proposed instruction which is delivered to the judge or justice at a time later than is provided for herein may be disregarded; but, in that event, the judge or justice shall write upon the margin of such proposed instruction the fact that he refused to consider the same for the reason that the requirements of this section have been disregarded."

Appellants now argue that it was prejudicial error for the court to refuse to give any of the plaintiffs' instructions (except two on the question of damages) while giving over 23 of defendants' instructions offered and presented and accepted by the court after the first witness was sworn. A reading of section 607a of the Code of Civil Procedure reveals the fact that the section is divided into two requirements. The first is that proposed instructions covering matters disclosed by the pleadings be presented before the first witness is sworn. Secondly, if the matter is not disclosed by the pleadings, but is a question of law developed by the evidence, then instructions covering such matter shall be delivered to the court before the commencement of the argument. The penalty imposed for failure to comply with the above requirements is that the judge may disregard instructions handed in at a later time than that required, in which event the judge shall write upon the proposed instruction the fact of its refusal for failure to comply with this section. It is to be observed that the section requires that the proposed instructions in all cases be served upon opposing counsel.

[1] It is no doubt the rule that if any instructions offered by the plaintiffs were material and correct statements of the law and were on matters developed by the evidence rather than disclosed by the pleadings, then the trial court was required to give such instructions or instruction; and if the court refused instructions under the above circumstances, then plaintiff is entitled to a reversal if such error were prejudicial within the meaning of article VI, section 4½ of the Constitution. Kirkpatrick v. Daminakes, 15 Cal.App.2d 446, 59 P.2d 556; Price v. McDonald, 7 Cal.App.2d 77, 45 P.2d 425.

First we will concern ourselves with the issues raised by the pleadings. The answer to paragraph VI of plaintiffs' complaint created an issue on the allegation that on December 12, 1936, at 5:45 p. m. John Blanton, Jr., walked easterly across Euclid avenue near the intersection with G street in the city of Upland; that Robert B. Curry so negligently drove his Buick as to collide with the person of Blanton, causing him injury. This same allegation runs through the second, third and fourth causes of action, and is the only important allegation upon which issue is joined under the plaintiffs' complaint. An issue is also made by the pleadings on the defendants' affirmative defense of contributory negligence.

Now applying the plaintiffs' offered instructions to the foregoing pleadings to determine whether the matters mentioned in the instructions were raised by the pleadings, we will consider these instructions to determine whether the evidence offered at the trial revealed a justification for the giving of the instructions which involved "questions of law developed by the evidence, and not disclosed by the pleadings".

[2] Plaintiffs' instructions numbers 1, 2, 6 and 28 deal exclusively with the rule of law that the plaintiff, if traversing an unmarked crosswalk, as defined in the instructions, was entitled to the right of way, and further instructed the jury that if they found a violation thereof was the proximate cause of the accident involved, then the plaintiff was entitled to a verdict, unless they further found that the plaintiff was guilty of negligence contributing to the accident. These instructions, dealing with this subject, were in substance in accordance with sections 560(a), 85 and 87 of the Vehicle Code effective September 15, 1935, St.1935, pp. 99, 188. It cannot be questioned that this principle of law was the very essence of plaintiffs' case under the sections as set forth hereinbefore, and if the plaintiff was proceeding in a place where he was entitled to the right of way and was struck, then that, in itself, might justify the jury in returning a verdict in his favor under proper instructions. The fact that an unmarked crosswalk was involved in the instant case does not appear in any respect from the pleadings hereinabove set forth. The only reference which could impliedly have any bearing on an unmarked crosswalk was that the accident happened at or near the intersection of Euclid avenue and G street. It is therefore apparent that the foregoing allegation is not equivalent to any statement that the accident occurred in an unmarked crosswalk. This factor in the plaintiffs' case arose by virtue of the evidence introduced at the trial and therefore plaintiffs were under no obligation to submit those instructions before the first witness was sworn.

[3] Plaintiffs' instruction No. 4 was taken from the language of Eastman v. Rabbeth, 128 Cal.App. 534, 17 P.2d 1009; Stone v. Gill, 52 Cal.App. 234, 198 P. 640; and Donovan v. Hornaday, 3 Cal.App.2d 103, 38 P.2d 824, and deals with the duty of a driver to maintain a lookout for persons in the roadway, where the place in which the accident occurred was sufficiently illuminated, and states that if the jury found that the defendant failed to keep such a lookout, this could be considered in determining the question of negligence. The proposition of the illumination, whether by street light or otherwise, and the evidence of the lookout maintained, if any, were all matters presented by the evidence, and nowhere alluded to in the pleadings.

Instruction No. 5 deals with the doctrine of last clear chance.

[4] From a cursory examination of the evidence we are not convinced that such an instruction was proper under the circumstances. Girdner v. Union Oil Company, 216 Cal. 197, 202, 13 P.2d 915; Gore v. Market Street Railway Company, 4 Cal.2d 154, 48 P.2d 2.

[5] Other instructions, without enumerating them, bearing on the question of speed at the place of the accident, were essential to a proper determination of the rights of the parties. The permissible speed at that point could not be determined by the pleadings. Production of evidence was necessary to establish the nature of the district to determine the law applicable thereto. No instruction on this point was given.

[6] Without further analysis of the proposed instructions, we are convinced that at least the substance of the instructions referred to should have been given. The jury should have been properly instructed on the issues presented. Although the trial court has our profound sympathy, we are convinced that the refusal to give these instructions, together with the action of the court in waiving the provisions of section 607a of the Code of Civil Procedure as to the defendants and allowing them to present their instructions practically in toto, after the first witness was sworn, and then foreclosing plaintiffs under the same section from presenting his instructions material to the issues and not developed by the pleadings, was prejudicially erroneous.

[7] The attempted appeal from the order denying the motion for new trial is dismissed. Chichester v. Seymour, 28 Cal.App.2d 696, 83 P.2d 301. The judgment is reversed.

We concur: BARNARD, P. J.; MARKS, J.

36 Cal.App.2d 348

HARMAN et al. v. BAY CITIES TRANSIT CO.

Civ. 12267.

District Court of Appeal, Second District, Division 2, California.

Dec. 29, 1939.

Hearing Denied Feb. 26, 1940.

1. Automobiles 🔑208

Where there was evidence that automobile in which motorists were riding stopped before entering intersection and that driver saw bus approaching from right and believed that he had ample time in which to cross intersection before bus reached intersection and that driver in so doing acted as a reasonably prudent man under similar circumstances would have acted, driver in attempting to cross intersection was not contributorily negligent. Vehicle Code, § 552, St. 1935, p. 187.

2. Trial 🔑295(1)

The instructions are to be considered in their entirety.

3. Trial 🔑260(8)

In action for injuries resulting from collision between automobile and bus, where jury were informed that failure to yield right of way to one entitled thereto constituted negligence, which instructions covered subject which trial court deleted from requested instructions of bus company, deletion of such subject from requested instructions which portions of instructions did not include the element of proximate cause was not error.

4. Trial 🔑260(1)

Where subject matter covered by requested instructions was fully covered by instructions given, refusal to give requested instructions was not error.

Appeal from Superior Court, Los Angeles County, Orlando H. Rhodes, Judge.

Action by Thomas E. Harman and another against the Bay Cities Transit Company, a corporation, for injuries sustained in a collision between an automobile in which plaintiffs were riding and defendant's bus. From a judgment for the plaintiffs, defendant appeals.

Affirmed.

Hearing denied; EDMONDS, J., dissenting.

Charles E. R. Fulcher, and Reginald I. Bauder, both of Los Angeles, for appellant.

Bernard Brennan, of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of plaintiffs after trial before a jury in an action to recover damages for personal injuries, defendant appeals.

Viewing the evidence in the light most favorable to plaintiffs (respondents), the essential facts are:

May 8, 1938, at about 10:22 p.m., plaintiff Thomas E. Harman was driving with his wife in an easterly direction on Colorado street just west of its intersection with Fourth street in the city of Santa Monica. At about the same time defendant was operating its bus in a northerly direction on Fourth street and approaching the same intersection. Plaintiff came to a boulevard stop before entering the intersection. He looked to his right and saw defendant's bus approximately 250 feet away, approaching the intersection at an indeterminate speed. He then proceeded in an easterly direction into the intersection at a speed of approximately five miles an hour, believing that he had ample time to pass in front of the bus. When east of the center line of Fourth street defendant's bus collided with the center of the automobile in which plaintiffs were riding, causing them personal injuries.

Defendant relies for reversal of the judgment on these propositions:

First: Plaintiff Thomas E. Harman was contributorily negligent as a matter of law.

Second: The trial court committed prejudicial error in striking from the following instructions proposed by defendant the portions thereof underscored:

(a) "Section 552 of the Motor Vehicle Code of the State of California provides as follows:

"'Vehicle Entering Through Highway. The driver of any vehicle which has stopped as required by this code at the entrance to a through highway shall yield the right of way to other vehicles which have entered the intersection from the through highway or which are approaching so closely on the through highway as to constitute an immediate hazard, but said driver having so yielded may proceed and the drivers of all other vehicles approaching the intersection on the through highway shall yield the right of way to the vehicle so about to enter or cross the through highway.'

"A violation of this section is negligence in and of itself and if, after a consideration of all the evidence you find that the plaintiff Thomas E. Harman violated the provisions of the above section, then he may not recover and it would be your duty to return your verdict in favor of the defendant and against the plaintiffs."

(b) "You are instructed that under the Motor Vehicle Act of the state of California in full force and effect at the time of the happening of the accident in question, it was unlawful for the driver of a vehicle to enter a through highway protected by a boulevard stop sign, such as the highway in question here, without first having brought such vehicle to a full stop.

"You are instructed that a violation of this provision constitutes negligence in and of itself, and if after a consideration of all the evidence in this case, you believe that the plaintiff Thomas E. Harman entered such highway without having brought his vehicle to a stop, that such conduct on his part constituted negligence, and plaintiffs cannot recover."

Third: The trial court committed prejudicial error in refusing the following instruction proposed by defendant:

"You are instructed that when the operator of a vehicle has brought the same to a stop before entering a through highway, that it is the duty of such operator to yield the right of way to all vehicles upon said highway which are in the intersection or so close thereto to constitute an immediate hazard. Therefore, you are instructed that even though you should find that the plaintiff Thomas E. Harman brought his vehicle to a full stop before entering the highway in question and started to cross the intersection at a time when the defendant's bus was so close thereto as to constitute an immediate hazard to the safe crossing of said intersection, that it was the duty of the said plaintiff to yield the right of way to said bus.

"You are further instructed that should you find that under such circumstances the plaintiff Thomas E. Harman failed to yield the right of way, that such conduct on his part constituted negligence, and if such negligence proximately contributed to the happening of the accident in any manner, however slight, then your verdict must be in favor of the defendant and against the plaintiffs."

[1] There is no merit in defendant's first proposition. An examination of the record discloses substantial evidence to sustain each and every fact set forth above. From those facts the trial jury may have believed, and by its verdict impliedly did believe that the automobile in which plaintiffs were riding stopped before entering the intersection, and that the plaintiff driver thereof saw defendant's bus approaching from his right and believed that he had ample time in which to cross the intersection before the bus reached the same; and that in so doing the plaintiff driver acted as a reasonably prudent man under similar circumstances would have acted. This finding of the jury being based, as we have stated, upon substantial evidence is binding upon this court. Further discussion of the evidence is unnecessary.

The second proposition is likewise untenable. The trial court instructed the jury as follows:

"When the law says that one person has the right-of-way over another its purpose simply is to establish a practical basis for necessary courtesy on the highway, and its meaning is that when at any given moment two persons neither of whom then occupies the space in question desires to proceed into the same place on the highway, one of them shall yield. The other has the privilege of the immediate use of the space in question. That privilege is his right-of-way.

"Failure to yield to one to whom the law has given the right-of-way is negligence. * * *"

[2, 3] The instructions of the trial court are to be considered in their entirety and as a whole. The jury was therefore informed that a failure to yield the right of way to one entitled thereto constituted negligence, which covered the subject which the trial court deleted from the requested instructions of defendant. Moreover the deleted portions of the instructions did not include the element of proximate cause.

[4] Defendant's final proposition is likewise untenable. The subject matter thereof was fully covered by the instructions heretofore quoted and the instructions which were read by the court to the jury.

For the foregoing reasons the judgment is affirmed.

We concur: MOORE, P. J.; WOOD, J.

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36 Cal.App.2d 306

PEOPLE v. CURTIS.

Cr. 3223.

District Court of Appeal, Second District, Division 1, California.

Dec. 29, 1939.

Hearing Denied Jan. 26, 1940.

1. Perjury 🔑22

An indictment for perjury before grand jury was not insufficient because it did not expressly allege that offenses under investigation by grand jury were committed in county where grand jury was sitting, where reference to grand jury transcript would show such fact, and especially where grand jury had power to inquire into all offenses committed or triable within the county. Pen. Code, §§ 778, 778a, 778b, 781, 782 et seq., 870, 915, 925, 952, 966.

2. Criminal law 🔑1167(1)

The failure of indictment for perjury to allege that false swearing was willful was not prejudicial, where jury was instructed that willfulness was required and trial otherwise proceeded as if allegation of willfulness were present in indictment. Pen. Code, §§ 952, 966.

3. Witnesses 🔑305(2)

Where witness was told that grand jury was investigating general political corruption and possible grand theft, alterations of public records, and violation of election laws, or conspiracy, and that witness could refuse to testify to avoid self incrimination, rights of witness as to self-incrimination were fully protected, so as to authorize perjury prosecution. Const. art. 1, § 13.

4. Statutes 🔑231

The sections of the Penal Code specifying requisite contents of indictment or information must be construed in conjunction with sections relating to form of indictment or information, statement charging commission of offense, and sufficiency of indictments, informations, and complaints. Pen. Code, §§ 950–952; § 959, as amended by St. 1935, p. 859.

5. Perjury 🔑36

The question of the materiality of evidence, whenever or however it arises, including issue of materiality of alleged perjured testimony, is always one for the court.

6. Criminal law 🔑734

It is duty of jury to find facts and apply them to law as expounded by court.

7. Perjury 🔑11(7)

Where grand jury was investigating alleged corruption and misconduct of public officers, testimony as to whether witness had solicited money with which to influence officials in grading civil service examination papers, and whether witness had been furnished with questions to be propounded at future examinations, with answers thereto, was material, as respects perjury. Pen. Code, § 923.

8. Perjury 🔑34(4)

In perjury prosecution, testimony of police officer that he gave accused money to influence officials in grading civil service examination papers *held* sufficiently corroborated. Pen.Code, § 1103a.

9. Perjury 🔑29(2)

Where accused is charged with testifying falsely before grand jury as to several matters, if evidence sustains one or more of such assignments of perjury it is unnecessary for prosecution to prove all assignments.

10. Grand jury 🔑26

A grand jury may inquire into commission of offense apparently outlawed by limitations where it appears that answers to such questions may lead to discovery of similar crimes as to which prosecution would not be barred.

11. Criminal law 🔑1137(3)

An accused could not complain of erroneous instruction given at his own request.

12. Criminal law 🔑822(1)

Instructions should not be considered singly but in their entirety.

13. Criminal law 🔑822(13)

Where reading of all instructions showed that trial court fully and fairly advised jury as to kind, quality and degree of proof necessary before accused could be convicted of perjury, instructions were not erroneous.

14. Witnesses 🔑255(9)

In perjury prosecution where witness detailed conversation with accused, permitting prosecution, for purpose of refreshing witness' memory, to read transcript of testimony as to conversation given by witness before grand jury, was not erroneous. Code Civ.Proc. § 2047.

15. Criminal law 🔑1170½(1)

In perjury prosecution, where witness detailed conversation with accused, permitting prosecution, for purpose of refreshing witness' memory, to read transcript of testimony as to conversation given by witness before grand jury, was not prejudicial where witness' testimony brought out by transcript and that given at trial were substantially the same, and other evidence fully authorized conviction. Code Civ.Proc. § 2047.

16. Witnesses 🔑414(1)

In perjury prosecution involving accused's testimony before grand jury that he did not take money for fraudulent practices in connection with civil service examinations, admission of records of civil service commission showing that examinations were in fact held at the time and in the manner testified to by certain witnesses, and showing alteration of figure indicating certain person's position on civil service list, was not erroneous.

17. Perjury 🔑36

Evidence of perjury authorized denial of motion to advise jury to acquit.

18. Criminal law 🔑864, 1174(5)

It is only where inquiry of court as to how jury stands numerically is coupled with purpose to ascertain how jury is divided as to guilt or innocence that province of jury is invaded and reversible error committed.

19. Criminal law 🔑1174(5)

If court obtained information as to how jury stood numerically through communication between court and jury outside presence of accused and his counsel, reversal of conviction would be required.

20. Criminal law 🔑1144(15)

The reviewing court could not assume that trial judge had communicated with jury outside presence of accused and his counsel in absence of showing of such fact.

21. Criminal law 🔑864, 1039, 1174(5)

A remark of court, on being informed how jury stood numerically, that "It has been that way for six ballots, at least, hasn't it?" to which foreman replied in the affirmative, was highly improper, but not cause for reversal, where accused made no objection at trial and made no attempt to ascertain source of trial judge's information, and evidence overwhelmingly established guilt. Const. art. 6, § 4½.

22. Criminal law 🔑1030(1)

Where timely objection might permit curing of prejudicial error, accused may not remain silent and raise question for first time on appeal.

23. Criminal law 🔑1186(4)

Where record discloses commission of error at trial appellate court must first find that on record it is seriously doubtful that without such error accused would have been convicted, before reversal is justified. Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Carlo Curtis was convicted of perjury, and he appeals.

Affirmed.

William J. Clark, Harvey D. Taylor, and Isador Gralla, all of Los Angeles, for appellant.

Earl Warren, Atty. Gen., R. S. McLaughlin, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., Jere J. Sullivan, Deputy Dist. Atty., and Percy Hammon, Deputy Dist. Atty., all of Los Angeles, for respondent.

WHITE, Justice.

Defendant appeals from a judgment of conviction upon an indictment charging him with perjury and from an order denying him a new trial. The perjury is alleged to have been committed by him in the course of his testimony given before the grand jury of Los Angeles county. Upon his appearance before the grand jury and prior to any interrogation of him other than to ask his name, address and telephone number, defendant was admonished of his rights in the following language:

"Mr. Curtis, you understand you are not required to testify; you can claim exemption from testifying and refuse to testify on the ground that it might tend to incriminate you; and you understand anything you say can be used against you. Do you understand those rights? A. Yes, sir.

"Q. And notwithstanding those rights, are you willing to make a statement here? A. Yes, sir."

Following his expressed willingness to testify, defendant was asked this question: "You understand that the grand jury at this time is investigating in general the political corruption in Los Angeles, possible grand theft, possible alterations of public records and possible violation of election laws or conspiracy to violate some of those statutes. You understand that, do you?" To which he gave the answer, "Yes, sir."

Epitomizing the testimony given by the defendant before the grand jury, so far as the same is germane to the issues now before us, the record indicates that he testified that he was acquainted with one Patrick J. Currey, a member of the Los Angeles police department; denied that he had a conversation with Currey about taking a promotional examination for sergeant in said police department; denied telling Currey that he could make him a sergeant in the police department or that he ever talked to Currey about the latter's paying the defendant any money to help the former get a promotion in the police department. This was followed by a categorical denial that Currey ever paid the defendant any money and a denial that defendant ever talked with anybody about helping them in examinations for promotion in the police department. Defendant denied ever receiving any money from anybody on the understanding that he would help them in their examinations for promotion in the police department, or that he ever talked with anybody about helping them, either about promotion in the police department or securing an appointment thereto. While under oath, defendant specifically denied that he ever told Officer Currey that he would be "in the money" on any promotional examination for sergeant; or that he had ever told Currey that he, the defendant, had "made a man by the name of Riley a sergeant in the police department"; admitted knowing Riley in 1935; denied knowledge of the fact that Riley took a promotional examination for sergeant in the police department or that he ever talked with Sergeant Riley about such promotional examination. Defendant denied ever telling Sergeant Riley that he "could help put him over in the examination for police sergeant for $100". He denied ever giving Sergeant Riley a list of questions and answers for a civil service examination in the police department or ever giving a list of such questions and answers to any one. He specifically denied ever giving anybody any list purporting to be questions or answers in any civil service examination in the city of Los Angeles.

Defendant admitted knowing one Earl H. Wilson, but denied knowing whether Wilson had taken an examination for the position of police officer or that he had ever talked to Wilson about the latter's taking such an examination. He denied ever telling Wilson that he could help him on a police examination and that it would cost Wilson $500; denied ever giving Wilson any questions or answers for any civil service examination or that Wilson ever paid him any money. He denied advising Wilson that he would be number 17 on the list on an examination in the police department, or that he knew that Wilson passed number 17 on the civil service eligible list.

Defendant admitted knowing one O'Neill Ganey, but denied ever giving the latter any list of questions and answers in connection with civil service examinations for the police department.

Defendant specifically denied ever giving anybody a list of numbers purporting to be a key to the answers in a civil service examination in the city of Los Angeles or that he ever gave any person a list of numbers purporting to be questions which were to be answered by marking the same "true" or "false" in any civil service examination.

In proof of the alleged perjury, the prosecution at the trial introduced testimony of Patrick J. Currey that he met defendant in April, 1938, following a conversation he had with another person who suggested that Currey go to the office of defendant; that upon introducing himself to defendant the latter advised him that he wished he had known him before the last detective examination; that he had aided four men on the last detective lieutenant examination and would see that Patrick J. Currey was taken care of on the sergeant's examination; whereupon Currey gave defendant $50. Currey further testified that defendant thereupon said, "You don't have to take my word for it that I can put you over on the sergeant's examination; you can call up these four men whom I have made;" at the same time giving four names to Currey; but at the trial Currey was unable to remember any of the names except the name of Sergeant Riley. The witness testified that he borrowed the $50 from the Los Angeles Police Federal Credit Union; that about a week later he met the defendant and conversed with him concerning the examination, defendant telling Currey that he would be taken care of on the sergeants' examination; that he, the defendant, had been over to see one Cormack and that the latter was a civil service commissioner at that time. The witness, Currey, further testified that the defendant advised him he would have to have an additional $250; that about June 6 or 7 the witness was working as a police officer at the intersection of Santa Barbara and Figueroa when defendant came out to see him; that both rode around the block, defendant stating to Currey that he would have to have $250 and that he would have to have it soon; that the witness advised defendant he would raise the money that day and invited appellant to return on Wednesday the 8th of June. Currey further testified that in the interim he secured $250 from the Los Angeles Police Federal Credit Union which he gave to defendant as agreed on June 8.

The witness Currey further testified that when the results of the civil service examination were announced he did not make a passing grade, and that upon advising appellant thereof the latter stated, "They can juggle them grades up and down any way they want. You will be taken care of." The witness further testified that following his unsuccessful attempt to pass the examination appellant promised to return his money, but never repaid the same.

That the witness Currey borrowed the money as aforesaid was corroborated by the testimony of his wife that she signed an application for a loan and later saw her husband with $250 in his possession. Further corroborating the witness Patrick J. Currey was the testimony of his uncle, a captain of police, who testified that he had known appellant for about 20 years; that during the month of March or April, 1938. he had a conversation with defendant on Spring street in the city of Los Angeles, at which time defendant advised Captain Currey that "he was strong with the city administration, that is, the Shaw administration, and he might be able to do me some good. I told him there wasn't anything I wanted, but I had a friend that he might help, and he said he could do that. He said it was merely for friendship, and later I met him and he said he would take $50." Subsequently thereto Captain Currey again met the defendant, who said "it was getting pretty tough and he would need some more money. I do not remember the exact amount, but somewhere around $200. * * * We were discussing civil service examinations. * * * He said he was pretty strong up there and he could do a lot of good to helping anybody get higher on the list." Captain Currey further testified that following announcement of the results of the examination and the failure of his nephew to make a passing grade, defendant stated to him that "he was double-crossed, and he did not know just exactly how it all happened, but he said that the boy would get the money back, he was going to refund it".

H. S. Eaton, a police officer of the city of Los Angeles and vice president of the Police Relief Association and treasurer of the Los Angeles Police Federal Credit Union, testified that on or about April 21 a loan of $50 was made to Patrick J. Currey by the credit union and on June 7, 1938, a further loan in the amount of $250 was likewise made.

Sergeant Edward J. Riley testified that he was acquainted with defendant for many years; that defendant visited Riley's home at Thirty-eighth and Western avenue, and later while Riley was living in West Los Angeles defendant came to his home four or five times, and that Riley had been to defendant's home two or three times, the first of which visits occurred in 1935. The witness further testified that he took a promotional examination in the police department about June 29, 1935, for the position of sergeant; that before he took the examination he saw the defendant on four different occasions in relation to the examination. Sergeant Riley further testified that defendant approached him to borrow $100, which Riley loaned him; that subsequent to this transaction and on or about June 26, after Riley had made application to take the promotional examination, defendant came to the former's home and gave some papers to Riley, telling the latter to study them over, that it might do him some good; that the papers in question contained a list of questions and answers marked "true" and "false". Riley testified that he took the questions, read them over several times, and on the morning before the examination returned them to defendant. He testified further that as near as he could recall approximately fifty per cent of the questions the defendant gave him were used in the examination. Riley further testified that some time in October, 1935, defendant came to his home and told him he thought he could get him a high oral rating in the examination because he had a friend in the city administration, but it would cost about $125 to $150.

Earl Howard Wilson, an assistant in a service station, testified that he was acquainted with defendant about ten years; that he took three different police entry examinations, the last one about March, 1936, and that about that time and prior to taking the examination he had a conversation with defendant wherein the latter advised Wilson he could be of some material assistance. Upon invitation, Wilson went to defendant's office, where the defendant told him he could get him a high place on the list for about $500, and that when Wilson advised defendant he did not have that much money he was told that some arrangements might be made with reference to terms. Thereafter, Wilson testified he saw defendant again, advising the latter that arrangements would be made to pay the required money on time payments, after which Wilson went to defendant's office, where he was given a list of questions which he was permitted to study. Wilson further testified that these questions had to do with police work and were identical with the questions on the examination sheet, with the exception of a couple of questions that were missing from the sheet that Wilson had. Wilson further testified that on March 25, 1936, he paid defendant $140, an additional $100 on June 18, and in all paid defendant approximately $365. Wilson further testified that he obtained information from the civil service department showing that he was number 17 on the list, and that defendant had advised him two weeks before he was notified of his rating that he would be number 17 on the list.

Various records of the civil service commission of the city of Los Angeles were introduced in evidence, showing the examinations taken by Sergeant Riley and the witnesses Wilson and Patrick J. Currey. In connection with the record of the examination of the witness Wilson, who obtained a general average of 95:2, it is apparent to the naked eye that a grade in column 2 of the record in which appeared the oral grades had been erased, which necessitated an erasure in the general average and also an erasure in the rank of the candidate. The witness who identified these civil service records stated that the changes were made by him under orders of his immediate superiors. The erasures and changes placed Wilson in a higher position or rank on the eligible list.

For his first ground of appeal appellant asserts that the indictment does not state facts sufficient to constitute a public offense. In support of this claim it is contended that the indictment alleges that the grand jury was and had been for some time engaged in an inquiry concerning violations of section 54b of the Penal Code, conspiracies to violate said section, alleged grand thefts and extortions, alleged violations of sections 113 and 114 of the Penal Code, and also alleged conspiracies to violate said sections, as well as "alleged receipt of bribes, bribery of executive and ministerial officers of the City of Los Angeles" and conspiracies to violate section 68 of the Penal Code. By reason of the foregoing appellant contends that there were embraced within the grand jury investigation referred to in the indictment three species of conspiracy, three distinct species of larceny, and the violation of four specific statutory provisions, one of which embraced several subdivisions. This, says appellant, renders it apparent that from the broad scope of the investigation there might come many charges, and that it is not alleged that the charges under investigation concerned only acts committed in Los Angeles county which the grand jury was authorized to investigate. It is further urged that the indictment is defective in that it does not contain an averment that the session of the grand jury was held in Los Angeles county. The next infirmity charged against the pleading is that it does not allege that the false swearing was wilful. The final challenge to the sufficiency of the indictment takes the form of a claim that the proceedings before the grand jury leave no doubt that it was this appellant himself who was the subject of the grand jury's investigation, and that because appellant was not so informed the constitutional provision (article 1, § 13) against self-incrimination prohibits the administering of an oath to him and that therefore a charge of perjury cannot be found against him.

[1, 2] None of these claims on the part of appellant can be upheld. It is to be remembered that the sufficiency of the indictment is not to be tested by the rigorous rules of the common law, nor by the rules existent in this state prior to the 1927 and 1929 amendments to our statutes governing pleadings in criminal cases. Section 966 of the Penal Code has to do solely with the sufficiency of pleadings in perjury and subornation of perjury cases. By the terms thereof an indictment or information charging perjury is declared sufficient when it sets forth the substance of the controversy or matter in respect to which the offense was committed and before whom the oath alleged to be false was taken; that the person before whom it was taken had authority to administer it; with proper allegations of the falsity of the matter on which the perjury is assigned. Measured by the rules thus announced, the indictment before us is amply sufficient. But further answer may be made to appellant's claims by the statement that the purpose of an indictment or information is simply to inform the accused of the charge which he must meet at the trial. Sec. 952, Pen.Code. As was said in People v. Beesly, 119 Cal.App. 82, 6 P.2d 114, 115, 970: "There, in a nutshell, is stated the principle of our present simplified form of pleading a criminal offense—the accused is entitled to notice of the offense of which he is charged but not to the particular circumstances thereof, * * *." Where this information came solely from the indictment, as at common law, more particularity was required, but under our system, the law now provides, as part of the accusatory procedure, that in every criminal case the accused is entitled to a transcript of the testimony given before the grand jury or the committing magistrate, as the case may be. Secs. 870, 925, Pen.Code. See, also, People v. Gilbert, 26 Cal.App.2d 1, 78 P.2d 770; People v. Yant, 26 Cal.App.2d 725, 80 P.2d 506. By reference to the grand jury transcript appellant would be apprised of the fact that all of the offenses under investigation in the instant case were committed in the county of Los Angeles. However, the grand jury is not confined to the investigation of crimes committed wholly within the county of Los Angeles. That body is clothed with power to inquire into all public offenses committed or *triable* within the county (sec. 915, Pen. Code); while sections 778, 778a, 778b, 781, 782, et seq., enumerate offenses that may be committed out of the county or partly within the county, and *triable* within this county. Appellant is in error when he asserts that the indictment does not in express terms allege that the session of the grand jury at which he testified was held in Los Angeles county, because the pleading in question directly alleges "* * * that on or about the 10th day of November, 1938, in the County of Los Angeles, State of California, the Grand Jury of the County of Los Angeles was then and there engaged in * * * an inquisition and investigation * * *"; and the transcript of his testimony before the grand jury advised appellant that he was sworn and testified in room 548 on the fifth floor of the hall of justice in the county of Los Angeles. Appellant's claim that the failure of the indictment to allege that the false swearing was wilful renders it defective is equally without merit. At the trial the jury was fully instructed that unless the defendant gave his testimony knowingly, *wilfully,* intentionally and with intent to deceive the grand jury, he was entitled to an acquittal, and the jury was further admonished that ignorance of the true facts, inadvertence or mistake, are not substitutes for wilfulness or intent. Furthermore, the trial proceeded as if the allegation of wilfulness were present in the indictment. The omission to directly charge in the indictment that the appellant testified falsely in a wilful manner had no effect upon the trial, nor did such omission impair or prejudice any of appellant's substantial rights. We fail to perceive where the inclusion of the charge of wilfulness would have affected in the slightest degree the course which the trial took or would have changed the verdict of the jury or the judgment of the court. People v. Settles, 29 Cal.App.Supp. 2d 781, 784, 78 P.2d 274; People v. Bonfanti, 40 Cal.App. 614, 616, 181 P. 80;

People v. Hinshaw, 194 Cal. 1, 23, 227 P. 156; People v. Kuder, 93 Cal.App. 42, 55, 269 P. 198, 630; People v. Beesly, supra.

[3] Appellant's contention that a charge of perjury could not be found against him because the proceedings before the grand jury make it manifest that he himself was the subject of the inquisitorial body's investigation, is also untenable. The nature of the grand jury's inquiry was clearly and understandingly explained to appellant, as hereinbefore set forth, at the time he appeared as a witness. Also, appellant was advised at the grand jury session that it was his privilege to refuse to testify on the ground that his testimony might tend to incriminate him. His rights and privileges were fully protected and safeguarded in the grand jury room.

[4] Appellant's contention that the indictment does not conform to the provisions of subdivision 2 of section 950 of the Penal Code finds a complete answer in what we have hereinbefore said, coupled with the language used by this court in People v. Gilbert, supra, 26 Cal.App.2d at page 8, 78 P.2d at page 775: "While appellants base their demurrer [to the indictment] entirely upon section 950 of the Penal Code, it is clear that section 950 must be construed in conjunction with sections 951, 952, and § 959, as amended by St.1935, p. 859, in order to determine how and in what manner an indictment must allege and name the charge so that a defendant will be able to properly prepare a defense."

It is next contended by appellant that the evidence is insufficient to sustain a conviction for the asserted reasons that "(a) there is no evidence that the testimony alleged to be false was material; (b) there is no corroboration; (c) it was not only necessary to allege the materiality of the testimony charged to be false but it is equally necessary to prove its materiality."

[5-7] Specifications (a) and (c) may be considered together. Section 923 of the Penal Code provides in part: "The grand jury must inquire * * * into the willful or corrupt misconduct in office of public officers of every description within the county." In the instant case, when appellant appeared to testify before the grand jury he was advised as follows: "You understand that the grand jury at this time is investigating in general the political corruption in Los Angeles, possible grand theft, possible alteration of public records, and possible violation of election laws or conspiracy to violate some of those statutes. You understand that do you?" To which the appellant responded, "Yes, sir." It is established in our law that it is for the judge presiding at the perjury trial to determine the materiality of the allegedly perjured testimony. The question of the materiality of evidence, whenever or however it arises, is always one for the court. Whenever the question of the materiality of evidence arises during the ordinary trial of a cause when one party offers evidence and its materiality is put in issue by appropriate objection, it is concededly a question of law for the court. The same is true when the question of the materiality of the charged false testimony arises in a trial for perjury. The duty of the jury is to find the facts and apply to them the law as expounded by the court. People v. Lem You, 97 Cal. 224, 32 P. 11. To us it seems irrefutable that when the grand jury was investigating alleged corruption and misconduct of public officers it was essential and material for that body to know from appellant when he appeared before it as a witness whether he had solicited money with which to influence public officials in the discharge of their duties in connection with grading the civil service examination papers of applicants for positions as police officers in the city of Los Angeles. It was certainly material to the inquisition for the grand jury to know whether appellant in advance of the holding of civil service examinations had been furnished with a list of the questions to be propounded at such examinations and the correct answers thereto. The court's instructions to the jury that appellant's answers to these and other questions propounded to him in the grand jury room were material to the proceedings, charges, matters and things then pending before and under investigation by the grand jury, were correct and proper.

[8, 9] Answering specification (b), it is sufficient to say that a reading of the evidence hereinabove narrated in this opinion clearly shows that the testimony of officer Patrick J. Currey was amply corroborated by the testimony of his uncle, Gregory Currey. It would unduly prolong this opinion to here set forth the corroborative testimony which appears in the record of the evidence given by the witnesses Wilson and Riley, because it is the law that where the alleged perjured testimony was given

before the grand jury, even though the defendant be accused of testifying falsely as to several matters, nevertheless, if the evidence sustains one or more of the assignments of perjury, it is not necessary for the prosecution to prove all of the assignments of perjury. People v. Follette, 74 Cal.App. 178, 190, 191, 240 P. 502. The testimony of Gregory Currey in corroboration of that given by the witness Patrick J. Currey clearly meets the test prescribed by section 1103a of the Penal Code. People v. Casanova, 54 Cal.App. 439, 202 P. 45; People v. Todd, 9 Cal.App.2d 237, 241, 49 P.2d 611; People v. Follette, supra.

[10] We find no merit in the claim of appellant that the grand jury was without jurisdiction to investigate crimes which appear affirmatively to have been barred by the statute of limitations, for the reason that the grand jury is empowered to inquire into the commission of an offense apparently outlawed by the statute of limitations when it appears, as in the instant case, that answers to such questions may lead to the discovery of similar crimes as to which prosecution would not be barred by the statute. State v. Kasherman, 177 Minn. 200, 224 N.W. 838.

[11] It is next contended by appellant that the court misdirected the jury in matters of law. It is true, as urged by appellant, that the court did instruct the jury that the question of the materiality of the testimony appellant was charged with giving before the grand jury was a question of law to be determined by the court, which instruction, as hereinbefore pointed out, is a correct statement of the law; and it is also true that in another instruction the jury was advised that it lay within their province to determine what testimony was material. However, this last-mentioned and erroneous instruction was given at the request of appellant himself; and it is well settled that an appellant cannot question or complain of instructions given at his own request. As was said in People v. Bradbury, 155 Cal. 808, 815, 103 P. 215, 219: "Appellant argues that by reason of the conflict in instructions, whereby in one the jury is told it must determine the materiality of the evidence, while in the other it is told that such materiality is always a question of law for the court to decide, should work a reversal of the case. But this conflict could not have been injurious to the defendant and must have made for his benefit; for, if the jury were led to the erroneous belief that they could decide upon the materiality of the evidence and had decided that it was not material, the defendant would have obtained an acquittal to which he was not entitled. The fact that under such an erroneous instruction the jury has decided the question of the materiality correctly, as here it did, furnishes no ground for reversal."

[12, 13] Appellant challenges the correctness of several other instructions, but when we remember that instructions should not be considered singly, but in their entirety. (People v. Macken, 32 Cal.App.2d 31, 89 P.2d 173), we have no hesitancy in saying, from a reading of all the instructions, that the jury was clearly, understandingly and unerringly admonished, and must have understood, that before they could find the defendant guilty they must be convinced beyond a reasonable doubt that he knowingly, wilfully, and in violation of his oath testified falsely as to certain matters material to the grand jury's inquisition; that they must base such conviction upon the testimony of two witnesses or of one witness and corroborating circumstances; and must be convinced beyond a reasonable doubt that at the time of the giving of such testimony he knew the same to be false and that he gave such testimony wilfully and for the purpose and with the intent of deceiving and misleading the grand jury. A reading of all the instructions given impresses us that the trial judge fully and fairly advised the jury as to the kind, quality and degree of proof necessary before appellant could be convicted of perjury. This is all the law requires. People v. Kelly, 70 Cal.App. 519, 524, 234 P. 110; People v. Alston, 139 Cal.App. 575, 576, 34 P.2d 759; People v. Bolton, 215 Cal. 12, 22, 8 P.2d 116; People v. Jordan, 24 Cal.App.2d 39, 74 P.2d 519.

Appellant next directs our attention to the action of the trial court, over his objection, in permitting the deputy district attorney during the direct examination of the witness Patrick J. Currey to read to the witness from a transcript of testimony given by him before the grand jury. The witness was being interrogated concerning a conversation had with the defendant in the latter's office. After the witness had detailed the conversation and concluded with the statement, "That is all," the deputy district attorney, for the purpose of refreshing the memory of the witness, and over objection, was permitted to read the following questions and answers from the testimony of the same witness given before the grand jury: "'Now, then, I wish you would tell us what Carlo Curtis said and what you said at the time you brought the $50 down to him? A. Carlo Curtis told me that as a favor to my friend he was going to see I was made a sergeant. He said he would have to have $50 and he said he would handle Cormack. That was a civil service commissioner.' Now, do you recall that?" To which the witness responded, "I do." The deputy district attorney then asked, "Now, will you state what was said, if that refreshes your memory?" To which the witness replied, "That was about the substance of what was said at that time."

[14] We perceive no error in the ruling of the court. Undoubtedly the witness would have had the right to read his testimony given before the grand jury for the purpose of refreshing his memory. Code Civ.Proc. § 2047. If a transcript of testimony given at a preliminary examination may be regarded as a private memorandum, and it was so held in People v. Durrant, 116 Cal. 179, 213, 48 P. 75, then certainly a grand jury transcript may also be so considered. In People v. Durrant, supra, 116 Cal. at page 214, 48 P. at page 84, the Supreme Court said: "When a witness called by a party fails to testify to matters previously within his recollection, or gives evidence in apparent variance with that formerly given, it is not incumbent upon the party producing the witness to wait for the assaults of the cross-examination to expose seeming inconsistencies and discrepancies. While he may not impeach his witness (saving under certain exceptional circumstances), he may with propriety refresh his recollection, to the end that the witness and his present evidence may both be put fairly and in their proper light before the jury."

[15] Further, even if we eliminate the aforesaid evidence from the record, it remains highly improbable that the jury would have rendered any other verdict than that of guilty. With this evidence out of the case entirely there still remained the testimony of Gregory Currey that appellant told him he was influential with the city administration and might be able to do him some good, and that the latter told appellant he wanted nothing for himself but had a nephew, Patrick J. Currey, whom he would like to help, to which appellant replied that he could and would do that, subsequently advising Gregory Currey that it would require the payment of $50. Also, a comparison of the evidence read to refresh the recollection of the witness with his testimony given on direct examination at the trial shows that the latter was substantially the same as that brought out by the grand jury transcript, and the error, if any, was harmless.

[16] We find no error in the ruling of the court by which certain records of the civil service commission of the city of Los Angeles were admitted in evidence. These documents served to corroborate the testimony of the witnesses Patrick J. Currey, Riley and Wilson. They showed that the examinations in connection with which these witnesses talked with appellant and in regard to which, according to such witnesses, appellant offered to help them, were in fact held at the time and in the manner testified to by such witnesses. For example, upon one of the examinations, as was heretofore pointed out, it was apparent to the naked eye without the aid of a glass that upon such document some number comprising two digits, the first of which was 2, had been erased, and that the figure 17 had been substituted in its place, thereby raising the witness Wilson's position on the civil service list from a place in the 20's to 17th place. It will be remembered that Wilson testified appellant had told him that he could get him a higher place on the list. Furthermore, the witness Patrick J. Currey testified that following the receipt by him of information that he had failed to attain a "passing grade" in his civil service examination, appellant told him that "they could juggle them grades up and down any way they want", and that Currey "would be taken care of". The conceded alteration on the list constituting one of the civil service examinations lends corroboration to Currey's testimony as to what appellant told him could be accomplished in connection with making changes in the positions of civil service applicants upon the list. The evidence was competent, material, relevant and properly admitted.

[17] What we have heretofore said with reference to the sufficiency of the evidence disposes of appellant's next ground of appeal, which is that the court erred in denying his motion to advise the jury to acquit him. The adverse ruling upon the motion was correct.

Finally, appellant earnestly urges that the trial court was guilty of such prejudicial misconduct as to deny him the right of trial by jury as the same is guaranteed by the Constitution and did thereby violate his right to the independent judgment of each individual juror. In this connection, the record discloses that the jury retired for deliberation at 3:15 p. m. Friday, February 17. At 10:15 p. m. of the same day they returned into court, stating that they were unable to agree upon a verdict, and were ordered taken to a hotel for the night. At 9 o'clock the following morning, Saturday, February 18, the jury returned to the jury room for further deliberation. At 10:05 a. m. of that day they returned into court for further instructions, after which they retired for the resumption of deliberations. At 2:30 p. m. the jury returned into court and reported their inability to agree, at which time the foreman advised the court that in his opinion the jury would be unable to reach a verdict. On further inquiry by the trial judge as to whether he could be of assistance to the jury, the foreman suggested that the court intruct the jury concerning "what constitutes corroborating evidence, corroborating circumstances", following which the court expressed its satisfaction with the instructions already given on that point and suggested a rereading of the same by the jury. The court then interrogated several jurors as to their views concerning a possible agreement by the jury upon a verdict, all of whom were of the opinion that a verdict was improbable. Thereupon the following colloquy occurred between the court and the foreman of the jury:

"The Court: I did not ask you, Mr. Olsen, but how did you stand on the last ballot?

"Foreman Olsen: The last ballot was 11 to 1.

"The Court: It has been that way for six ballots at least, hasn't it?"

"Foreman Olsen: Yes, the last six ballots."

After admonishing the jury to again read the instructions, the court directed that they retire for further deliberations, which they did at 2:37 p. m., and at 3:15 p. m. the jury returned into court with a guilty verdict.

[18] Appellant contends that the trial judge was guilty of error in continually interrogating the jury with reference to the possibility of their agreeing upon a verdict after they had expressed their opinion that they were deadlocked. With this contention of appellant we cannot agree, because the weight of authority seems to be that only when the inquiry of the court as to how the jury stands numerically is coupled with the purpose on the part of the court to ascertain how the jury is divided as to the guilt or innocence of the defendant, is the province of the jury invaded and reversible error committed. People v. Talkington, 8 Cal.App.2d 75, 47 P.2d 368, and cases therein discussed. Where, as in the instant case, the court by inquiry sought to ascertain how the jurors were numerically divided, there is no error, and certainly no reversible error. As was said in People v. Von Badenthal, 8 Cal.App.2d 404, 410, 48 P.2d 82, 85: "Such information by itself [referring to inquiry by the court as to the numerical division of the jury] is proper as a means of assisting the court in its determination as to whether there is a reasonable probability of the jury agreeing upon a verdict and the advisability of sending them out for further deliberation".

[19-23] However, that portion of the court's inquiry last above quoted, wherein the trial judge, after ascertaining that the jury stood numerically 11 to 1, said, "It has been that way for six ballots at least, hasn't it?" to which the foreman replied, "Yes, the last six ballots," presents an important and serious question. We are in full accord with appellant when he says that if the foregoing establishes the fact or warrants the reasonable inference that there had been some communication between the court and jury outside the presence of the defendant and his counsel, by which means the court obtained information that the jury had stood 11 to 1 for the preceding six ballots, then the rights guaranteed one accused of crime were violated, and a conviction obtained under such circumstances should be set aside. The law zealously guards the right of its citizens to a fair and impartial trial and is vitally concerned that all proceedings had upon criminal trials shall be in the presence of the accused. It therefore becomes necessary for us to determine whether the last-quoted language of the trial court justifies the conclusion that the court had in some clandestine manner established communication with the jury which resulted in the court's being advised as to the number of ballots taken by the jury while

they were numerically divided 11 to 1. No exception to the now challenged statement of the court was taken at the trial, nor was any inquiry made by appellant's counsel as to how the court knew or purported to know that the jury had stood 11 to 1 for the preceding six successive ballots. We are therefore left to surmise and conjecture as to whether the remark of the trial judge was the figment of his imagination; was a mere guess upon his part; or was prompted by information secretly obtained by him from the jury. We cannot assume that the trial judge was guilty of such serious misconduct as here charged, in the absence of a showing thereof. The place to make such a showing or at least to attempt to do so was at the trial when the incident occurred. By remaining mute appellant deprives us of any ground or reason upon which to predicate a conclusion that the trial judge surreptitiously obtained information as to what was transpiring in the jury room. This is especially true when, as here, the proof of defendant's guilt is overwhelming and practically demonstrated and when not one word was offered, either by defendant or by any witness called in his behalf, in denial of the truth of the charges made against him by witnesses produced by the prosecution. The remark of the trial court was highly improper and should never have been made, but the same does not, under the facts of this case, authorize a reversal in the absence of an objection or exception to it by appellant at the trial or the making of some effort by him to ascertain from the trial judge the source of information, if any, which prompted the statement. It is manifest that had appellant by timely objection or exception called to the attention of the trial court the remark in question, any prejudicial error arising therefrom might well have been cured. A defendant under such circumstances may not remain silent and raise the question for the first time on appeal. With the record in the condition in which we find it, we must look into the effect of the error of the trial court in connection with the disposition of the appeal in the light of the provisions of section 4½ of article VI of our state Constitution, which forbids us to set aside any judgment or grant a new trial unless, after an examination of the entire cause, including the evidence, this court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. The phrase "miscarriage of justice", used as descriptive of that condition of a cause, has no hard and fast definition. It seems to us that where the record discloses the commission of errors at the trial the appellate court must first find that upon the record it is seriously doubtful that without such errors the defendant would have been convicted before a reversal of the judgment is justified. People v. Adams, 76 Cal.App. 178, 186, 244 P. 106. As was said in People v. Black, 73 Cal.App. 13, 38, 238 P. 374, 385: "It is the law that, when applying the provisions of section 4½ of article 6 of the Constitution to an entire cause, we must direct a reversal when we are unable to say 'whether appellant would or would not have been convicted but for the errors of the court.' People v. Degnen [70 Cal.App. 567], 234 P. 129." In the case before us the evidence against appellant was undenied and conclusive of his guilt, and in the light of the record we cannot say that the error complained of was so flagrant that it might have been directly responsible for the verdict of conviction. It must be remembered that in the discussion of which the complained of remark formed a part the court admonished the jury to reread certain instructions. We have read the instructions given, together with the evidence, and have no hesitancy in saying that under the evidence but one verdict could be reached, and that was the one returned by the jury. Such being the case, we are without power to set it aside.

The judgment and the order appealed from are, and each of them is, affirmed.

We concur: YORK, P. J.; DORAN, J.

36 Cal.App.2d 602

KATENKAMP et al. v. UNION REALTY CO. (two cases).

Civ. 11781, 11783.

District Court of Appeal, Second District, Division 1, California.

Jan. 18, 1940.

Hearing Denied March 18, 1940.

1. Navigable waters 🔑41(1)

Under the common enemy doctrine, landowner is authorized to use every precaution not unreasonable in dealing with extraordinary water conditions to avert damage to his land.

2. Navigable waters 🔑41(1)

Whether landowner's action in attempting to avert damages to his land from extraordinary water conditions is reasonable so as to be authorized by common enemy doctrine must be determined by existing conditions, and not by consequences which follow.

3. Navigable waters 🔑41(1)

In action for damages for transfer of sand from ocean beach in front of plaintiffs' land to defendant's adjoining land by maintenance of two groins, consolidated with mandatory action demanding removal of groins, evidence sustained finding that no necessity existed, so far as protection of defendant's property from inroads of sea was concerned, for raising height of 1925 groin and erection of additional groin in 1929.

4. Navigable waters 🔑41(1)

In action for damages, for transfer of sand from ocean beach in front of plaintiffs' land to defendant's adjoining land by maintenance of two groins, consolidated with mandatory action demanding removal of groins, conflicting evidence supported finding that groins were maintained by defendant for improvement of its property, and not for protection from inroads of sea.

5. Appeal and error 🔑996

Where facts are proved with legal sufficiency, a finding of fact based upon reasonable inferences drawn therefrom cannot be disturbed on appeal.

6. Appeal and error 🔑1011(1)

The findings of the trial court will not be disturbed on appeal, where there is a substantial conflict in the evidence.

7. Evidence 🔑587

In order to establish a theory by circumstantial evidence, it is not necessary that facts be such and so related to each other that the theory is only conclusion that can fairly or reasonably be drawn therefrom.

8. Evidence 🔑587

In civil cases, circumstantial evidence, in order to be sufficient to sustain verdict, need not rise to that degree of certainty which will exclude every reasonable conclusion other than that arrived at by jury.

9. Navigable waters 🔑41(1)

In action for damages for transfer of sand from ocean beach in front of plaintiffs' land to defendant's adjoining land by maintenance of two groins, although damages sustained by plaintiffs were contributed to in part by the construction of a breakwater by city, defendant was liable for such proportion of total damage as was caused by the groins.

10. Navigable waters 🔑41(1)

In action for damages for transfer of sand from ocean beach in front of plaintiffs' land to defendant's adjoining land by maintenance of two groins, where damages sustained by plaintiffs were contributed to in part by the construction of a breakwater by city, trial court was entitled to estimate as best it could from the evidence before it how much of total damage was occasioned by defendant's groins.

11. Navigable waters 🔑41(1)

In action for damages for transfer of sand from ocean beach in front of plaintiffs' land to defendant's adjoining land by maintenance of two groins, where damages sustained by plaintiffs were contributed to in part by the construction of a breakwater by city, trial court did not err in allowing damages approximating 25 per cent. of amount testified to as having been sustained by plaintiffs, where there was positive evidence that the groins caused 75 per cent. of plaintiffs' damages, and some evidence to the effect that groins were sufficient to cause all the damages.

12. Negligence 🔑61(1)

Where separate and independent acts of negligence of two parties are direct causes of a single injury to a third person, and it is impossible to determine in what proportion each contributed to the injury, either is responsible for the whole injury, although his act alone might not have caused the entire injury, and although, without fault on his part, the same damage would have resulted from the act of the other.

13. Appeal and error ⚷1195(3)

Where District Court of Appeal on a prior appeal, in reversing and remanding case, ruled that plaintiffs' claim for damages for transfer of sand from ocean beach in front of plaintiffs' land to defendant's adjoining land by maintenance of two groins was not barred by statute of limitations, such holding became the "law of the case" upon the coming down of the remittitur. Code Civ.Proc. § 338, subd. 2.

[Ed. Note.—For other definitions of "Law of the Case," see Words & Phrases.]

14. Appeal and error ⚷925(1)

In action for mandatory injunction to remove two groins which transferred sand from ocean beach in front of plaintiffs' land to defendant's adjoining land, it would be assumed, on appeal, that trial court gave due consideration to contention that it would be inequitable to grant injunction because benefits which plaintiffs might expect from removal of groins would be slight and far offset by damages which would result to defendant's property, in view of conflict in evidence on such point.

15. Appeal and error ⚷1122(2)

The purpose of constitutional provision giving appellate courts power to make findings of fact contrary to or in addition to those made by trial court is not to develop appellate courts generally into trial courts, and it is contemplated that appellate courts will exercise the power sparingly and, generally, will exercise it only when purpose of the new findings is to constitute a basis for an affirmance of the judgment or a basis for a reversal of the judgment with directions to trial court to enter a judgment for appellant. Const. art. 6, § 4¾.

16. Appeal and error ⚷891

Appellant's application to District Court of Appeal to submit additional evidence, pursuant to constitutional provision giving appellate courts power to make findings of fact contrary to or in addition to those made by trial court, was denied, where evidence, if admitted, would not have compelled reversal of judgment with direction to enter judgment for appellant. Const. art. 6, § 4¾.

DORAN, J., dissenting.

◆

Appeal from Superior Court, Santa Barbara County; A. B. Bigler, Judge.

Action by J. F. Katenkamp and others against the Union Realty Company for damages for transfer of sand from an ocean beach in front of plaintiffs' property to adjoining land of defendant as result of defendant's maintenance of two groins, consolidated with action by the same plaintiffs against the same defendant for mandatory injunction demanding removal of groins. From judgments for plaintiffs in both actions, defendant appeals.

Judgments affirmed.

Prior opinion, 93 P.2d 1035.

Heaney, Price, Postel & Parma, of Santa Barbara, for appellant.

Leland Crawford and Alfred W. Robertson, both of Santa Barbara, for respondents.

WHITE, Justice.

The two actions forming the basis of this appeal involve the construction by defendant of two groins into the water fronting its properties upon the westerly arm of Miramar bay in Santa Barbara county. Defendants' real property is situated just east of the city of Santa Barbara, consisting of approximately 1,200 feet fronting the Pacific ocean. Plaintiffs' properties also border on the Pacific ocean and are situated east of defendant's property. Two groins are here involved, one known as the easterly groin, which is 300 feet long, and one known as the westerly groin having a length of 190 feet. The easterly groin is closest to the plaintiffs' properties, while the westerly groin is distant 200 feet west of said easterly groin. The easterly groin was built and completed in the early summer of the year 1925, while the westerly groin was constructed early in the summer of 1929, at which last-named time the easterly groin was capped, raised slightly in height and connected to the shore. In the interim between the erection of the easterly and westerly groins, viz., August, 1927, the city of Santa Barbara commenced construction of a breakwater for the purpose of providing a yacht harbor. This breakwater was approximately 3½ miles west of the properties of the respective parties to this litigation. Construction of the breakwater continued into the year 1928 and until the fall of 1929, when it was completed.

By their amended complaint plaintiffs allege that following the erection of the second groin and the capping of the original groin in 1929, natural currents of the sea were changed, causing sands in suspension to be deposited along and to the west of defendant's groins and the currents to carry away and erode plaintiffs' properties. Plaintiffs claimed that when their property commenced to erode the sands were carried away, leaving exposed the underlying rocks and clay; all of such conditions. it was charged, resulted from the groins constructed by defendant.

The two actions here in question were filed September 29, 1932, and October 5, 1932, one being an action for a mandatory injunction demanding removal of the groins, and the other being for damages allegedly resultant from the erection and maintenance of said groins. Following the sustaining of demurrers to the amended complaint and the entry of judgments thereon in favor of defendants, both such judgments were reversed by the appellate courts, and the causes remanded for trial. 6 Cal.2d 765, 59 P.2d 473, and 11 Cal.App. 2d 63, 53 P.2d 387. Upon the coming down of the remittitur in each action, defendant filed its answers, and the matters came on for trial, following which judgment was entered June 20, 1937, in favor of plaintiffs, decreeing that a mandatory injunction issue commanding defendant forthwith to permanently remove the two groins in question from in front of plaintiffs' property, while in the second action plaintiffs were respectively awarded damages in various sums totaling $4,200. By stipulation both actions were tried together, but separate findings and judgments were entered. While separate appeals were taken by the defendant, it has been agreed that the cases may be considered together upon a consolidated set of briefs.

In addition to its denial of the allegations contained in plaintiffs' amended complaint, defendant set up the following affirmative defenses; summarized in appellant's brief as follows:

"(a) That the groins are maintained for the purpose of protecting the property of appellant, its said property being exposed to the inroads of the sea and thus to erosion.

"(b) As to the action in damages—that the action is barred by paragraph 2 of section 338 of the Code of Civil Procedure of the State of California.

"(c) As to the injunction suit—that it would be inequitable to order the removal of the groins or any part thereof because any benefits resulting to respondents would be slight and the damage to appellant's property, great; that the damages to appellant's property would far offset any possible benefits respondents might receive, and that the remedy of injunction would therefore be harsh, inequitable and unjust."

The general grounds of appeal, therefore, are epitomized by appellant in its brief as follows:

"1. Was appellant within its rights in maintaining said groins, even if respondents' properties were thereby damaged, or in other words, do the facts in this case warrant the application of the common enemy rule?

"2. Does the evidence show any recoverable damage to have been caused by the groins?

"3. Does the evidence show what portion of recoverable damages, if any, was caused by appellant's groins?

"4. Is the action in damages barred by the provisions of paragraph 2 of section 338 of the Code of Civil Procedure of the State of California?

"5. Would it be inequitable, under the circumstances, to order the removal of said groins or a portion thereof?"

In support of its first ground of appeal, appellant asserts that because its land borders on the seashore and is exposed to the inroads of the sea, it has a right to use and did use only reasonable means for its protection that by reason of what is commonly characterized as the "common enemy doctrine" it is not accountable to an adjacent littoral owner for injuries occasioned thereby. The doctrine referred to found its first pronouncement in England about the year 1828, in the case of Rex v. Commissioners of Sewers for the Levels of Pagham, 1828, 8 Barn. and C. 355. In the cited case it appears that the commissioners, in order to protect certain lands which it was their duty to protect, erected certain groins, some of which, it was charged, caused the sea to flow with greater violence against the lands of one Cosens, thereby making a greater inroad upon such land than the sea would otherwise have done. The opinion of the court, delivered by Lord Tenterden, C. J., and Bayley, J., denying the mandamus prayed for against the commissioners, proceeds in part as follows: "* * * It may be conceived that such is the effect of the groyne" (causing the sea to make a greater inroad upon the land than possibly it might otherwise have done); "but the sea is a common enemy to all proprietors on that part of the coast, and I cannot see that the commissioners, acting for the common interest of several land-owners, are, as to this question, in a different situation from any individual proprietor. Now, is there any authority for saying that any proprietor of land exposed to the inroads of the sea, may not endeavor to protect himself by erecting a groyne or other reasonable defence, although it may render it necessary for the owner of the adjoining land to do the like? I certainly am not aware of any authority or principle of law which can prevent him from so doing. If we were in this instance to say that the commissioners for the level in question were bound to erect a groyne for Mr. Cosens, it might, and probably would, cause injury to the land lying to the eastward in the same manner as that erected for the protection of the level has caused injury to Mr. Cosens and the owner of the land lying eastward of Mr. Cosens would have a right to call upon the commissioners to protect him also. In like manner each successive proprietor of land lying to the eastward would be entitled to claim protection, and the commissioners might be compelled to erect defences against the sea along the whole line of coast from the level of Pagham to the North Foreland; for so far, I believe, the sea is making inroads upon the land. The extent to which the principle must be carried, if once admitted satisfies me that it cannot be sustained in reason or in law. I am, therefore, of opinion that the only safe rule to lay down is this, that each land-owner for himself, or the commissioners acting for several land-owners, may erect such defences for the land under their care as the necessity of the case requires, leaving it to others, in like manner, to protect themselves against the common enemy. For these reasons, the rule for a mandamus must be discharged."

To the foregoing Bayley, J., added by way of concurrence: "* * * But if they" (the commissioners) "act bona fide, doing no more than they honestly think necessary for the protection of the level, their acts are justifiable, and those who sustain damage therefrom must protect themselves. It has been argued that Mr. Cosens, having sustained damage from the groyne erected by the commissioners, is entitled to compensation. I do not agree to that as an abstract proposition. If a man sustains damage by the wrongful act of another, he is entitled to a remedy; but to give him that title those two things must concur, damage to himself, and a wrong committed by the other. That he has sustained damage is not of itself sufficient. Now here Mr. Cosens may have sustained damage, but the commissioners have done no wrong. The dictum of Mr. Justice Wilmot was cited to show that where there is a right this Court ought to find a remedy. But the right that Mr. Cosens and each land-owner has, is to protect himself; not to be protected by his neighbours. To that right no injury has been done, nor can any wrongful act be charged against the commissioners; the court, therefore, have no grounds for granting the mandamus applied for."

The doctrine just enunciated was followed in the early California case of Lamb v. Reclamation District No. 108, 73 Cal. 125, 14 P. 625, 2 Am.St.Rep. 775, where it was sought to abate and remove as a public nuisance a levee erected along the west bank of the Sacramento river and to recover damages for the overflowing of plaintiff's land on the other side of the river, about two miles below, allegedly caused by said levee. In this case our Supreme Court quotes extensively and approvingly from the decision in the case of Rex v. Commissioners, supra, in which latter case the waters of the sea were characterized as a common enemy against which every man has a right to defend himself. See, also, Sanguinetti v. Pock, 136 Cal. 466, 473, 69 P. 98, 89 Am.St.Rep. 169; McDaniel v. Cummings, 83 Cal. 515, 520, 23 P. 795, 8 L.R.A. 575; Jones v. California Development Co., 173 Cal. 565, 574, 160 P. 823, L.R.A.1917C, 1021; LeBrun v. Richards, 210 Cal. 308, 291 P. 825, 72 A.L.R. 336.

[1, 2] The principle underlying the foregoing decisions which deal with extraordinary water conditions is that under such stress the landowner may use every precaution not unreasonable to avert damage to his land. Whether such owner's conduct is reasonable must be determined by existing conditions and not by consequences which follow. Respondents seek to distinguish the above-cited cases and assert their inapplicability upon the ground that the California cases cited refer only to storm waters, and that the tide waters of the Pacific ocean are not storm waters in any sense. Be that as it may, the cases cited confirm the holding in the early English case of Rex v. Commissioners, supra, that the sea is a common enemy and whenever

it attacks littoral property the owner thereof may protect his property from its ravages and use every reasonable means so to do without liability.

With this principle in mind, we now turn to the record to ascertain whether, under the circumstances shown to exist here, the actions of the defendant were, as contended for by plaintiffs, unreasonable and therefore subject to abatement and responsibility for damages inflicted upon the property of plaintiffs. In determining the reasonableness of appellant's conduct, we are brought to a consideration of whether the erection and maintenance of the groins were and are a necessary protection from the inroads of the sea.

[3] Appellant acquired its properties here in question in 1924. At that time there were no structures on this property fronting the ocean except a house known as the Bark House. In 1925 appellant built the first groin, at a cost of $5,786.25. That such groin proved effective for preventative purposes against ravages of the sea is evidenced by the fact that in 1927 appellant built bathhouses upon its property at a cost of $5,838, and in 1928 erected food booths upon the property at a cost of several thousand dollars. Up to this time in 1929 there is no claim on the part of respondents that their properties were damaged by the first groin erected in 1925, nor is there any evidence that appellant's beach club or its appurtenant bathhouses and food booths were damaged by the ocean waters after their erection following the installation of the groin in 1925 up to the time of the erection of the second groin in 1929. Under this state of the record, there were sufficient facts in evidence to sustain the court's finding that no necessity existed, so far as protection of appellant's property from the inroads of the sea is concerned, for the raising of the height of the 1925 groin and the erection of the additional groin in 1929. As to the causal connection between the erection of the groin in 1929 and the damage to respondents' properties, the record contains evidence that prior to June, 1929, the ocean front of plaintiffs' property was covered with a sandy beach to a depth of approximately six feet of sand; that since June, 1929, said sands have disappeared from plaintiffs' property, leaving exposed the underlying rocks, and in places exposing beds of clay beneath the sands and rocks; also, that the ordinary high tide line of the waters of Miramar bay has encroached upon plaintiffs' properties to a varying distance of from 30 to 60 feet. Indicative of the relative condition of the area included in the respective properties of plaintiffs and defendant prior to the erection of the groins is the following testimony given by Thomas Dinsmore, supervisor of the first district of Santa Barbara county, whose familiarity with the shore in question extends back sixty years:

"Q. Calling your attention to Plaintiffs' Exhibit Number 9, are you familiar with the point shown here as 'Fernald Point'? A. I am.

"Q. Have you frequently observed that point? A. Yes.

"Q. And prior to the erection of any groins? A. Yes.

"Q. Please state to the Court the condition of the shore there prior to the erection of groins. A. That point was always rocky around that Fernald Point.

"Q. Calling your attention to the portion of the property marked on this exhibit as 'Union Realty Company property', are you familiar with that property? A. I am.

"Q. And were you familiar with it prior to the erection of any groins on there? A. I was.

"Q. Will you state to the Court, as you recall the condition of that property prior to the erection of the groins? A. The same condition. There was a rocky point that runs out there.

"Q. Calling your attention to the portion of the property shown on this map, commencing at Eucalyptus Lane and Miramar Pier. (Plaintiffs' property.) The area in there. Do you know what that area was called? A. What do you mean, 'area'?

"Q. That area shown on this map between the Union Realty Company property, Eucalyptus Lane, and Miramar Pier. A. That was known as Miramar Beach there.

"Q. Will you state to the Court the condition of the property prior to the erection of any groins upon the Union Realty Company property? A. There was always a wide beach there prior to that."

As to what change occurred in plaintiffs' properties after the erection of the second groin and the capping of the first in June, 1929, John Frederick Katenkamp testified as follows:

"Q. Just explain what you observed physically. A. I observed the sand under

Mrs. Katenkamp's cottage also being washed away, and that our beach was being denuded of sand.

"Q. Will you explain more fully what, if anything, you observed as to the other properties? A. In proportion this happened to the properties situated toward the east.

"Mr. Rogers: I move to strike out the answer as stating the opinion and conclusion of the witness.

"The Court: Denied.

"Q. When did you first observe this condition, Mr. Katenkamp? A. It became very apparent in July of 1929.

"Q. Continuing on during the year 1929, what did you observe? * * *

"Q. Just explain, then, what you observed. A. I observed the sand beach disappearing and noticed rocks appearing instead.

"Q. With reference to Plaintiffs' Exhibit No. 10, will you please go to the map and with a K6 indicate the point you first observed rocks appearing and approximately when? Approximately what period in 1929 did you make that observation? A. From the month of July on—about the middle of July.

"Q. When did you first observe the rocks appearing, Mr. Katenkamp? A. At that time.

"Q. Did rocks appear right away as soon as the groin was completed? * * *

"The Court: It is leading. Sustained.

"Q. During the year 1930, you were on the beach, were you, during that year? A. Except for two months in the spring.

"Q. And what months were they? A. About the fifteenth of April to the fifteenth of June.

"Q. During the year 1930, with the exception of those two months, how frequently were you on the beach at Miramar Bay? A. At least two or three times a day.

"Q. Will you state to the Court what you observed during the year 1930 upon Miramar Bay, at the properties at the foot of Eucalyptus Lane shown on plaintiffs' Exhibit No. 10, extending easterly along the shore? A. I observed our beach was disappearing more and more.

"Q. Did that occur all the way through 1930? A. Occasionally we would have a reversal of weather conditions, but as a rule the beach continued to disappear.

"Q. During the year 1931? * * *

"Q. I will ask the witness what he observed, if anything, during the year 1931 upon the shore immediately east of the easterly Edgecliff groin? A. I observed a rather marked increase in the erosion directly east of the Edgecliff groin and a continuous disappearance of our beach further east.

"Mr. Rogers: I move to strike out the statement as to the erosion as stating the conclusion of the witness.

"The Court: You mean the disappearance of sand? A. No, now the bluff was being attacked.

"The Court: Did the beach itself disappear? A. The rock beach remained, but the sand disappeared.

"The Court: Objection overruled. * *

"Q. During the year 1932, what was the condition of this area you have just described? A. Just about the same, with the damage increasing except for one period.

"The Court: You can't testify as to damage. A. The erosion increased every year except for a short period about August, 1932, when a considerable quantity of sand collected itself on the eastern end of Miramar Bay between the easterly groin and the pier.

"Q. During 1933 what was the condition, Mr. Katenkamp? A. The same.

"Q. Has that continued up to the present time? A. Yes, sir. * * *"

Further, Dr. U. S. Grant, assistant professor of geology at the University of California, testified that he had made a special study of shore line processes and shore line phenomena; that he is acquainted with and had made a personal examination of the areas here in question; that in his opinion, if the breakwater had not been built "there would have been possibly, surely, a larger amount of sand drift eastward along these beaches, but nevertheless I think the groins would act like most groins under similar conditions and would tend to deflect seaward the longshore drift". This witness further testified:

"By the Court: Q. I would like to ask a question or two. As I understand you, Doctor, you stated in your opinion that this breakwater has some effect in depriving this land here of sand? A. Yes, your Honor. I believe that the breakwater has had an effect on this whole general region over to as far and including Summerland.

"Q. Part of the beach here apparently had no sand; how about that? A. Where it had no sand, then the effect is not noticeable. The effect is to reduce the amount of sand available in this region here, but not to cut off the entire supply.

"Q. What makes you think this land was deprived of sand by reason of the breakwater? How did you reason it out? A. It is apparent that since the breakwater has been built, there has been an increase in the width of the beaches in this general region, and it seems to me that there has been a very decided effect. * * *"

With reference to the relative responsibility of the groins and the breakwater, the court propounded to Dr. Grant the following interrogatory: "* * * I want to know what in your opinion is the proportion of the damage done by the groins with reference to the proportion done by the breakwater."

To which the witness responded: "For the region immediately east of the groin I believe that groin is responsible for the larger effect, say 75 per cent. I would rather not state figures, but I believe it is true in general where we have a groin of this nature, especially where it projects out from the coast in the manner that it does, that we are apt to have a rather serious lack of sand on the lee side, and that is true here."

In opposition to the foregoing, and in support of its claim that the groins were necessary in order to protect its property from the encroachments of the sea, defendant introduced testimony of which the following résumé is typical:

Charles F. Leeds, a consulting engineer of unquestioned standing and unchallenged education, training and experience, testified that he became familiar with the defendant's property in 1923; that along this property the shore was usually covered with cobbles; that there was some sand there, but he could not say how much; that in 1924 they constructed some experimental groins at Edgecliff; that the president of defendant, Union Realty Company, stated that he wanted the property protected, so plans were prepared for two groins and permits for their construction were obtained. This witness testified that the purpose of the groins was to demonstrate whether they could protect the property. He testified he saw the property frequently after that, and in 1925 a further study was made, when a design was worked out and a permit obtained for what is in the instant case known as the easterly groin. The old groins were allowed to disintegrate. The groin constructed in 1925 was a concrete box which was filled with boulders, and extended 262 feet. The witness further testified that the sand began to collect almost as soon as the construction was undertaken, and it was filled up to the top in a matter of three or four days; that sand was going over the top of the groin even at that time; that after the groin filled up sand actually went over the top of the groin. In 1929 it was decided to increase the protection, and a groin was constructed to the west. The easterly groin was given a concrete cap on the shoreward portion. This cap was constructed for a distance of approximately 170 feet from the shoreward end. Mr. Leeds further testified that the groins at Edgecliff do not deflect the sands seaward; that as a matter of fact there is a tendency very slight, to deflect the sands shoreward.

With reference to the breakwater at Santa Barbara and its effect upon the beach, Mr. Leeds testified that after the breakwater was constructed there was a good sandy beach over the area from Santa Barbara Point to Carpinteria. With reference to the cause of the erosion complained of by plaintiffs, this witness testified that the cause of the erosion on all of these easterly beaches is the damming of the littoral drift by the breakwater. In this connection his testimony, as epitomized by appellant, was in part substantially as follows: "It is the breakwater which is the cause of the erosion. This is shown by the amount of sand impounded within the breakwater area and the fact that the accretion west of the breakwater was practically simultaneously with the erosion of the easterly beaches. As the accretion at the breakwater increased in size there was progressively a deterioration of the easterly beaches—not a regular progression, but continuous throughout the time since the breakwater was started. * * * Since the groins have become full originally they have had no effect on the property easterly. * * * These high tide lines further show that the groins have had no effect, because if the groins had affected it there would have been a particular point of greater divergence. * * * In his opinion the groins have not caused any erosion to the property east since the capping of the easterly groin, because he has seen sand passing over the groin and, knowing the height to which it was built, sand would pass over in sufficient quantities to maintain the beach if the supply from the west had not been cut off. * * * After the capping of the easterly groin he recalls no noticeable deterioration of the beaches until about a year after. * * * The closing in of the breakwater resulted in the shutting off of the supply of sand and the starvation of the beaches. * * * Assuming that all other conditions remained the same, if the two groins were removed the supply of sand which is now impounded to the west of those groins would then be dispersed eastward and would pass across the beaches east of those groins and would improve those beaches for the short time that it took for the sand to pass across. Thereafter the beaches would return to their present condition. The improvement would be just a matter of a few days. If the littoral drift west of the groins were restored to that which existed prior to the construction of the breakwater and the groins were left in, the beaches easterly of the groins would be restored to their former condition."

Monough P. O'Brien, as a witness for defendant, testified that he is a professor of mechanical engineering at the University of California, with years of experience in the study of beach erosion; that in his opinion the cause of the erosion is the fact that the breakwater has intercepted the normal littoral drift in the region east of the breakwater. If the littoral drift were reestablished to the west of the groins and they were left in, this littoral drift would reach Eucalyptus lane, the beaches would build back to average conditions which existed previously to the construction of the breakwater. If the groins were removed, and the breakwater were left in, the sand now impounded by the groins would move easterly and pass the beaches along Miramar bay, continue eastward and the beaches on Miramar bay would not show an increase in the amount of sand. On the assumption of facts stated they include erosion on the Miramar beach with no erosion to the west immediately following the increase in the height of the groins by three or four feet. If the evidence showed that there was a continuation in the erosion, one cannot attribute that erosion to these groins. Assuming the capping of the groin in 1929, the erosion commencing in July of 1929, and continuing continuously since then, he could not attribute the erosion starting in 1929 to the increase of the easterly groin and the westerly groin, for the reason that it was not sufficient to make any difference in the beach.

[4-6] We are impressed that the foregoing does no more than raise a substantial conflict in the evidence as to whether there existed a reasonable need for the construction of the groins in order to protect defendant's property from the ravages of the sea, and also as to whether defendant did in fact erect the groins for the purpose of protecting its property from encroachment by the sea and to prevent erosion or for the purpose of transforming into an artificial sandy beach to be utilized in connection with bathhouses, boardwalk and other improvements incidental to a beach club, what had formerly been a rocky shore in front of its property. There is in the record evidence of sufficient substantiality to warrant the court in basing thereon a reasonable inference contrary to the contentions of defendant. Where facts are proved with legal sufficiency, a finding of fact based upon reasonable inferences drawn therefrom cannot be disturbed on appeal any more than any other finding supported by sufficient legal evidence. Ryder v. Bamberger, 172 Cal. 791, 799, 158 P. 753. No rule of law is more familiar nor more firmly established than the one which declares that when a substantial conflict is disclosed in the evidence the findings of the trial court will not be disturbed on appeal. McKean v. Alliance Land Co., 200 Cal. 396, 253 P. 134; Deacon v. Bryans, 88 Cal.App. 322, 263 P. 371.

[7, 8] It is not neccessary, in order to establish a theory by circumstantial evidence, that the facts be such and so related to each other that such theory is the only conclusion that can fairly or reasonably be drawn therefrom, because it is now settled law that "circumstantial evidence in civil cases, in order to be sufficient to sustain the verdict, need not rise to that degree of certainty which will exclude every reasonable conclusion other than that arrived at by the jury". Chalmers v. Hawkins, 78 Cal.App. 733, 739, 248 P. 727, 730; opinion of Supreme Court denying a hearing in Estate of Wallace, 64 Cal.App. 107, 116, 220 P. 682, 685; Tietke v. Forrest, 64 Cal.App. 364, 221 P. 681; Mah See v. North American Acc. Co., 190 Cal. 421, 213 P. 42, 26 A.L.R. 123; Ley v. Bishopp, 88 Cal.App. 313, 263 P. 369; Barham v. Widing, 210 Cal. 206, 214, 215, 291 P. 173. In the last-cited case, where the judgment was based upon an inference drawn from

circumstantial evidence although the inference was opposed to the direct testimony of the defendant and another witness, the Supreme Court upheld the judgment declaring at page 215 of 210 Cal., at page 177 of, 291 P.: "The jurors were entitled to accept the solution to which these circumstances led them in preference, even, to the positive statements of the defendant and his nurse to the contrary." In Mah See v. North American Acc. Co., supra [190 Cal. 421, 213 P. 44, 26 A.L.R. 123], the court declared the rule to be that "even though all the facts are admitted or uncontradicted, nevertheless, if it appears that either one of two inferences may fairly and reasonably be deduced from those facts there still remains in the case a question of fact to be determined by the jury * * * the verdict of the jury * * * cannot be set aside by this court on the ground that it is not sustained by the evidence".

[9-12] It is next contended by appellant that the evidence fails to show any recoverable damage to have been caused by the groins. Appellant's contention in this regard is to the effect that the evidence clearly and overwhelmingly shows that the breakwater constitutes one of the causes of the erosion of the easterly beaches, including the beach at Miramar. This, however, is answered by what we have heretofore said concerning the conflict in the evidence upon that issue. Nevertheless, appellant urges that even though it be conceded that the evidence does support respondents' contention that the groins erected by appellant contributed to the erosion of respondents' lands, this might under certain circumstances entitle respondents to an injunction, but would not support the finding in their favor for damages. Appellant bases this claim upon the contention that the record is barren of evidence upon which appellant's proportionate liability might fairly be determined. It must be conceded that the evidence, taken as a whole, clearly indicates that the Santa Barbara breakwater contributed in part to the damages sustained by respondents. It is equally true that appellant is liable for such proportion of the total damage resulting from the contributing factors as was caused by the groins it erected. Miller v. Highland Ditch Co., 87 Cal. 430, 25 P. 550, 22 Am.St.Rep. 254. But in determining the amount of the damages that should be assessed against appellant herein, the trial court was entitled to estimate as best it could from the evidence before it how much of the total damage occasioned by the city's breakwater and appellant's groins was caused by the latter. Learned v. Castle, 78 Cal. 454, 18 P. 872, 21 P. 11. Undoubtedly in cases like this entire accuracy is impossible, and great difficulty is encountered in accurately apportioning or assessing the damage done by appellant's construction; but it must not be forgotten that such difficulty would have been avoided had appellant but taken care that no occasion should arise requiring such apportioning and assessing of the whole damages. Ogden v. Lucas, 48 Ill. 492; Carroll v. Central Counties Gas Co., 74 Cal.App. 303, 240 P. 53. In the case at bar there is positive evidence, as hereinbefore pointed out, that the groins erected by appellant caused 75 per cent of respondents' damage, and there is some evidence to the effect that the groins were sufficient to cause all the damage. In allowing damages approximating 25 per cent of the amount testified to as having been sustained by respondents, we cannot say that the court erred, because, as is said in 26 Ruling Case Law 764, "The weight of authority is to the effect that where separate and independent acts of negligence of two parties are the direct causes of a single injury to a third person, and it is impossible to determine in what proportion each contributed to the injury, either is responsible for the whole injury; and this although his act alone might not have caused the entire injury, and although, without fault on his part, the same damage would have resulted from the act of the other."

[13] Appellant's next claim, that the action for damages is barred by the provisions of subdivision 2 of section 338 of the Code of Civil Procedure, is answered by the holding of the Appellate Court on the prior appeal in this case. (Katenkamp v. Union Realty Co., 11 Cal.App.2d 63, 53 P.2d 387, 389, hearing denied by Supreme Court) that the injury complained of herein was a "taking and damaging of the real property * * * as distinguished from a mere trespass * * * on (an) interest in land". An action for damages therefor is not barred until the passing of five years thereafter; that being the time necessary to elapse before title may be claimed by adverse possession. With the coming down of the remittitur in the appeal last referred to, the holding

therein contained as to the inapplicability of the statute of limitations became the law of the case.

[14] In support of its next ground of appeal, appellant, while admitting a conflict in the evidence upon the the issue, nevertheless asserts that the mandatory injunction requiring the removal of the groins affords to respondents inequitable relief. The basis for this argument is the claimed fact that all of the beaches east of the Santa Barbara breakwater were denuded of sands and had similarly suffered erosion, for which reason it is argued that the expert opinions given by two witnesses to the effect that if appellant's groins were removed improvement would result in the condition of the beach on respondents' property is incredible, in face of the opinions expressed by other experts to the effect that these beaches would receive no benefit except a very slight improvement for a period of a few days following the removal of the groins. We are asked to conclude from all the evidence on this subject that the benefits which the respondents might expect from the removal of the groins would be extremely slight and merely temporary, and would be far offset by the damage which would result to appellant's property. Hulbert v. California, etc., Cement Co., 161 Cal. 239, 118 P. 928, 38 L.R.A.,N.S., 436. In view of the conceded conflict in the evidence upon this point, coupled with the fact that all of the matters argued by appellant as grounds for its contention were brought to the attention of the trial court, it must be assumed that the court gave them due consideration in arriving at its conclusion that the situation here presented is not one for the application of the doctrine of balancing hardships; and we are not authorized to disturb the finding of the trial court in that connection, based as it is upon a substantial conflict in the testimony with reference thereto.

Finally, appellant contends that the findings of fact and conclusions of law are conflicting, contradictory, not supported by the evidence, and fail to support the judgments. It would unduly prolong this already lengthy opinion to here narrate in detail the claims made by appellant in this regard. Suffice it to say that we have given careful consideration to the findings, conclusions of law and the judgments predicated thereon, as well as the evidence and exhibits in the case, from all of which we are unable to conclude that appellant's rights have been in any manner prejudicially affected thereby. The findings in the main follow the theory adopted by the trial court that appellant purchased its property here involved in its natural and normal condition of an ocean front property with a rocky beach in front of it, while respondents' properties fronted upon a sandy beach; that in erecting the groins appellant was actuated not by fear of the ravages of the sea or the desire to protect its property from the water's encroachment, but erected the groins for the purpose of improving its property at the expense of respondents' rights to the full enjoyment of their respective properties.

[15] The appellant, pursuant to the provisions of section 4¾ of article VI of the Constitution and legislative enactment in accordance therewith, has filed an application to submit additional evidence. The scope, purpose and intent of the cited constitutional provision and legislative enactment were discussed at length and painstakingly analyzed in Tupman v. Haberkern, 208 Cal. 256, 280 P. 970, 975, where it was said: "We are convinced that it was not the intention of the new law that the reviewing courts should develop generally into trial courts; that it was contemplated that the courts of appellate jurisdiction would exercise the new power sparingly and, as a general rule, would exercise it only when the purpose of the new findings was to constitute a basis for an affirmance of the judgment or a basis for a reversal of the judgment with directions to the trial court to enter a judgment for the appellant."

[16] We have given careful attention to the proposed evidence, and from a consideration thereof in connection with the entire record, we conclude that if admitted such evidence would not compel a reversal of the judgment with directions to the trial court. It is true that such evidence would indicate that since the making and entry of the judgments in these cases the Santa Barbara harbor was dredged and the shoal formed within the harbor by the trapping and deposit of sand by the breakwater was removed; that this deposit, in the process of such removal was transferred by means of pipes and pumps to the beaches east of the breakwater along a shore front of approximately one mile, and at a distance from the breakwater which would permit wave action to resume its function of moving sand easterly along the beaches, and

thus re-establish the littoral drift; that the quantity of sand thus removed from the area of the breakwater and placed upon the easterly beaches was in excess of 500,000 cubic yards. That part of the proposed evidence consisting of photographs might tend to show the restoration of sandy beaches and the arrest of erosion, and it is contended by appellant that such evidence would demonstrate that the groins built and maintained along the beaches do not deflect the sand seaward and do not deprive the leeward beaches of sands, and were not the cause of the erosion and damage of which respondents complain; but when considered in the light of all the other evidence contained in the record, including the physical fact that the erosion and damage to respondents' property commenced practically contemporaneously with the erection and maintenance of the second groin and the capping of the first groin, as well as the testimony of engineers, based upon experience with groins along the Pacific coast, that the sand immediately to the east side is affected by the groins, it is at once apparent that the evidence submitted by appellant in its application is not decisive of the issue, by reason of which fact this court could not, following reception of the proffered evidence, direct the court below to enter a judgment upon a reversal of the existent one.

For the foregoing reasons, the application for an order directing that further evidence be taken is denied and the judgments from which the respective appeals herein were taken are, and each of them is, affirmed.

I concur: YORK, P. J.

DORAN, Justice.

I dissent. The prevailing opinion is based upon the familiar rule that an appellate court, when called upon to determine whether there is evidence to support the judgment, will disregard the fact, if it is a fact, that the evidence is conflicting. That substantial evidence is sufficient to support a judgment even though other evidence, equally substantial or less substantial, is in conflict therewith, there can be no question. The conflict, however, in order to justify the application of the rule, must be real and not merely apparent.

In my judgment, appellant's contention is sound. The evidence of the physical facts, which are beyond dispute, together with the inferences that, by reason of the laws of nature, are inescapable, demonstrate to my satisfaction that the alleged damage is the result of the construction of the breakwater and not the groins. The logical and inevitable inference to be drawn from such evidence is secure as against any attempt to create an apparent conflict by means of opinions that at most are but speculative or wistful. An appellate tribunal is not bound to affirm a judgment that thus offends the rules of reason. The judgment of the trial court appears to me to result from the failure to distinguish between an inference and an opinion. The former has the qualities of certainty and definiteness, whereas the latter not only lacks such qualities, but may be and frequently is the product of speculation mingled with desire or even expediency.

36 Cal.App.2d 628

RICH v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 6371.

District Court of Appeal, Third District, California.

Jan. 18, 1940.

Hearing Denied March 18, 1940.

1. Workmen's compensation 🔑1358

The burden is on one claiming compensation under Workmen's Compensation Act for injuries sustained while he was state senator to show that he was performing services growing out of and incidental to his employment and acting within course thereof at time of injury. St.1937, p. 267, § 3351(b); p. 269, § 3600; p. 299, § 5705.

2. States 🔑28(1)

While law does not expressly require state senate to pay public tribute to deceased member thereof, it may be considered part of its function and duty to do so, as has been its long standing custom.

3. Officers 🔑110

Attendance at deceased public officer's funeral is in proper case reasonably included in duties of fellow public officer, who acts in official capacity in so doing, especially when expressly designated by his superior officer to be present in such representative capacity.

4. States ⚷28(1)

While state senator's primary duty is legislative, other incidental nonlegislative duties are imposed on him, and Legislature has other than legislative powers and powers incidental thereto.

5. States ⚷28(1)

When Legislature is acting in nonlegislative capacity, members thereof are still acting within scope of their authority and employment.

6. States ⚷28(1)

A state senator does not cease to be "public officer" on final adjournment of Legislature before end of his term, but members of Legislature are considered "state officers" during their entire terms of office, as evidenced by constitutional limitations respecting their acceptance of other offices and manner of payment of their salaries. Const. art. 4, §§ 19, 23.

[Ed. Note.—For other definitions of "State Officer," see Words & Phrases.]

7. Workmen's compensation ⚷617

While public officer's powers may not be enlarged by custom, his statutory or constitutional duties may be so enlarged under workmen's compensation laws as to entitle him to compensation benefits.

8. States ⚷28(1)

A state senator's duty to pay public tribute of respect to deceased fellow member of Legislature or member of executive or judicial branch of state government by attending his funeral when designated as official representative of all other members of senate thereat by president of senate, pursuant to established custom of many years, is inherent in such office.

9. Workmen's compensation ⚷619

An injury to state senator, designated by lieutenant governor to attend deceased senator's funeral as representative of senate while Legislature was not in session, when state automobile, operated by state employee, overturned while such officer was returning therein to his home after funeral services, occurred "in course of his employment" as state senator and furtherance of his employer's business within Workmen's Compensation Act. St.1937, p. 267, § 3351(b); p. 269, § 3600.

[Ed. Note.—For other definitions of "Course of Employment," see Words & Phrases.]

Proceeding by W. P. Rich to review the Industrial Accident Commission's findings and award denying petitioner's claim against the State of California and the Legislature and Senate thereof for compensation under the Workmen's Compensation Act for injuries sustained by petitioner while a member of the senate.

Findings and award annulled and set aside.

Hearing denied; CURTIS and EDMONDS, JJ., dissenting.

E. H. Christian, of Oakland, and Albert E. Sheets, of Sacramento, for petitioner.

Fred B. Wood, of San Francisco, and Lawrence G. Allyn and Norman Meller, both of Sacramento, amici curiae.

Everett A. Corten, of San Francisco, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is a review of the findings and award of the Industrial Accident Commission, whereby that body directed that petitioner take nothing on account of his asserted claim for compensation, due to injuries sustained.

The facts are brief and undisputed. At the time of the accident hereinafter referred to, W. P. Rich was a state senator, having been reelected in 1938 for a term of four years. On December 20, 1938, he was notified by Lieutenant Governor George J. Hatfield that he had been appointed a member of a special senate committee to attend the funeral of Senator McColl, to be held in Redding on December 23rd. This appointment and all of the activities of this committee occurred after the adjournment of the 1938 session of the legislature sine die and not during any special or subsequent session. Senator Rich accepted the assignment, and in a state car assigned for that purpose, operated by a state employee, he proceeded from his home in Marysville to Redding, where he attended the funeral of his deceased colleague. After the funeral services, as Senator Rich was returning to his home in the same car and operated by the same state employee, the car was overturned, causing serious injury to petitioner.

The question for determination here is whether or not the injury suffered by petitioner occurred in the course of or arising out of his employment as a state senator, or stating it more directly, is attending funerals of fellow senators reasonably incidental to the duties of a state senator?

[1] It is admitted that there was no express legislative or constitutional authority for the appointment of a committee of the senate to attend the funeral of a member of the legislature, although for many years it has been customary for senators to attend funerals after adjournment of the senate as members of a committee designated by the presiding officer of that body, that is by the lieutenant governor. It is also admitted that a state senator is an employee within the meaning of the Workmen's Compensation Act. Section 3351 (b), St.1937, p. 185, Labor Code. Since petitioner is claiming the benefit of that act the burden is placed upon him (Labor Code, § 5705) to show that at the time of the injury he was performing services growing out of and incidental to his employment and that he was acting within the course of his employment. Sec. 3600, Labor Code.

[2] While it is true there is no express provision of the law requiring the senate to pay tribute to a deceased member, it has been a custom of long standing to pay such public tribute to a deceased member, thereby upholding the respect and dignity of its office, and it might well be considered a part of its function and duty.

[3] Public money has often been used to erect monuments, commemorating the life of some great man, and bestowing dignity and honor upon the office he once had held. In the city of Sacramento the state maintains a burying ground where may be interred a person who, at the time of his death, was a state officer or member of the senate or assembly. Sec. 3596, Pol.Code. Attendance at funeral rites of a deceased public official by one holding a public position is not alone done as a mark of respect to the deceased and his family but is a tribute to the office he held and tends to maintain a public respect for such office and the government of which it is a part. It would seem, therefore, that the attending of funerals of fellow public officers can, in proper cases, be said to be reasonably included in the duties of a public officer, and in so doing, such public officer is in effect and in law, acting in his official capacity, and especially so when the attending officer was expressly designated by his superior officer to be present in such representative capacity.

Considerable stress is laid upon the fact that the injury to petitioner occurred while the legislature was not in session, and it is urged that the act of a senator in attending a funeral could not be considered as applying directly or indirectly to the business of the legislature, and that the principles laid down in the case of Special Assembly Interim Committee v. Southard, 13 Cal.2d 497, 90 P.2d 304, and Swing v. Riley, 13 Cal.2d 513, 90 P.2d 313, are here decisive.

In the Southard case, supra, the court held that neither the senate nor assembly could authorize a committee to act after the legislature had adjourned sine die. In the case of Swing v. Riley, supra, the court held that both houses of the legislature acting together by a concurrent resolution did not have the power to appoint a committee to act after the final adjournment of the legislature.

In those two cases the court was considering the legislative functions only of the legislature, and the effect of single house and joint resolutions, and held that such resolutions are not substitutes for the statutory authority necessary to permit legislative committees to subpoena witnesses and to incur expenses after the adjournment of the legislature sine die.

The duties of the committee of which petitioner was a member, did not depend upon the legislative functions of the senate, nor was it an investigating or fact finding committee. The difference in purpose of an interim committee to find the facts and report back to the legislature, and a committee to pay respect to a deceased member of that branch of our government, is so obviously different that we cannot rest our conclusions upon the cited cases.

[4] While the primary duty of a senator is legislative, there is also imposed upon him other and nonlegislative duties which are incidental to that primary function. Some nonlegislative duties are when a senator is sitting as a member of a court of impeachment, or sitting to receive the returns of the election of a governor, or choosing one for the office of governor in case of a tie vote. In People ex rel. Knight v. Blanding, 63 Cal. 333, it was held the confirmation of appointments by the senate was not a legislative function. Other instances might be readily called to mind; and there is nothing in the cited cases that attempts to deny to the legis-

lature powers other than legislative, or powers incidental thereto.

[5] When the legislature is acting in a nonlegislative capacity the members thereof are still acting within the scope of their authority and employment.

[6] Nor are these cited cases authority for the proposition that a state senator ceases to be a public officer upon final adjournment of the legislature and prior to the end of the term for which he is elected, or for the proposition that, as a public officer, he does not have any powers whatsoever of any nonlegislative duties, however limited they may be, incidental to his status as a public officer. If such were true, not only would a state senator be denied the right of exercising nonlegislative powers while the legislature was in session, but it would deny to the legislature itself the power by statute to impose post session proper nonlegislative duties upon a state senator. That members of the legislature are considered officers of the state during their entire term of office is evidenced by certain constitutional limitations, such as accepting other office (art. IV, sec. 19) and their manner of payment of salary (Art. IV, sec. 23). The Interim Committee cases, supra, upon which respondent relies, in fact concede that by statute such power exists to invest in a legislative committee the right to exercise legislative functions subsequent to final adjournment.

[7] While it is true, as contended by respondent, that a public officer's powers may not be enlarged by custom, nevertheless, under the Workmen's Compensation Laws, at least statutory or constitutional duties of a public officer or employee may be enlarged by custom so as to entitle him to compensation benefits. It was held in San Bernardino County v. Industrial Accident Commission, 217 Cal. 618, 20 P.2d 673, 675, that "an employee is in the 'course of his employment' when he does those reasonable things which his contract with his employer expressly or impliedly permits him to do"; and Department of Public Works v. Industrial Accident Commission, 128 Cal.App. 128, 16 P.2d 777, is support for the contention that custom may enlarge the scope of employment of public employees. In Entremont v. Whitsell, 13 Cal. 2d 290, 89 P.2d 392, the Supreme Court of this state recognizes that the rules of law applicable to Workmen's Compensation cases may differ from the rules applicable to other types of cases. In other jurisdictions we find the same rule: City of Alexandria v. McClary, 167 Va. 199, 188 S.E. 158; Grym v. City of Virginia, 193 Minn. 62, 257 N.W. 661; Scrivner v. Franklin School District, 50 Idaho 77, 293 P. 666.

[8] If, therefore, we can depend upon the rule that custom may be looked to for a guide we find that the duty involved in this case is one inherent to the public office of state senator. We find it established and has been the custom for many years for members of the senate to pay their tribute of respect to a deceased fellow member or a member of the executive or judicial branch of our government, and for the president of the senate to designate certain members to attend such funerals as officially representing all the other members of the senate.

[9] It therefore appears to us that not only by reason of the rules of the Workmen's Compensation Law but also upon the broad basis that attending funerals of fellow senators by a member especially designated to attend as a representative of that body, is incidental to the duties of the office of a state senator, and that petitioner has fully sustained the burden placed upon him.

Therefore the injury sustained by petitioner occurred in the course of his employment and in furthering the business of his employer, in the rendering of a service to the memory of, and adding dignity and respect to the office of a deceased officer of the state.

The findings and award of the Industrial Accident Commission are annulled and set aside.

We concur: THOMPSON, J.; TUTTLE, J.

36 Cal.App.2d 542

In re McNUTT'S ESTATE.

McNUTT v. McNUTT (two cases).
Civ. 12290, 12291.

District Court of Appeal, Second District, Division 2, California.

Jan. 12, 1940.

Hearing Denied March 11, 1940.

1. Divorce 🔑327

As respects foreign divorce, domicile is necessary to give a court jurisdiction in an action for divorce and state cannot exercise through its courts jurisdiction to dissolve a marriage where neither spouse is domiciled within the state.

2. Divorce 🔑327

Where husband while residing and being actually within the State of New York procured a decree of divorce from a Mexican court, Mexican decree was void because of lack of jurisdiction which could not be conferred except by residence within Mexican state.

3. Divorce 🔑327

Where husband and wife were domiciled in New York wife was powerless even by written stipulation to confer jurisdiction upon Mexican court in husband's action for divorce instituted while he was residing and was actually within State of New York.

4. Divorce 🔑327

Where Mexican divorce decree was void because of lack of jurisdiction, wife's subsequent silence did not thereby estop her from assailing the validity of the decree on petition for letters of administration on deceased husband's estate.

5. Husband and wife 🔑279(1)

A property settlement between husband and wife must be strictly construed.

6. Husband and wife 🔑279(4)

Courts will not enlarge the language of a postnuptial agreement so as to deprive either spouse of right to claim as heir of deceased spouse unless there is a clear and unmistakeable intention to barter such rights away, and to reach such conclusion the contract must by express terms or by necessary implication clearly so provide.

7. Husband and wife 🔑279(4)

Where wife accepted benefits under property settlement agreement whereby wife released all her right, title, interest and dowry to all real estate owned by husband or which he might thereafter become seized, wife by silence, inaction and continuous receipt of payments until husband's death was not "estopped" to claim deceased husband's estate as widow where no intention was expressed that wife should waive her right to inherit from husband.

[Ed. Note.—For other definitions of "Estoppel," see Words & Phrases.]

8. Husband and wife 🔑279(4)

Wife's release of dower right in property settlement agreement could not be construed to effect a release of her rights of inheritance or of her rights as a widow.

9. Husband and wife 🔑279(2)

Wife who received allowance under separation agreement was not required on attacking agreement after husband's death to tender return of benefits accepted where to make such requirement would have been inequitable.

10. Husband and wife 🔑276(1)

In proceedings by wife to administer the estate of deceased husband by reason of decedent's intestacy and like proceeding by another claiming as his widow, validity of property settlement between husband and wife was a proper issue since wife was entitled to assert all claims and defenses pertaining to her property rights and decree would be conclusive upon widow when estate was distributed.

11. Husband and wife 🔑265

The statute forbidding gift of personal property in community estate is intended to protect the wife's share from the prodigality of a reckless or faithless husband. Civ. Code, § 172.

12. Husband and wife 🔑265

A husband being the present owner of one-half of personalty in community estate gift thereof cannot be disturbed after his death. Civ.Code, §§ 161a, 172.

13. Husband and wife 🔑265

Where husband as community partner was absolute owner of one-half of personalty in the community estate, gift of personalty should not after husband's death have been declared void in toto but wife's right as heir should be limited to an undivided one-half of the property. Civ.Code, §§ 161a, 172, 172a.

McCOMB, J., dissenting.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Proceeding in the matter of the estate of William Slavens McNutt, deceased, wherein Louise McNutt petitioned for letters of administration opposed by Georgia McNally McNutt, contestant, and wherein Georgia McNally McNutt petitioned for letters of administration opposed by Louise McNutt. From adverse judgments Louise McNutt appeals.

Amended and as amended affirmed.

Hearing denied; WASTE, C. J., and CARTER and GIBSON, JJ., dissenting.

Joseph A. Spray, of Los Angeles (Charles P. Gould, of Los Angeles, of counsel), for appellant.

Freston & Files and Sydney Wetzler, all of Los Angeles, (Ralph E. Lewis and James A. McLaughlin, both of Los Angeles, of counsel), for respondent.

MOORE, Presiding Justice.

William Slavens McNutt, departed this life January 25, 1938, leaving two women, each claiming widowhood by reason of his death. He was married to Georgia McNutt, the plaintiff, August 6, 1907, and abode with her until after his infatuation with Louise Glorius, defendant, in 1924, when he abandoned plaintiff. In 1926, while plaintiff was destitute and broken in health, under decedent's duress and upon his fraudulent representations that he would do nothing for her if she consulted her own lawyer, and solely by reason thereof and because of her dire need, she signed a writing whereby decedent agreed to pay her $50 per week. In 1927, while residing and being actually within the state of New York, decedent procured a decree of divorce from a court at Hermosillo, state of Sonora, Mexico, and promptly pretended to celebrate a marriage with defendant. He lived with her until his dissolution.

Upon the passing of decedent, defendant petitioned for letters of administration of his estate, alleging that she was the widow. Thirteen days later, plaintiff filed her petition in the same proceeding alleging her long coverture, the invalidity of the property settlement by reason of said fraud and duress, and the nullity of said Sonora decree because of want of the court's jurisdiction in that decedent never established residence in said Mexican state. Because of these facts, plaintiff asserted her right to administer the estate and to possess it all by reason of decedent's intestacy. Subsequently, basing her cause upon said duress and fraud of decedent and the asserted nullity of said divorce decree, plaintiff filed a civil action for the recovery of: (1) $7,900, the proceeds collected by defendant on a life insurance policy purchased by decedent with community funds; (2) a certain yacht given defendant by decedent; and (3) all other movables given or delivered and all moneys paid to defendant by decedent in excess of the household necessities of decedent and defendant. The actions were consolidated for trial, which resulted in findings in accordance with plaintiff's allegations in both cases and in two separate judgments from which these appeals are taken.

In addition to the findings above indicated, the court determined also that defendant procured a divorce in the state of Nevada from Leo V. Glorius, while she was a resident of the state of New York; that all gifts to defendant by decedent were paid out of community moneys; and that plaintiff was ignorant of decedent's wealth and income at the time of said settlement.

From the facts as found, the court decided that the Nevada and Sonora divorce decrees were void; that decedent's marriage to defendant was void; that plaintiff was decedent's lawful wife at the time of his death; that plaintiff is entitled to recover said $7,900; and that plaintiff is the lawful owner and entitled to the possession of said yacht and all other movable property and moneys delivered and paid to defendant by the decedent.

Defendant relies for a reversal upon the following: (I) That the plaintiff was estopped from asserting the invalidity of her divorce from, and the property settlement with, decedent; (II) that the validity of the property settlement was not properly at issue; (III) that the court erred in declaring void the gifts made to the defendant in toto; and (IV) that the court erred in refusing testimony as to the relations existing between plaintiff and decedent and his brother from the date of the settlement to the date of decedent's death.

[1-4] I. There is no doubt that the Sonora decree of divorce was void. It is held in New York that "the basic principle underlying the entire subject is that only one sovereignty possesses jurisdiction over the marital status, and that is the one in which the matrimonial domicile exists," etc. In re Shuff's Estate, 151 Misc. 754, 272 N.Y.S. 418, 420. In California it is held

that "domicile is necessary to give a court jurisdiction in an action for divorce * * * 'A state cannot exercise through its courts jurisdiction to dissolve a marriage where neither spouse is domiciled within the state.' * * * To hold that the courts of Mexico ever acquired jurisdiction to render the decree presented by appellant would be a travesty on justice. * * *" People v. Harlow, 9 Cal.App. 2d 643, 50 P.2d 1052, 1053; Ryder v. Ryder, 2 Cal.App.2d 426, 37 P.2d 1069.

Since a divorce proceeding is an action in rem and both parties and the state have an interest in the res, the Mexican decree obtained by the decedent was properly impeached because of lack of jurisdiction. Nothing could be done to confer jurisdiction upon the Sonora court except to reside within that Mexican state. The plaintiff here, who was defendant there, was powerless even by written stipulation to confer jurisdiction upon the foreign court. Kegley v. Kegley, 16 Cal.App.2d 216, 60 P.2d 482. If she could not stipulate it by writing, she could not by her subsequent silence retroactively cure the vice of the decree which she was entitled to show in the California courts to defeat an attempt to establish rights based upon such judgment. Estate of Bruneman, 32 Cal.App.2d 606, 90 P.2d 323. Since the foreign decree was void for lack of jurisdiction in the court, it was proper to show that fact upon the trial when its validity was asserted against plaintiff's legal rights. DuQuesnay v. Henderson, 24 Cal.App.2d 11, 74 P.2d 294.

The authorities cited by defendant to establish the validity of the Sonora decree are not apropos. In the Bruguiere case, Bruguiere v. Bruguiere, 172 Cal. 199, 155 P. 988, Ann.Cas.1917E, 122, the court was not concerned with a decree void upon its face. It dealt with a decree which was vicious because of the public policy of California which invalidates a decree when gained by simulated domicile. Also, she had remarried, waiving all claims upon him who had procured an illegal decree. She never questioned the legality of his decree until her subsequent marriage had proved a failure. In the Morehouse case, Morehouse v. Morehouse, Tex.Civ.App., 111 S.W.2d 831, 834, the couple had lived together fifteen years when he obtained a divorce in Texas upon his false affidavit of her nonresidence. The proceedings were strictly in accordance with statutory law. He remarried two years later, in 1924, effected a settlement with plaintiff in 1925. She was estopped because the second wife was an "innocent participant in the second marriage", because the court had jurisdiction of the res, and because plaintiff had accepted payments under their property settlement for over ten years and she treated "it as valid and acts as an unmarried person in violation of any obligations incident to the former status". The Texas court had jurisdiction but was imposed upon by the husband's fraud, of which the wife had actual knowledge. Drummond v. Lynch, 5 Cir., 82 F.2d 806, is not a parallel because (1) the court did have jurisdiction and (2) the wife treated the divorce as valid by her own remarriage. In Dry v. Rice, 147 Va. 331, 137 S.E. 473, the husband sued only after his wife had already divorced him. In Berman v. Thomas, 41 Ariz. 457, 19 P.2d 685, jurisdiction was not involved. In Hughes v. Leonard, 66 Colo. 500, 181 P. 200, the court found neither duress nor fraud. The case of In re Davis' Estate, 106 Cal. 453, 39 P. 756, raised no question of rights of inheritance by the former wife. Having concededly waived such rights, she sought to administer upon his estate. A wife with full knowledge that her husband has, through fraud or perjury, *not going to the jurisdiction of the court,* obtained a decree of divorce, may not sit idly by for years and until he is deceased and then successfully invoke equity to gain property lost by acquiescence in acts prohibited by law or public policy. McElrath v. McElrath, 120 Minn. 380, 139 N.W. 708. But in the case at bar, the fraud and perjury committed by the decedent went to the jurisdiction of the court. Consequently the decree cannot estop the plaintiff now from asserting her rights as a community survivor. Neither reason nor morals require her to journey into a foreign land, among strange people, to answer the call of a court that had not the slightest claim to jurisdiction over her status.

In spite of the nullity of said decree and its inefficacy as a basis of estoppel, defendant contends plaintiff is estopped by virtue of the property settlement, which she made with decedent in October, 1926. It is claimed that by her silence and inaction after the settlement, and by her continuous receipt of the payments it provided until decedent's death, she should be estopped even though the nullity of the decree be conceded. The language of that writing is as follows: "The said Georgia McNally McNutt agrees to and does hereby grant, remise, release and quitclaim unto the said William Slavens McNutt all her right, title, interest and dowry in and to all real estate whereof the said William Slavens McNutt is or may hereafter become seized or possessed and also agrees and does hereby release the said William Slavens McNutt of and from all claims of every character and description."

[5-7] Conceding for the moment that the fraud and duress found by the court are without sufficient support, this instrument strictly construed, as it must be (Jones v. Lamont, 118 Cal. 499, 50 P. 766, 62 Am.St.Rep. 251; In re Garcelon's Estate, 104 Cal. 570, 38 P. 414, 32 L.R.A. 595, 43 Am.St.Rep. 134), does not purport to surrender plaintiff's position as heir of her husband or her right to administer upon his estate, or her interest in his personal property. At the most, she released nothing but her (1) dower interest, and (2) interest in his realty. In view of the language used, the court would not have been justified in reading into the contract terms which the parties did not deem necessary to express their intention. It is a definite doctrine of the law that courts will not enlarge the language of a postnuptial agreement "so as to deprive either spouse of such rights unless there is a clear and unmistakable intention to barter them away, and, to reach such conclusion, the contract must not be of doubtful interpretation, but must, by express terms or by necessary implication, clearly so provide". Girard v. Girard, 29 N.M. 189, 221 P. 801, 803, 35 A.L.R. 1493. Defendant attempts to bolster her claim of estoppel by the authority of In re Davis, supra. That case is not pertinent. Mrs. Davis agreed "that she will receive the same in full satisfaction of all claims she may have as the wife of said W. W. Davis on any property he now has or may in any manner acquire * * * and surrender forever all claims of any nature she may now or hereafter have against any property that [he] may now have or may hereafter in any manner acquire". [106 Cal. 453, 39 P. 757]. But even with that language to defeat Mrs. Davis' claim to administer the estate, Mr. Justice McFarland in a concurring opinion raised a doubt as to "whether or not she did so relinquish her heirship."

[8] If it had been the intention of the parties that plaintiff should waive her right to inherit from decedent, under such circumstances as those presented, it would have been "the easiest and most natural thing in the world * * * for them to have simply, plainly, and in apt language said so". Girard Case, supra. By releasing her dower rights, we cannot construe that it was the intention of the parties that decedent was effecting a release of plaintiff's rights of inheritance or of her rights as a widow. Sullings v. Richmond, 5 Allen, Mass., at page 187, 81 Am.Dec. 742.

To amend decedent's writing so as now to exclude plaintiff from inheriting his estate would be to deny the possibility that he suffered a change of heart; that memories of his early attachment had diverted him from the execution of a will in favor of defendant. A reasonable interpretation of the property settlement contract requires the conclusion that the rights now asserted by plaintiff were not by said instrument forfeited.

But, upon proof which was deemed sufficient for the trial court, the property settlement was annulled. While the evidence is meager, it is ample to warrant the finding of duress, if not of fraud. The judgment annulling the contract on those grounds, being supported, must stand. This renders the plea of estoppel, based upon the contract, without force even though plaintiff had by its terms sacrificed all of her rights by an acceptance of said property settlement. Plaintiff had been wronged immeasurably. Driven from her home after nineteen years of conjugal loyalty and service to decedent, only after his fatuous infatuation with a younger woman; forced by his duress to accept a pittance of his earnings as her "share" of the community estate, why should she now be condemned to silence by the plea of one who knowingly participated in wrecking a home, in sending an unhappy woman into seclusion, and in usurping the chair that was not hers by law or by common morality? This cannot be merely because, to defeat distress, she used the meager stipend tossed from her husband's bounty and to which she was entitled in the absence of a contract. Moreover, defendant suffered no detriment by the plaintiff's modest withdrawal from conflict. Rather did she, unmolested, reap the benefits of decedent's prosperous annual income through eleven years; in one year, it exceeded the figure of $49,000. Through plaintiff's reticence, defendant was left to exult in a realm which she would never have known had she declined the benefit of illicit alliances and the advantage of fraudulent divorces. Only one who is innocent may be permitted to plead an estoppel based upon timidity and forbearance, and then only when the same innocent would suffer deprivation by denying her plea. Since plaintiff was the lawful heir to the estate seized of her husband at his death, now that he has passed on, she is strictly within her rights to declare the facts to gain her own. Trimble v. Trimble, 219 Cal. 340, 26 P.2d 477. Nothing that she did or failed to do with respect to the decree can create an estoppel. Ryder v. Ryder, supra. Nothing that she did or failed to do with respect to the property settlement can now defeat her legal claims. She maintained her status; she neither married nor published that she was a single woman and the pittance paid her was far less than she was entitled to receive as the wife of decedent. In no sense has defendant been damaged by plaintiff's behavior.

The authorities cited by defendant in support of her plea of estoppel are not in point. In the Estate of Sloan, 179 Cal. 393, 177 P. 150, Mrs. Sloan had received with her settlement properties and moneys that were adequate and far in excess of that required for her support. In the Estate of Yoell, 164 Cal. 540, 129 P. 999, the couple had been married thirty-five years. She executed a property settlement upon the advice of counsel. In asking for an increase of allowance, she did not even plead fraud in its procurement. Furthermore, under the agreement, her husband had paid her certain moneys and conveyed to her certain lands. The agreement stood unimpeached and the rights of the parties were left to be adjudicated in accordance with its legal terms and effect.

The contention that plaintiff should have restored the consideration for the settlement in order to be entitled to rescind is unsupported. In any ordinary case of rescission, a tender of benefits received is the primary predicate to a successful maintenance of an action. Two exceptions often occur, namely: (1) where the thing received by the injured party has no value, and (2) where the thing received is no more than the oppressor was bound to deliver to the oppressed in the absence of a contract. It was manifestly unjust to require of a wife, as a prerequisite to the maintenance of an action for rescission of a property settlement on the ground of fraud, that she restore tc the husband the moneys received by her and used for living expenses, which, under the law she would have been entitled to receive and use notwithstanding the contract. Locke Paddon v. Locke Paddon, 194 Cal. 73, 227 P. 715; Milekovich v. Quinn, 40 Cal.App. 537, 181 P. 256.

[9] Since the plaintiff herein was entitled to receive "a modest personal allowance" from her husband, who counted his annual income in the tens of thousands, it would have been inequitable to require the plaintiff to restore the sums which had supported her in her distress in order to maintain her action. Milekovich v. Quinn, supra; Green v. Duvergey, 146 Cal. 379, 80 P. 234. No estoppel arises from the acceptance of benefits provided for by a contract, where the person accepting is entitled thereto, regardless of the transaction in question. 21 Cor.Jur. 1208.

[10] II. The validity of the settlement was a proper issue of this action. It was the subject of a lawsuit because its validity had never been adjudicated. It is attacked *directly* here in these two proceedings. Plaintiff is entitled to have it cancelled that it might not be an extant record against her claim as community survivor. She was entitled in either action to assert all claims and defenses pertaining to her property rights because the decree would be conclusive upon the widow when the estate is distributed. Estate of Cover, 188 Cal. 133, 204 P. 583; Estate of Warner, 6 Cal.App. 361, 92 P. 191.

III. The gifts of decedent to defendant should not have been cancelled in toto Plaintiff frankly confesses that this question has "never been completely settled". The husband, out of community funds, paid for a life insurance policy, the total proceeds of which were collected by defendant in the sum of $7,900. Also, he gave defendant a valuable yacht and miscellaneous movables and moneys. The judgment declares these gifts void, orders the yacht and insurance money restored to plaintiff and orders defendant to deliver plaintiff "any other moneys or properties which she received from decedent by way of 'gifts'." In this respect the court erred.

[11, 12] Decedent, a community partner, was absolute owner of one-half and had the management and control of all of the community estate. Civ.Code, sec.

161a. He was forbidden to make a gift of the personal property of the estate. Civ. Code, sec. 172. This inhibition was clearly intended to protect the wife's share from the prodigality of a reckless or faithless husband. This intent is further evidenced by the succeeding clause which forbids his sale of the community's movables "without a valuable consideration". But being the "present" owner of one-half of such movables (Civ.Code, sec. 161a) his gift thereof cannot be disturbed after his death. Ballinger v. Ballinger, 9 Cal. 2d 330, 70 P.2d 629, 631; Trimble v. Trimble, supra. The moneys invested in the life policy and in the yacht never lost their community character "during the lifetime of the husband, and after his death the attempted gift thereof could be set aside to the extent of one-half thereof". Ballinger v. Ballinger, supra. "The only logical conclusion is that the wife's right to assail the conveyance where, as here, the action was brought *after the husband's death*, is limited to an undivided half of the property". Dargie v. Patterson, 176 Cal. 714, 169 P. 360, 361. "There would thus seem to be no escape from the effect of our holding in the case of Dargie v. Patterson, supra, * * * and only set aside his conveyance as to the wife's or widow's, one-half interest therein." Lahaney v. Lahaney, 208 Cal. 323, 281 P. 67, 69. The husband's deed "to community property * * * is valid and binding as to the husband's one-half interest * * * and the deed should not, therefore, be decreed wholly void and should not be canceled." Pretzer v. Pretzer, 215 Cal. 659, 12 P.2d 429.

[13] Under the foregoing authorities and section 172a of the Civil Code, a husband's gift of community property without his wife's consent may be set aside in its entirety by the wife during her husband's lifetime; but after his death, such gift may be cancelled to the extent of only one-half. Trimble v. Trimble, supra; Matthews v. Hamburger, Cal.App., 97 P.2d 465. It follows, therefore, that the gifts by decedent to defendant may now, after his death, be avoided as to one-half thereof, but no more.

IV. To the contention that the court erred in sustaining objections to questions asked and letters offered to prove plaintiff's friendly relations with decedent and his brother in disproof of the fraud and duress claimed to have been perpetrated by them upon her, there are two answers, viz.: (1) such rulings were within the sound discretion of the trial court and (2) they were not prejudicial, if erroneous. A judgment will not be reversed for error which does not prejudice the substantial rights of appellant. 2 Cal.Jur. 1022.

In the action of Georgia McNally McNutt v. Louise McNutt, the judgment is amended by striking subdivisions 3 and 5 therefrom and inserting the following:

(3) that plaintiff have and recover of and from the defendant the sum of $4,500, being one-half of the moneys collected by the defendant upon a certain policy of insurance purchased by decedent from the New England Mutual Life Insurance Company.

(5) that plaintiff is entitled to the ownership and immediate possession of an undivided one-half of all other moneys and property received by defendant from decedent as gifts or as agent or trustee of decedent, and the plaintiff's title to said one-half of said moneys and property is hereby quieted.

In the matter of the estate of William Slavens McNutt, the judgment is amended by adding to the end of said judgment, the following: "And the said Georgia McNally McNutt as administratrix of the estate of the said William Slavens McNutt is entitled to the immediate possession of one-half of all moneys given by the said William Slavens McNutt to the said Louise McNutt in his lifetime not expended by decedent and the said Louise McNutt for household expenses in his lifetime; and said administratrix is entitled to the immediate possession of an undivided one-half interest in and to all movable property received by said Louise McNutt from the said decedent as gift or otherwise."

As amended, both judgments are affirmed.

WOOD, Justice.

I concur in the judgment. In the property settlement agreement plaintiff did not relinquish her right to inherit and since the Mexican divorce was invalid she is entitled to prevail in both actions. I do not concur in the views expressed in the foregoing opinion on the subject of plaintiff's allegations of fraud and duress and the trial court's rulings in relation thereto. In my opinion plaintiff is not in position to present the issue of fraud and duress.

McCOMB, Justice (dissenting).

I dissent from the portion of the order affirming the judgments. The respondent, as I read the record, far from being the paragon of virtue described in the main opinion, was quite the contrary. Disregarding her marriage vows to abide with him "until death do us part" and "for richer or poorer", she connived with the decedent at a time when he was in financial distress to permit him to obtain a divorce from her, however being insistent that he contribute to her financial upkeep, which he did for a period of over eleven years (without protest on her part) in the total sum of $29,700.

In the meantime, while accepting the fruits of his labors, she contributed nothing toward his well being (physically or spiritually), but on the contrary harassed him on each occasion when, due to financial stress, he was tardy in furnishing her funds. She permitted him to marry appellant and to live with her over a number of years without protest. March 4, 1927, decedent and appellant were married and appellant lived with him as his wife, cared for him as a loving and dutiful spouse, including administering to him in his last illness, all with the knowledge and without protest of respondent.

Now that his lips have been hushed by the Grim Reaper, having accepted decedent's bounty, she desires to reap the benefit of his years of labor, toward which she contributed nothing and to which appellant undoubtedly contributed much, by claiming the benefit of her own deceit and fraud.

The rule as announced in the main decision, in my opinion, finds no support either in an enlightened jurisprudence, equity, good morals, or substantial justice. Certainly, if the main decision is to stand, the Legislature at the earliest opportunity should adopt appropriate legislation to prevent the reoccurrence of such a palpably unjust result.

The essential facts and the law applicable thereto are, in my opinion, the following:

Mr. McNutt (who died January 25, 1938) was married to respondent in New York on August 6, 1907. October 13, 1926, he entered into a property settlement with respondent, which she claims was induced through fraud and duress, by the terms of which he obligated himself to pay her $50 per week from the date of the agreement until the death of either party. The property settlement contained also this provision: "The same Georgia M. McNutt agrees to and does hereby grant, remise, release and quit claim unto the said William Slavens McNutt, all her right, title, interest and dower in and to all real estate whereof the said William Slavens McNutt is or may hereafter become seized or possessed, and also agrees and does hereby release the said William Slavens McNutt of and from all claims of every character and description."

Respondent also executed a document by which she consented that decedent might obtain a divorce in Mexico. This he did shortly thereafter. Subsequently decedent married appellant in the state of New Jersey, with whom he lived, with the knowledge of respondent, until the time of his death.

Decedent abided by the terms of his agreement with respondent, paying her $50 a week from the date of the agreement until his death, a period of eleven years, which in the aggregate amounted to the sum of $29,700. It is conceded that the divorce decree obtained by decedent in Mexico was void, for the reason that the court did not have jurisdiction to grant the decree.

Respondent claims that she is entitled to be administratrix of decedent's estate as his surviving widow; that certain property, including the proceeds of an insurance policy paid to appellant, constitutes community property, and that therefore as decedent's surviving widow she is entitled to the same.

These are the questions presented for determination:

First: Is respondent estopped from asserting the invalidity of the divorce decree obtained by decedent in Mexico and the invalidity of the property settlement agreement between herself and decedent, which she alleges was procured through fraud and duress, for the reason that for more than eleven years without objection she accepted the benefits accruing to her under the property settlement agreement, being fully aware of the alleged fraud and duress and that decedent had married appellant?

Second: If respondent is estopped to assert the invalidity of the property settlement agreement between herself and decedent, has she forfeited her right to be administratrix of his estate?

The first question must be answered in the affirmative. Where a party to a property settlement agreement alleged to have been obtained through fraud or duress, knowing of the alleged fraud or duress, accepts benefits under the agreement and treats it as valid during the lifetime of the other party, such party is estopped when the marriage relationship is dissolved by death to assert the invalidity of the property settlement agreement or a decree of divorce obtained by decedent. Bruguiere v. Bruguiere, 172 Cal. 199, 203, 155 P. 988, Ann.Cas.1917E, 122; Estate of Yoell, 164 Cal. 540, 549, 129 P. 999; Morehouse v. Morehouse, Tex.Civ.App., 111 S.W.2d 831, 834; Drummond v. Lynch, 5 Cir., 82 F.2d 806, 810; Dry v. Rice, 147 Va. 331, 137 S. E. 473, 475; McElrath v. McElrath, 120 Minn. 380, 139 N.W. 708, 710, 44 L.R.A., N.S., 505; Berman v. Thomas, 41 Ariz. 457, 19 P.2d 685, 688; Hughes v. Leonard, 66 Colo. 500, 181 P. 200, 204, 5 A.L.R. 817.

In McElrath v. McElrath, supra, the Supreme Court of Minnesota at page 710 of 139 N.W. thus states the rule: "We have found no case holding that a spouse, with knowledge that the other, through fraud or perjury, not going to the jurisdiction of the court, has obtained a decree of divorce, may sit idly by for years, until the death of the one guilty of fraud, and then successfully invoke the equity powers of the court to secure property rights. When the spouse wronged by the decree, or any one claiming under such an one, comes into court asking relief, so that property may be reached, it must be done within a reasonable time after knowledge of the fraud, or of facts from which a person of ordinary prudence would proceed to ascertain the true state of affairs."

Again in Berman v. Thomas, supra, the Supreme Court of Arizona at page 688 of 19 P.2d has this to say: "Nine years elapsed before plaintiff questioned the property settlement or the decree of divorce. Although her husband lived for eight years after they had been divorced and their property rights settled, plaintiff took no action towards asserting her present claims. Her silence during that period can only be accounted for on the theory that she was not dissatisfied therewith. If her husband coerced or compelled her to obtain the divorce and fraudulently deceived her as to the extent and value of her community property, as she alleges in her complaint in cause No. 6252-B, her delay in attacking such proceeding was not because of lack of knowledge of his perfidy in overreaching her, but for some other reason. If a party can thus await the death of her adversary husband and thereafter secure the acceptance by the court of her version of their matrimonial and property troubles thought to be adjudicated in their lifetime, the estate, of the deceased spouse would be exposed entirely too much to the whims and avarice of the survivor. The plaintiff's delay in attacking the judgment in cause No. 3352-B might have been, and probably was, because she thought, or knew, that she could not successfully attack it so long as her husband was alive and able to contest her attack. After said judgment was entered, she was most of the time living in Globe, where her husband's property was, and when not there was in and about Phoenix, and must have known all about the situation."

Applying the legal principles enunciated by the foregoing cases to the instant case, we find that respondent in October of 1926 entered into a property settlement agreement with decedent whereby she made a complete release of any claim she might then or thereafter have to the property of decedent, in consideration of the payment to her of $50 per week thereafter. At the same time she consented to a Mexican divorce. February 3, 1927, the Mexican divorce decree was granted and notice served on respondent. March 4, 1927, decedent married appellant, which fact was known to respondent immediately thereafter; and respondent, from the date of the property settlement agreement to the date of the death of decedent, January 25, 1938, accepted from him $50 each week pursuant to their agreement. Shortly after the property settlement agreement was entered into respondent took the same to her attorneys, together with the papers concerning the Mexican divorce. At no time subsequent thereto and prior to decedent's death did she question or take any action to assert the invalidity of the property settlement agreement or the Mexican divorce. She permitted appellant to hold herself out as the lawful wife of decedent and to incur the benefits and obligations incident to a valid marriage.

In view of the foregoing facts, upon the simplest principles of equitable estoppel respondent is estopped after decedent's death to question the validity of either the property settlement agreement or the Mexican divorce decree for the sole purpose of sharing in his estate.

The second question must likewise be answered in the affirmative. The law is established in California that if a wife by property settlement agreement relinquishes any right she has to inherit her husband's property she thereby waives her right to administer upon his estate. In re Davis' Estate, 106 Cal. 453, 456, 39 P. 756. As heretofore pointed out, the property settlement agreement between the parties provided in part as follows: "The same Georgia M. McNutt agrees to and does hereby grant, remise, release and quit claim unto the said William Slavens McNutt all her right, title, interest and dower in and to all real estate whereof the said William Slavens McNutt is or may be hereafter become seized or possessed, and also agrees and does hereby release the said William Slavens McNutt of and from all claims of every character and description."

In re Davis, supra, held that under a similar provision in a property settlement agreement the wife relinquished any right which she might have had to inherit her husband's property or to administer upon his estate. At page 456 of 106 Cal, 39 P. at page 757, our Supreme Court said: "The appellant contends that, inasmuch as the agreement could not and did not take from the wife her status as such, she remains the widow of deceased, and is entitled to administer upon his estate, irrespective of the question as to her right in the property; in other words, that she is so entitled merely by reason of being the widow, and that the question as to heirship is not involved on an application for the grant of letters. But in neither respect can appellant's position be sustained without doing violence to the express language of the statute. In the first place, as we have seen, the right of the widow to administer, like that of any other relative, is made to depend upon her right to take of the personal estate; and, that being so, the question as to her right to inherit is necessarily involved in the application for letters. See Howell v. Budd, 91 Cal. 342, 27 P. 747; In re Carmody, 88 Cal. [616], 618, 26 P. 373. Of course, she remains the widow, since the parties could not by their contract change their matrimonial status; but it was perfectly competent for them to alter their legal relations as to their property, and this they accomplished. The wife contracted away her inheritable interest in her husband's property, and with that right went the right to administer upon his estate."

For the foregoing reasons the judgments appealed from should, in my opinion, be reversed.

PEOPLE v. MULHOLLAND.*

Cr. 1714.

District Court of Appeal, Third District, California.

Jan. 18, 1940.

Hearing Granted Feb. 15, 1940.

1. Courts 🔑42(6)

Under constitutional provision vesting exclusive jurisdiction of all felonies in the superior courts as well as all misdemeanors not otherwise provided for by the Legislature, the Legislature may vest jurisdiction of all misdemeanors in inferior courts established within the county, the effect of which is to entirely deprive the superior court of jurisdiction of all misdemeanors within the county. Const. art. 6, § 5.

2. Criminal law 🔑90(4)

The criminal jurisdiction of a class "A" justice's court established in a township is exclusive and county-wide in respect to a high misdemeanor where there is no municipal court in the county. Pen.Code, § 1425, subd. 1.

3. Criminal law 🔑90(5)

The jurisdiction of the offenses of acting as a dealer and of acting as a commission merchant without procuring licenses, which offenses are punishable by fine of not more than $1,000 or by imprisonment in county jail for not more than one year or by both, was within class "A" justice's court established in a township to the exclusion of the superior court, where there was no municipal court in the county. Pen.Code, § 1425, subd. 1; St.1937, pp. 715, 720, §§ 1261, 1273.

4. Justices of the peace 🔑52

The statute relating to jurisdiction of class "A" justices' courts must be construed to effectuate the purpose of relieving the calendars of the superior courts in the absence of any definition of territorial jurisdiction of justices' courts. Pen.Code, § 1425; § 1425, subd. 1; Code Civ.Proc. §§ 106, 112.

5. Factors 🔑2
Licenses 🔑16(2)

The statutes defining "producer" and "dealer" in farm products and requiring licenses of commission merchants and dealers must be construed in the light of reason. St.1937, pp. 715, 720, §§ 1261, 1273.

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*For subsequent opinion see 104 P.2d 1045.

6. Constitutional law ⚷82, 205(5), 206(4)
Licenses ⚷7(1), 16(2)
Statutes ⚷72

The statutes relating to the licensing of farm produce dealers and defining "producer" and "dealer" were intended to protect the farmer in disposing of his "products" which are something which farmer has raised upon the farm, whether it be livestock or crops, and the term "dealer" means one who contracts for or obtains such products so raised, and, as so construed, statutes do not violate provisions of the state Constitution referring to inalienable rights, uniform general laws, and privileges and immunities, nor the federal constitutional provision referring to deprivation of rights, privileges, and immunities by a state. St.1937, pp. 715, 720, §§ 1261, 1273; Const.Cal. art. 1, §§ 1, 11, 21; U.S.C.A.Const. Amend. 14, § 1.

[Ed. Note.—For other definitions of "Dealer" and "Products of Farm," see Words & Phrases.]

◆

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

C. F. Mulholland was charged by information with acting as a commission merchant and as a dealer without having procured licenses as required by the Agricultural Code, and, from a judgment sustaining a demurrer, the People appeal.

Affirmed.

Earl Warren, Atty. Gen., J. Q. Brown, Deputy Atty. Gen., and F. C. Clowdsley, Dist. Atty., and Maxwell M. Willens, Deputy Dist. Atty., both of Stockton, for appellant.

E. H. Zion, of Modesto, for respondent.

Mr. Justice TUTTLE delivered the opinion of the court.

The defendant is charged by the amended information on file herein on two counts of violations of section 1273 of the Agricultural Code, St.1937, p. 720 in the first count, of acting as a commission merchant, and in the second count, as acting as a dealer without having procured licenses as required by section 1261 of said code, St. 1937, p. 715.

The defendant filed a demurrer alleging as to both counts that the superior court of San Joaquin county was without jurisdiction of the offenses, and as to the second count, that said sections of the Agricultural Code defining a dealer and requiring a license by a person acting as such is unconstitutional.

It is shown by the pleadings and by the stipulation on file herein that the alleged offenses arose in Ripon township in San Joaquin county; that the justice's court of said Ripon township is one of class "B" jurisdiction as defined by section 1425 of the Penal Code that elsewhere in said county, to-wit, at Stockton, California, there is a justice's court of class "A" jurisdiction, to-wit, the justice's court of Stockton township.

The court sustained the demurrer on each of said grounds and the People appeal from each of the said rulings. The decision of the court is necessarily based upon the view that the jurisdiction of the justice's court of Stockton township extends throughout the county to the exclusion of the superior court.

[1] Article VI, section 5 of the Constitution vests the exclusive jurisdiction of all felonies in the superior courts, as well as all misdemeanors not otherwise provided for by the legislature. It has been definitely held that the legislature may vest the jurisdiction of all misdemeanors in inferior courts established by the legislature within the county, the effect of which is to entirely deprive the superior court of jurisdiction of all misdemeanors within the county. In re Luna, 201 Cal. 405, 257 P. 76; In re Leach and Huggins, 99 Cal.App. 645, 279 P. 157.

The present statutory provision fixing the jurisdiction of justice's courts is found in section 1425 of the Penal Code as amended in 1933, providing as follows:

"The justices' courts have jurisdiction as follows:

"1. Justices' courts of Class A shall have jurisdiction exclusive of that of any municipal court established in the county, in all criminal cases amounting to misdemeanor only, except those of which the juvenile court is given original jurisdiction.

"2. Justices' Courts of Class B shall have jurisdiction in all criminal cases amounting to misdemeanor only, punishable by fine not exceeding one thousand dollars, or imprisonment not exceeding six months, or by both such fine and imprisonment." (Added by Stats.1905, p. 705; amended by Stats.1929, p. 861; Stats.1933, p. 1454.)

The punishment prescribed by section 1273 of the Agricultural Code is as follows: "(1) Any person is guilty of a misdemeanor and is punishable by a fine of *not more than one thousand dollars, or by imprisonment in the county jail for not more than one year or by both* who assumes or attempts to act as a commission merchant, dealer, broker or agent without a license * * *."

The first question presented is whether, where a Class "A" justice's court is established in any township of the county, that court has exclusive jurisdiction over a criminal offense which is within its subject-matter jurisdiction under the provisions of section 1425, subd. 1 of the Penal Code, or whether the superior court of such county has such exclusive jurisdiction. In other words, is the jurisdiction of such justice's court county-wide in respect to a high misdemeanor where there is no municipal court within the county?

[2, 3] If the foregoing question were asked in respect to the civil jurisdiction of that justice's court, the answer would be in the affirmative. This was so decided in the case of Cambra v. Justice's Court, 4 Cal.2d 445, 49 P.2d 1121, 1122. It was there held that "the establishment of the justice's court of class A in Santa Ana Township with jurisdiction over demands, such as the claim for damages here involved, amounting to [less than] $1000.00, ousted the superior court of Orange county of jurisdiction of the cause. The justice's court of class B in Huntington Beach township, limited in this class of cases to demands of $300, cannot take jurisdiction. The superior court of the county, having been deprived of jurisdiction of such causes, the proper and only court for the trial of the cause now in the county is the justice's court of class A, established and functioning in Santa Ana township, the respondent here." The amount in controversy in the case was $583. The court goes on to say: "The purpose of the creation of municipal courts and justice's courts of class A was primarily to relieve the calendars of the superior courts in counties wherein such courts are created." Civil jurisdiction of class A justice's courts is defined in section 112 of the Code of Civil Procedure. In respect of the character of action involved in the Cambra case, its subject-matter jurisdiction is thus defined: "(a) In all cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to one thousand dollars or less * * *." There is nothing whatever said about jurisdiction outside the township in which the court is created—county-wide jurisdiction. There is no territorial limitation whatever now in this state in respect to any justice's court. Prior to the amendment of section 1425 of the Penal Code in 1929, that section read as follows: "The justices' courts have jurisdiction of the following public offenses committed *within the respective counties* in which such courts are established * *." St. 1905, p. 705. This territorial designation is now entirely deleted from said section, and has been since 1929. Likewise, as to *civil* jurisdiction, section 106 of the Code of Civil Procedure formerly provided that "The civil jurisdiction of justices' courts extends to the limits of the townships in which they are held". This section was repealed in 1933. (Stats.1933, p. 1835.) Section 112 of the Code of Civil Procedure and section 1425 of the Penal Code define subject-matter jurisdiction only, and do not mention territorial jurisdiction. We see no valid reason why there should be any difference in this respect between the rule in a civil case and the rule in a criminal case. The purpose for the creation of such justices' courts (class "A"), as given in the Cambra case—the relief afforded to the superior court—is an equally potent argument when applied to a criminal case. If county-wide jurisdiction is to be applied in the one case, it should likewise be applied in the other.

Respondent relies chiefly upon two cases. The first is Antilla v. Justices' Court, 209 Cal. 621, 290 P. 43, decided June 19, 1930. There, the question presented was whether a justices' court (now designated in section 1425 of the Penal Code as a class "B" court), had county-wide jurisdiction, or whether its jurisdiction was confined to the territorial limits of the township in which it was situated. The court held with the latter contention. upon the ground that the legislature, by omitting the provision of section 1425 of the Penal Code, giving the justices' court county-wide jurisdiction, in the reenactment of said section in 1929, showed an intent to restrict the jurisdiction to the limits of the township. When the last-mentioned section of the Penal Code was originally enacted in 1905 (Stats.1905, p. 705), there was but one class of such courts—now designated as class "B". Class "A" courts (though not under that designation), were not established until 1929. (Stats.1929, p. 861). The Antilla case may be therefore distinguished from the instant case for the reason that the legislature could only have had Class "B" courts in contemplation when it fixed the territorial jurisdiction of justices' courts, and when it omitted the county-wide jurisdiction clause in 1929, it could not be said that such repeal indicated any intention to limit the jurisdiction of class "A" courts, for the reason that class "A" courts were not established prior to such repeal.

The second case relied upon by appellant is In re Bridwell, 112 Cal.App. 19, 296 P. 312. Like the Cambra case, that action originated in Orange county, in 1931. At that time section 1425 of the Penal Code set up two classes of justices' courts, and defined the subject-matter jurisdiction of each. The first class was townships having a population of over 30,000. The second class were those townships whose population was under 30,000. Such classes are, under the present section, known as class "A" and class "B", respectively. The court held that the former courts were restricted in their jurisdiction to the territorial limits of the township in which they existed. The court based its decision upon the Antilla case. We are of the opinion that the Bridwell case was, in effect, overruled by the Cambra case which was decided several years later. We might add that the failure of the legislature to define the territorial jurisdiction of these inferior courts has resulted in considerable confusion and uncertainty which could have been readily obviated, and the necessity of amendment is still obvious.

[4] Summarizing the situation, we find that there is a total absence, in the laws of this state, of any definition of the territorial jurisdiction of our justices' courts. The legislature evidently left the question to be decided by the courts. By the enlargement of the subject-matter jurisdiction of class "A" justices' courts, and the consequent diminishment of such jurisdiction in the superior courts, the work of the latter has been considerably relieved. As the Supreme Court has said, the purpose of such legislation is "primarily to relieve the calendars of the superior courts". Cambra case, above. We believe that, in the absence of anything to the contrary, that it is our duty to construe the law to effectuate that purpose.

Respondent seeks to also uphold the ruling of the trial court upon the ground that the following provisions of the Agricultural Code are unconstitutional:

"Subd. (b) Producer. The term 'producer' means any person engaged in the * * * growing or producing any farm product * * *.

"Subd. (f) Dealer. The term 'dealer' means any person other than a commission merchant who contracts for or obtains from the producer thereof * * * any farm product except by payment to the producer, at the time of obtaining possession or control, of the full agreed price of such commodity in lawful money of the United States," etc. Section 1261.

Respondent contends that such provisions violate sections 1, 11 and 21, article 1, of the Constitution of California, and section 1 of the Fourteenth Amendment to the Federal Constitution, U.S.C.A. Section 1 refers to inalienable rights. Section 11 refers to uniform general laws, and section 21 refers to privileges and immunities. Section 1 of the Fourteenth Amendment refers to deprivation of rights, privileges and immunities by the state. Respondent's whole argument upon this question is based upon his own construction of the sections of the code mentioned above. No authorities are cited to uphold such construction. We quote from his brief:

"Section 1261 of the Agricultural Code hereinafter referred to as section 1261 declares that ANY person who is engaged in the business of raising farm products is a producer. In other words, one who buys and sells farm products which he does not raise is a producer if he actually raises one other farm product. To construe it as meaning one who raises the particular product he is about to sell to a dealer, is changing the meaning of the subdivision, for it certainly states that *any* (notice that word 'any') person who produces ANY (notice that word 'any') farm product is a dealer. Therefore, if a person is a grower of wheat to sell, who also buys cattle which he fattens and later sells, he is a producer so far as the cattle are concerned under the terms of the subdivision. There is no other construction that can be fairly placed upon it. Such a condition places a burden upon any purchaser as it deprives him of the right to contract freely."

[5, 6] We are unable to accept such construction of the law. It is the duty of the courts to construe such enactments in the light of reason. The law was intended to protect the farmer in disposing of his *products*—something which he raised upon the farm, whether it be livestock or crops. The very word "producer" carries that implication. By the term "dealer" is meant one who contracts or obtains such products so raised. If a farmer who raises wheat buys stock for the purpose of resale, he does not produce such stock, and one who purchases it from him is not a dealer under the Agricultural Code, which defines a "dealer" as one "who contracts for or obtains from the *producer* thereof possession or control of any farm product". Adopting this construction of the code sections mentioned, we cannot say that they are in violation of the constitutional provisions mentioned, and this seems to be the position of respondent.

The order sustaining the demurrer is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

37 Cal.App.2d Supp. 753

PEOPLE v. GARCIA et al.

Cr. A. 1630.

Appellate Department, Superior Court, Los Angeles County, California.

Dec. 29, 1939.

1. Municipal corporations 🔑642(1)

Where all counts in complaint charging violations of picketing ordinance charged generally that defendants violated section of ordinance which merely declared a penalty for violating other ordinance provisions, and each count contained specific averment of facts sufficient in themselves to state an offense, if pertinent ordinance provisions were valid, in reviewing convictions, superior court would disregard references to section which merely declared a penalty and look to particular subdivisions of ordinance which purported to prohibit acts allegedly committed by defendants.

2. Municipal corporations 🔑594(2)

Neither the section in Los Angeles picketing ordinance which declares generally that, for the purposes specified therein, it is unlawful for any person to picket, nor the section which provides generally that for such purposes it shall be unlawful for any person to display any banner in the vicinity of any place of business, is complete in itself as a definition of an offense.

3. Municipal corporations 🔑594(1)

The section of the Los Angeles picketing ordinance which prohibits picketing is proscriptive only of acts which are not authorized by following section rendering preceding section inapplicable to picketing during bona fide strikes, or by section prohibiting picketing and following section when read together.

4. Municipal corporations 🔑594(1)

Under Los Angeles ordinance purporting to prohibit picketing except by bona fide employees, all persons may engage in picketing subject to conditions otherwise prescribed, since limitation as to bona fide employees is arbitrary and void.

5. Municipal corporations 🔑594(1)

Under the Los Angeles picketing ordinance, picketing is recognized as a lawful activity not to be absolutely forbidden, but merely regulated, and only certain manifestations of it prohibited, and it is not the enablement of bona fide employees to picket that is void, but rather the arbitrary restriction of such right to them.

6. Municipal corporations 🔑631(1)

Where six defendants were charged with violating Los Angeles picketing ordinance by picketing a place of business having but three entrances, and none of the defendants was a bona fide employee of place of business being picketed, the ordinance section prohibiting picketing by more than one bona fide employee per entrance of place being picketed was not applicable to defendants.

7. Statutes 🔑241(1)

Crimes are not to be built up by courts with the aid of inference, implication, and strained interpretation.

8. Statutes 🔑241(1)

Penal statutes must be construed to reach no further than their words, and no person can be made subject to them by implication.

9. Municipal corporations 🔑631(1)

Defendants could not be convicted of violating section of Los Angeles picketing ordinance providing that no two bona fide employees while picketing a place of business should be within less than 25 feet of each other, where none of the defendants was a bona fide employee of place being picketed.

10. Municipal corporations 🔑594(1)

Under Los Angeles ordinance prohibiting picketing except by bona fide employees under certain circumstances, the recognition of the right of bona fide employees to display signs while picketing is valid, but the arbitrary denial of the exercise of such right to other persons is void, and hence, so far as ordinance is concerned, all persons picketing a place of business may carry banners.

11. Municipal corporations 🔑642(1)

On defendants' appeal from conviction for alleged violation of section of picketing ordinance designating matter to appear on signs or banners displayed by persons engaged in picketing, superior court was not required to determine whether a person engaged in picketing and displaying a sign could be compelled to have "picket" on the sign, where complaint did not charge such offense and state did not seek to support conviction on that theory.

12. Constitutional law 🔑90

As respects constitutional guaranty, the carrying of a sign is a manner of exercising "freedom of speech."

13. Constitutional law 🔑90

While a statute may be valid which in effect punishes the use of language which has the effect of inciting the unlawful use of violence or commission of crime, the end may not, except possibly in certain extraordinary situations, be attained through the medium of censorship or previous restraint.

14. Constitutional law 🔑90

The rights of freedom of speech, press, and assembly may be abused by using speech or press or assembly in order to incite to violence and crime, and the people, through their Legislatures, or by the initiative, may protect themselves against such abuse, but legislative intervention can find constitutional justification only by dealing with the abuse, and the rights themselves must not be curtailed.

15. Constitutional law 🔑90, 274

The section of Los Angeles picketing ordinance limiting the words that may appear on banners displayed by persons engaged in picketing is void, with respect to limitation concerning words, in that such section violates provisions of Fourteenth Amendment and provisions of California Constitution concerning freedom of speech and press. U.S.C.A.Const. Amends. 1, 14; Const.Cal. art. 1, § 9.

16. Municipal corporations 🔑631(1)

Whatever prohibition was defined by the section in the Los Angeles ordinance prohibiting picketing and the section limiting the activity of bona fide employees while picketing a place of business was not applicable to defendants charged with picketing in violation of ordinance, where defendants were not bona fide employees of place of business claimed to have been picketed.

17. Municipal corporations 🔑631(1)

Where defendants, while engaging in alleged picketing, conversationally stated to others that place being picketed was on a strike, defendants "proclaimed" within meaning of section of Los Angeles picketing ordinance purporting to prohibit persons from proclaiming within the hearing of any person in vicinity of any place of business with such an intent as described elsewhere in ordinance.

[Ed. Note.—For other definitions of "Proclaim; Proclaimed," see Words & Phrases.]

18. Constitutional law 🔑90

Previous prohibition or censorship of exercise of right of speech and assembly in appropriate public places cannot be sustained.

19. Constitutional law 🔑90

The section of Los Angeles picketing ordinance providing that no person shall proclaim within the hearing of any person in the vicinity of any place of business with such intent as described in other provisions of ordinance, in so far as such section purports to deny to any person the right to proclaim his ideas without loud or unusual noise and in orderly and otherwise lawful manner, is void.

20. Municipal corporations ⚿111(4)

The sections of Los Angeles picketing ordinance which prohibit picketing and carrying banners in public places cannot be severed from the sections permitting picketing by bona fide employees and limiting the matter to appear on banners displayed by employees while picketing, nor can the sections be given independent vitality, and such sections are invalid.

◆

Appeal from Municipal Court of Los Angeles; R. Morgan Galbreth, Judge.

Sal Garcia and others were convicted of violating an ordinance of the city of Los Angeles, No. 80,170, relating to picketing, and they appeal.

Reversed, with directions.

Gallagher, Wirin & Johnson, of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., W. Jos. McFarland, Asst. City Atty., and Frank H. Ferguson, Deputy City Atty., all of Los Angeles, for respondent.

SCHAUER, Judge.

We are again confronted with legal problems arising out of Los Angeles City Ordinance number 80,170, known as the Los Angeles Picketing Ordinance. That ordinance has been considered by us and portions of it construed in the cases of People v. Tilkin, 1939, Cal.Super., 90 P.2d 148, and People v. Gidaly, 1939, Cal.Super., 93 P.2d 660. The questions here, while finding genesis in different facts and to some extent in different provisions of the ordinance, are controlled fundamentally by the propositions of law enunciated in the prior decisions.

[1] The complaint in this case is in four counts. All counts charge generally that the defendants violated section 11 of the ordinance mentioned and each avers specific facts constituting, severally, the respective alleged different offenses. Section 11 contains no proscriptive language and merely declares the penalty for violating other provisions of the ordinance which are proscriptive, but inasmuch as each count contains a specific averment of facts sufficient in themselves to state and identify an offense, if the pertinent ordinance provisions are valid, we shall disregard the references to section 11 as being mere surplusage and look to the particular subdivisions of the ordinance which, consistently with the acts alleged, should have been pleaded as violated and which do purport to prohibit such acts. The section references recurring throughout this opinion are to sections of the above identified Los Angeles City Ordinance number 80,170.

Count I.

The pleading and proof establish that six defendants picketed (peacefully walked to and fro on a public street in the vicinity of) a place of business having but three entrances.

It is argued for the State that sections 3 and 4(b) prohibit more than one picket per entrance (with a minimum of two for any one establishment).

Count II.

The pleading and proof established that the six defendants engaged in picketing as described under Count I and that, in so doing, each of them walked within a distance of less than 25 feet from others participating therein.

Sections 3 and 4(e) prohibit certain pickets coming closer together than 25 feet.

Count III.

This count does not allege picketing as that term is defined in section 1(a) of the ordinance but the proof, by stipulated facts, establishes that two defendants, Popoff and Garcia, did participate in the picketing described herein under Count I, and that while so engaged each of them carried a placard, of lawful size, but bearing printed words other than those allowed by section 6 of the ordinance, Garcia's placard reading "Berg Metal Works Unfair to Organized Labor, I L W U, Local 1–26" and Popoff's reading "We Want Decent Wages, I L W U, Local 1–26."

Sections 5 and 6 prohibit a picket from displaying a placard containing any words, lettering or design other than "(i) the name or initials of the organization represented by the person * * * carrying such * * * banner, and (ii) the word 'picket,'" and "(iii) the statement that a strike is in progress at the place of business so being picketed, including the name or address of such place of business". The matters specified in clauses (i) and (ii) just quoted from section 6 are required to be stated on any sign displayed while clause (iii) is merely permissive.

Count IV.

The pleading and proof establish that defendants Seeliger and Pfeiffer, while participating in the picketing described under Count I herein, spoke orally, in a conversational tone, to all persons who approached them and whom they believed to be employees or prospective employees, saying: "This place is on strike. Don't work here."

Sections 3 and 4(c) purport to prohibit any activity by a picket other than "patrolling upon the public places in front of or about such place of business [the place being picketed] and * * * wearing or carrying such an arm band or other banner as is permitted by Section 6 of this Ordinance." Section 7 provides that "No person shall * * * cry out or proclaim, * * * within the hearing of any person * * * in the vicinity of, or about any place of business * * * in any such manner or with any such intent as described in clauses lettered (i) and (ii) of Section 5 hereof." The clause (ii) of section 5 includes the language "in a manner calculated or with the intent to induce or influence any person to refrain from entering, occupying or leaving any place of business, or to refrain from performing services or labor, or to refrain from seeking or obtaining employment."

We have heretofore held, in effect, in People v. Tilkin, 1939, supra, Cal.Super., 90 P.2d 148, and reiterated in People v. Gidaly, 1939, supra, Cal.Super., 93 P.2d 660, that insofar as any offense connected with picketing a place of business is concerned, section 4 is a substantial part of the definition of any act intended to be interdicted by section 3. We said, in the opinion in the case first mentioned [90 P.2d 150], "We are of the opinion that in any case where section 4 is involved, it and section 3 must be read together". Likewise, in the same case, we held, "sections 5 and 6 must be read together, to determine the offenses which have been created," and in People v. Gidaly, supra [93 P.2d 663], we declared with reference to the prohibitions there involved, that sections 3 and 4 were to be "construed together * * * the various provisions of section 4 being regarded as parts of the definitions of these offenses, and not mere exceptions to section 3." To phrase the proposition differently, we must read the interrelated sections together to ascertain what acts are penalized.

[2] From what has been said, it appears that Counts I and II rest exclusively upon sections 3 and 4, Count III on sections 5 and 6, and Count IV on sections 3, 4, and 7. Disregarding section 7, for the time being, we have the premise fixed by the prior decisions above mentioned that neither section 3, which declares generally that, for the persuasive purposes specified therein, it is "unlawful for any person to picket," nor section 5, which prescribes likewise generally that for such purposes, "It shall be unlawful for any person to * * * display any banner [sign] * * * in the vicinity of * * any place of business," is complete in itself as a definition of an offense. To give either of those two sections the construction that it is complete in itself would make it comprehensively prohibitive rather than regulatory of the acts of picketing, the latter being the avowed purpose of the enactment.

[3-5] We have arrived then at a point where we must recognize that section 3, being part of a regulatory enactment, is proscriptive only of acts which are not authorized by section 4, or by sections 3 and 4 when read together. Section 4 declares broadly that the provisions of section 3 shall not apply to picketing at a place of business by the persons and on the conditions described and defined in said section 4. The persons so described are "bona fide employees" as that term is defined in section 1. But as we have held in People v. Gidaly, 1939, supra, Cal.Super., 93 P.2d 660, that the limitation as to such "bona fide employees" is arbitrary and void, it follows that all persons may engage in picketing subject to the conditions otherwise prescribed. It is obviously the limitation as to bona fide employees which fails and not the enablement because such enablement is not an exception to section 3 but is a cognate part of the definition of the offense attempted to be created and if it were not effective as an enablement section 3 would not be regulatory of a lawful activity but comprehensively prohibitive of it. In other words, picketing, as such, is recognized in the ordinance as a lawful activity not to be absolutely forbidden but merely regulated and only certain manifestations of it prohibited. It is not the enablement of "bona fide employees" to picket that is void but rather the arbitrary restriction of that right to them. It is thus apparent that, under the

ordinance as heretofore construed by us, all persons have an equal right to engage in picketing a place of business.

[6-8] Looking now to the conditions defined in section 4 under which that right may be exercised, we find that, so far as is pertinent to Count I, and the point involved herein, the sole prohibition is that "No *bona fide employee* so designated [in writing after a vote as specified in section 4(a)] to picket a place of business shall picket such place of business where at the same time more such designated *bona fide employees* are engaged in picketing such place of business than a number equal to one picket for each entrance * * * abutting upon a public place". (Italics added.) The stipulated evidence conclusively establishes that the defendants in this case were not at any time "bona fide employees" of the place of business being picketed. Therefore, not only is the prohibition not applicable to any of these defendants as primary actors but also the presence of the others, not being "bona fide employees," did not create the defined situation of more than two "bona fide employees" being engaged in the picketing. Whether it was or was not constitutionally competent for the legislative body or electorate in defining the offense to predicate it on the participation of "bona fide employees" only and not on the presence of members of the public at large, that is the most that has been done and we cannot build up a crime on facts which are not within the definitive language of the penal act. As we said in People v. Zimbrolt, 1939, Cal.Super., 91 P.2d 252, 253, "Crimes are not to be 'built up by courts with the aid of inference, implication, and strained interpretation.' Ex parte McNulty, 1888, 77 Cal. 164, 168, 19 P. 237, 239, 11 Am.St.Rep. 257, and 'penal statutes must be construed to reach no further than their words; no person can be made subject to them by implication.' Ex parte Twing, 1922, 188 Cal. 261, 265, 204 P. 1082, 1084."

If we would essay, in this case, as urged by those supporting the ordinance, to interpret sections 3 and 4 as comprehensively prohibiting picketing to all persons and under all circumstances, excepting only members of the limited class of "bona fide employees" and them only when all of the coetaneous conditions prescribed in the ordinance were fully complied with, we should find ourselves under the necessity of holding the proscriptions of such sections wholly void. These defendants would be guilty of violating the ordinance not because more than three had simultaneously participated in picketing a place of business having three entrances contrary to the regulatory measures of section 4, but because they had picketed in violation of the comprehensive prohibition of section 3. That section would be, in effect, non-existent so far as bona fide employees complying with the required conditions were concerned but would be wholly prohibitive of picketing by any other than a bona fide employee and hence would be void as an arbitrary discrimination, for the reasons expounded in our prior decisions in People v. Tilkin, supra, and People v. Gidaly, supra, and also, if picketing be regarded as an exercise of the freedom of speech and assembly guaranteed by the federal constitution, U.S.C.A.Const.Amend. 1, would be void as an arbitrary and unnecessary abridgment of such rights.

[9] As to Count II, the pertinent prohibitive definition is found in section 4(e), "No two such bona fide employees while so picketing such place of business shall be within less than twenty-five (25) feet of each other." For the reasons hereinabove given, the evidentiary showing that none of the defendants was a "bona fide employee" disposes of this charge.

[10] Count III is predicated on sections 5 and 6 which recognize the right of a picket to display a banner or sign but attempt to forbid the exercise of that right by persons other than "bona fide employees" and to strictly limit the language which may appear thereon. For reasons similar to those hereinabove enunciated, it is apparent that the recognition of the right of "bona fide employees" to display signs is entirely valid but the arbitrary and discriminatory denial of the exercise of that right to other persons is void. Thus, so far as this ordinance is concerned, all persons picketing a place of business may carry banners.

[11] The signs carried by defendants complied with the ordinance requirements (section 6) as to size and as to setting forth (section 6(i) the name or initials of the organization represented by the defendants but failed to contain the word "picket," as required by section 6(ii), and did contain the statements (on that carried by Garcia) "Berg Metal Works Unfair to Organized Labor" and (on Popoff's) "We Want Decent Wages," in violation of the

restriction of section 6(iii) limiting the language, other than that required by clauses lettered (i) and (ii), to "the statement that a strike is in progress at the place of business so being picketed, including the name or address of such place of business". Whether or not a person engaged in picketing and displaying a banner or sign can lawfully be compelled to have the word "picket" on any sign displayed, we need not now determine because the complaint does not charge that offense nor does the respondent seek to support the judgment on that theory. The charge is laid entirely on the use of language and lettering on the sign not authorized to be there, i. e., in violation of the "previous restraint."

[12-15] The language that was displayed by the defendants on the signs they carried obviously does not constitute a clear and present danger to government and is not otherwise objectionable as being obscene, indecent or contravening public health, morals, safety or welfare. It is ordinary language aptly calculated to convey an idea pertinent to the employees' side of an argument between employer and employees. The carrying of a sign is a manner of exercising freedom of speech, a publication of ideas, the advertising of a dispute, and is not open to the argument made, impotently or otherwise, in support of laws against free distribution of handbills, i. e., that they tend to litter up streets. As was said in the concurring opinion in People v. Gidaly, 1939, supra, Cal.Super., 93 P.2d 660, 669, "While a law may be valid which in effect punishes the use of language which has the effect of inciting the unlawful use of violence or the commission of crime (Stromberg v. People of California, 1931, 283 U.S. 359, 368, 369, 51 S.Ct. 532, 75 L.Ed. 1117, 1123, 73 A.L.R. 1484), the end may not (save possibly in such extraordinary situations as are mentioned in the authority next hereinafter cited) be attained through the medium of censorship or previous restraint. Near v. Minnesota ex rel Olson, 1930, 283 U.S. 697, 716, 719, 720, 51 S.Ct. 625, 75 L.Ed. 1357, 1367, 1369; Lovell v. City of Griffin, 1938, 303 U.S. 444, 451, 58 S.Ct. 666, 82 L.Ed. 949, 953; Hague v. Committee for Industrial Organization, 1939 [307 U.S. 496] 59 S.Ct. 954, 83 L.Ed. [1423]. 'These rights (freedom of speech, press and assembly) may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their Legislatures (or by the initiative) may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed.' De Jonge v. Oregon, 1936, 299 U.S. 353, 364, 365, 57 S.Ct. 255, 260, 81 L.Ed. 278, 284." As further authority for the propositions declared in the foregoing quotation may now be added the citation of Schneider v. State, 1939, 60 S.Ct. 146, 84 L.Ed. —. The word "banner" as used in section 6 of our city ordinance is defined in section 1(e) to include in its meaning any "sign" or "paper". Hence, if we were to hold here that the ordinance is valid in its "previous restraint" or limitation of the words that may be printed, and consequently of the ideas that may be conveyed, on "banners" it would also follow, as suggested in the concurring opinion in People v. Gidaly, 1939, supra, Cal.Super., 93 P.2d 660, 668, that "A newspaper or handbill carrying the story of a labor dispute and expressing the claims of either side would clearly be prohibited from display to the public (whether on public or private property) in the vicinity of a place of business at which a strike was in progress." Obviously, as declared in that opinion, such a law is void in that it transgresses "the irremissibly vetitive provisions of Amendment Number XIV of the United States Constitution, U.S.C.A., making applicable here the rights declared in Amendment I, and of Section 9, Article I, California Constitution." See Schneider v. State, 1939, supra, 60 S.Ct. 146, 84 L.Ed. —.

[16] Count IV, under which it was proved that the defendants Seeliger and Pfeiffer, while peacefully picketing, conversationally stated, to all persons whom they thought would be interested, "This place is on strike. Don't work here," rests on sections 3 and 4(c) of the ordinance, and, as previously noted, on section 7. Section 4(c), by its express terms, affects only "bona fide employees" and hence, for the reasons more particularly hereinabove elucidated, whatever prohibition is defined by sections 3 and 4(c), construed together, is not applicable to the defendants here. Section 7 provides that "No person shall make any loud or unusual noise, speak in a loud or unusual tone, or cry out or proclaim, * * * within the hearing of any person * * * in the vicinity of * * * any place of business * * * in any such manner or

with any such intent as described in clauses lettered (i) and (ii) of Section 5 hereof." The clauses (i) and (ii) refer, respectively, to the manner and intent of: (i) intimidation or coercion of persons entering, occupying, leaving, or dealing with a place of business, etc., (ii) peaceful persuasion of persons to refrain from entering, occupying, leaving or dealing with a place of business, etc. From the stipulated evidence before us, it is apparent that the only proscription of section 7 possibly applicable to defendants' conduct is "No person shall * * * proclaim * * * within the hearing of any person * * * in the vicinity of * * any place of business * * * with any such intent as described."

[17–19] The word proclaim means (Webster's New International Dictionary of the English Language, 1930) "To make known by public announcement; to give wide publicity to; to publish abroad; to promulgate; declare," and as synonyms the same authority gives: "publish, promulgate, announce." These meanings plainly encompass defendants' acts; just as plainly the constitutional shields of nation and state preserve to defendants the right to do those acts. All that has been said in the discussion under Count III relative to the right of defendants to publish their claims and convey their ideas via the printed banner or page applies equally to their right orally, in orderly and otherwise lawful manner, to express such claims and convey their ideas. Previous prohibition or censorship of the exercise of the right of speech and assembly in appropriate public places cannot be sustained. Herndon v. Lowry, 1937, 301 U.S. 242, 258, 57 S.Ct. 732, 81 L.Ed. 1066, 1075; Hague v. Committee for Industrial Organization, 1939, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423; Schneider v. State, 1939, 60 S.Ct. 146, 84 L.Ed. ——. Hence section 7 of the ordinance, in so far as it purports to deny to any person the right to proclaim, i. e., to "publish, promulgate, announce" his ideas, without loud or unusual noise and in an orderly and otherwise lawful manner, is void.

[20] The trail which we have pedetentously blazed through the maze of conflicting prohibitive and enabling implications of said sections 3, 4, 5 and 6 of the picketing ordinance is not the only route of reason to the conclusions reached. The terms "bona fide strike" and "bona fide employee" are defined in the ordinance and those definitions are set forth in our opinion in People v. Gidaly, 1939, Cal.Super., 93 P.2d 660. The arbitrary and discriminatory classifications with which sections 3 and 5 are inoculated by sections 4 and 6 through the application of the conditions and limitations found in the definitions of said terms "bona fide strike" and "bona fide employee," permeate the whole structure of said sections. Sections 4 and 6 are "bone and sinew" of sections 3 and 5. Without 4 and 6, sections 3 and 5 are incongruent to the objects of the ordinance and inconsistent with its purpose; they would abolish, not regulate, picketing. Yet the very provisions of sections 4 and 6 which are essential to give reason to sections 3 and 5 are themselves unreasonable and void in substantially every respect save wherein they in effect repeal said sections 3 and 5. Of an analogically similar condition, Mr. Justice Cardozo spoke when he said (concurring in Schechter Poultry Corp. v. United States, 1935, 295 U.S. 495, 555, 55 S.Ct. 837, 853, 79 L.Ed. 1570, 1593, 97 A.L.R. 947): "To take from this code the provisions as to wages and the hours of labor is to destroy it altogether. If a trade or an industry is so predominantly local as to be exempt from regulation by the Congress in respect of matters such as these, there can be no 'code' for it at all. * * * Wages and the hours of labor are essential features of the plan, its very bone and sinew. There is no opportunity in such circumstances for the severance of the infected parts in the hope of saving the remainder. A code collapses utterly with bone and sinew gone." And so also do collapse those sections of this ordinance regulating picketing—sections 3, 4, 5 and 6. Sections 4 and 6 are the Siamese twins of 3 and 5, joined vitally; sections 4 and 6 being fatally infected, constitutionally, have been declared substantially defunct by the decisions in People v. Tilkin, 1939, supra, and People v. Gidaly, 1939, supra; their twins cannot be severed nor can they be given independent vitality.

The judgments are in each case reversed and the causes are remanded to the Municipal Court, with directions to dismiss the complaints.

SHAW, P. J., and BISHOP, J., concur.

15 Cal.2d 71

In re STEPSAY.

L. A. 17287.

Supreme Court of California.

Jan. 22, 1940.

1. Attorney and client ⚷4

The inquiry as to moral character of an applicant for admission to practice law is broader in scope than in a disbarment proceeding, and the court may properly refuse to admit an applicant to practice upon proof which would not justify an order of disbarment.

2. Attorney and client ⚷7

In proceeding for registration as an attorney applicant for admission to practice law, applicant had burden of establishing that he was of good moral character.

3. Attorney and client ⚷10

Evidence that applicant for registration as an attorney applicant for admission to practice law had, while practicing in a foreign state, retained $25 due a client for approximately two or three months, that complaints had been filed against applicant for unprofessional conduct while practicing in foreign state but were dismissed for their trivial nature, did not justify denial of applicant's application on ground that applicant failed to show that he possessed requisite good moral character, in view of applicant's frankness before committee of bar examiners and letters as to applicant's honesty and good character.

In Bank.

Proceeding in the matter of the application of Ben B. Stepsay for admission to practice law, wherein petitioner filed a petition asking that the Supreme Court set aside a resolution of the committee of bar examiners denying petitioner's application to register as an attorney applicant to practice law in the state.

Petition granted.

S. Arion Lewis, Jr., of Los Angeles, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent State Bar.

PER CURIAM.

[1] Petitioner herein was admitted as an attorney at law in the state of Michigan in October, 1922, and practiced law continuously in the city of Detroit in that state for a period of thirteen years, until February, 1937, when due to the ill health of his son, he removed to the state of California. On May 27, 1938, he filed his application before the committee of bar examiners of the State Bar of California for registration as an attorney applicant for admission to practice law in this state. His application met all the requirements prescribed by the rules of the State Bar of California, and was accompanied by the fee required by law of attorney applicants. It came on for hearing before the committee of bar examiners on the 16th day of August, 1938, as to petitioner's moral character. Upon the conclusion of said hearing the committee denied the application of petitioner on the ground "that the applicant had failed to meet the burden of showing that he is possessed of the requisite good moral character and of removing reasonable doubt as to his moral fitness". Petitioner filed a petition for a rehearing of his application which was denied by the committee. Thereafter and on the 5th day of May, 1939, petitioner filed a supplemental application for registration which was accompanied by fourteen letters addressed to the committee of bar examiners purporting to have been written by prominent judges and attorneys residing in Detroit, the former home of petitioner. This supplemental petition was also denied by the committee of bar examiners. Thereupon petitioner filed in this court the present petition asking that this court set aside said resolution of the committee of bar examiners denying petitioner's application, and for an order permitting him to take the next regular attorney's examination to be conducted by said committee. On presentation of said petition, this court made its order addressed to the State Bar of California to show cause why said petition should not be granted. The State Bar has made its return in which it has set forth the facts of the case substantially as narrated above. It will be seen therefrom that the sole ground for the denial of the application of petitioner for registration as an attorney applicant for admission to practice law in this state was that he "failed to meet the burden of showing that he is possessed of the requisite good moral character and removing reasonable doubt as to his moral fitness". There is, of course, no question that one of the prerequisites to practice law in this state, and in all other jurisdictions, so far as we are advised, is the pos-

session on the part of an applicant of a good moral character. In answer to a question contained in the questionnaire annexed to petitioner's application to the committee of bar examiners, in which petitioner was asked if any charges had ever been made or filed, or proceedings instituted against him, the petitioner replied, "None except those shown by affidavit of Miles H. Knowles, Secretary of Grievances, Third Judicial District, State Bar of Michigan, arising out of disputes for fees, and which were in all cases dismissed by Secretary of Detroit Bar Association without having been submitted to any grievance committee." In the affidavit of the secretary of the grievance committee referred to in petitioner's answer to the above question, it is stated that "three complaints were filed against petitioner for unprofessional conduct" and "that the said complaints were of a trivial nature, being dismissed by the Secretary of Grievances as not having sufficient importance to be referred to the Grievance Committee".

At the hearing before the committee of bar examiners held on August 16, 1938, the petitioner was the only witness. He was interrogated respecting the three complaints made against him to the grievance committee in Detroit. Nothing was developed by the evidence before the committee as to any of these complaints except as to the one made by Richard Mueller. As to that, the petitioner testified that he brought suit on a contingency basis for his client Mueller to collect for services rendered by the latter. The case was tried in the justice's court and resulted in a judgment in favor of petitioner's client. The case was appealed, but settled, and the defendant agreed to pay the amount due on a partial payment plan. Petitioner collected the entire amount and sent to his client all amounts due his client except the sum of $25. He wrote to his client that he was at the time unable to send him this balance due, but in a short time thereafter he mailed to his client a check for $25, the full amount due. The letter containing the check was returned as the client had moved. The letter with the check enclosed was retained by petitioner until he received a telephone call from the Bar Association regarding the matter. Petitioner immediately responded to the call and appeared personally before the association with the letter containing the check, which the secretary opened. The petitioner then paid the $25 due his client and no further action was taken respecting the complaint. This happened some two or three months after petitioner collected the money for Mueller. Petitioner testified that the Mueller instance was the only one during his entire practice in which he withheld funds belonging to any of his clients. Upon this evidence the committee of bar examiners adopted the resolution quoted above, denying petitioner's application to register as an attorney applicant to practice law in this state.

[1] It is the contention of The State Bar that the offense of petitioner as shown by the above evidence was of such a serious nature that he should be forever barred from practicing law in this state. Without attempting to palliate petitioner's offense and with no desire to excuse him for this offense, we find ourselves unable to agree with the conclusion reached by the committee of bar examiners.

That petitioner violated his duty to his client in withholding the money for a period of two to three months cannot be denied. An attorney's fidelity to his client is one of the highest duties growing out of the relation of attorney and client. Any deviation on the part of the former in the strict performance of his obligations has always met the severe censure of the courts. The withholding of money due a client by an attorney has been the moving cause of many disciplinary proceedings against offending attorneys in the courts of this state. Usually the penalty imposed for such offense is suspension from practice for periods varying from three months to two or three years. In Barbee v. State Bar, 213 Cal. 296, 2 P.2d 353, and Goldstone v. State Bar, 214 Cal. 490, 6 P.2d 513, 80 A.L.R. 701, the suspension was for three months; in Smuckler v. State Bar, 2 Cal. 2d 80, 38 P.2d 777 and Oster v. State Bar, 2 Cal.2d 625, 42 P.2d 627, the suspension was for six months; in Bentson v. State Bar, 216 Cal. 58, 13 P.2d 512, and Ring v. State Bar, 4 Cal.2d 196, 47 P.2d 704, one year; in McArthur v. State Bar, 215 Cal. 652, 12 P.2d 453, eighteen months, and in Re Tyler, 71 Cal. 353, 12 P. 289, 13 P. 169, two years. It has only been in extreme cases that the court has felt called upon to disbar an attorney for such offense. Seavey v. State Bar, 4 Cal.2d 73, 47 P.2d 281; Allen v. State Bar, 218 Cal. 19, 21 P.2d 107, and Wilcox v. State Bar, 2 Cal.2d 614, 42 P.2d 631. But even in the Barbee and Goldstone cases where the suspension was for only three months, the offenses charged against the accused attorneys were far more serious than that against petitioner herein. It is true that the inquiry as to the moral character of an attorney in a proceeding for his admission to practice is broader in scope than in a disbarment proceeding (Spears v. State Bar, 211 Cal. 183, 294 P. 697, 72 A.L.R. 923; In re Wells, 174 Cal. 467, 163 P. 657), and the court may properly refuse to admit an applicant to practice law upon proof which would not justify an order of disbarment. In the two cases in which this rule was announced each of the applicants was found guilty of a most flagrant offense and each was found to have made false statements either in his application or in affidavits in support thereof. While we are in accord with the rule there announced it can have but slight applicability in the instant case where the factual situation is so entirely different.

[2, 3] No claim is made that the petitioner did not fully, fairly and truthfully answer all questions propounded to him in the questionnaire annexed to his application. He was frank in all his statements before the committee of bar examiners at the hearing of his application and apparently attempted to conceal nothing from the committee. It is true that the burden of establishing good moral character was upon him (Spears v. State Bar, supra), but, in our opinion, he met this burden not only by his open and frank testimony before the committee, but by the production before the committee of the letters from judges and attorneys above referred to. Nine of these letters are from judges of the circuit and other courts in the city of Detroit. One is from a lawyer who was the former employer of petitioner, and the others are from practicing attorneys in said city. They all speak in the highest terms of petitioner's honesty, integrity and good character. Some of the letters emphasize his courtesy and patience while others speak of "the esteem of his colleagues and of the bench". These letters are entitled to a most respectful consideration by this court when passing upon petitioner's moral fitness to practice law in this state. In the case of Warbasse v. State Bar, 219 Cal. 566, 571, 28 P.2d 19, 21, similar letters were before this court, and the question for its decision was the moral character of the petitioner in that proceeding who sought to be admitted to practice law in this state. Referring to such letters, the court said: "There has been filed by petitioner letters of recommendation from judges, attorneys, and business men. Most of the letters are from judges of the Appellate Division, Second Department, of the Supreme Court, the court which suspended him. Although the number of letters is not unduly large, they are from persons whose positions indicate that they possess a real sense of responsibility for the integrity of the legal profession, and who, therefore, would not be induced by reasons of friendship, or any reason other than a sincere belief in his honesty and integrity, to recommend him for admission to our bar. The letters attest petitioner's ability, his wide experience, and the worth of his character. We believe that the writers thereof were giving an honest estimate of his character and that we may unqualifiedly accept that estimate."

These letters filed with the commission in the present proceeding taken in connection with petitioner's truthful answers to the questions contained in the questionnaire, although one of them referred to the complaints made against him before the Detroit grievance secretary, and the full and complete disclosure made by petitioner before the committee respecting these complaints are indicative of petitioner's real character. We are satisfied that they are a more truthful index to his real character than the one isolated offense which it is apparent he committed during his thirteen years of active practice of law. In view of the showing thus made by petitioner we are of the opinion that his petition herein should be granted.

It is therefore ordered that petitioner be permitted to take the next regular attorney's examination to be conducted by the committee of bar examiners of the State Bar of California, and to take such other steps as may be required to entitle him to be admitted to practice law in this state.

15 Cal.2d 82

WEBER v. SANTA BARBARA COUNTY.

L. A. 16106.

Supreme Court of California.

Jan. 26, 1940.

1. Taxation ⚿104

The state income tax was intended as a substitute for the ad valorem tax formerly imposed on intangible personalty except solvent credits. Pol.Code, § 3627a, as amended by St.1931, p. 2479; § 3717; St.1935, p. 1090.

2. Statutes ⚿206

In attempting to ascertain legislative intention, effect should be given, whenever possible, to the statute as a whole, and every word and clause thereof, leaving no part or provision useless or deprived of meaning.

3. Taxation ⚿58

The ad valorem tax on intangible personalty imposed as of first Monday of March, 1935, did not fall within provision of amendment substituting the income tax for ad valorem tax, notwithstanding income tax was computable on income derived on or after January 1, 1935, where amendment contained proviso that all taxes imposed prior to passage or adoption of income tax and effective date thereof should remain fully collectible, and income tax statute became effective June 13, 1935. Pol.Code, § 3627a, as amended by St.1931, p. 2479, and as amended by St.1935, p. 2251; St.1935, p. 1090.

4. Taxation ⚿47(7)

The simultaneous imposition of an ad valorem tax on property and of a tax measured by income from such property does not violate constitutional inhibitions against "double taxation." Pol.Code, § 3627a, as amended by St.1931, p. 2479, and as amended by St.1935, p. 2251; § 3717; St.1935, p. 1090.

[Ed. Note.—For other definitions of "Double Taxation," see Words & Phrases.]

5. Taxation ⚿204(2)

The amendment to statute taxing intangibles providing that property specified in section should no longer be taxable under provisions of section if and when an income tax should be passed or adopted in state should be strictly construed against the taxpayer, although a statute imposing a tax is construed liberally in favor of taxpayer. Pol.Code, § 3627a, as amended by St.1935, p. 2251.

In Bank.

Appeal from Superior Court, Santa Barbara County; Albert F. Ross, Judge.

Action by Hilda Olsen Boldt Weber against the County of Santa Barbara to recover a tax paid under protest, wherein defendant filed a demurrer. From a judgment of dismissal after sustaining the demurrer without leave to amend, plaintiff appeals.

Affirmed.

Prior opinion, 86 P.2d 1069.

Griffith & Thornburgh, of Santa Barbara, for appellant.

Stater & Dawson and John H. Dawson, all of Los Angeles, Pillsbury, Madison & Sutro, Alfred Sutro, and Francis N. Marshall, all of San Francisco, and Holbrook & Tarr, W. Sumner Holbrook, Jr., Miller, Chevalier, Peeler & Wilson, and Melvin D. Wilson, all of Los Angeles, amici curiae.

Percy Heckendorf, Dist. Atty., and Rigmor O. Carlsen, Deputy Dist. Atty., both of Santa Barbara, for respondent.

J. H. O'Connor, Co. Counsel, S. V. O. Prichard, Asst. Co. Counsel, and A. Curtis Smith, Deputy Co. Counsel, all of Los Angeles, amici curiae.

CARTER, Justice.

Action to recover a tax paid under protest and alleged to have been unlawfully collected. Defendant's demurrer to the complaint was sustained without leave to amend and plaintiff prosecutes this appeal from the judgment of dismissal thereafter entered.

The tax sought to be recovered is in the amount of $7,170.58 and was imposed on certain stocks and bonds owned by the plaintiff on the first Monday of March, 1935. Section 3627a of the Political Code, as it then read, St. 1931, p. 2479, provided for the imposition of an ad valorem tax on intangible personal property as of the first Monday of March, which tax, under the section, was immediately due and payable except when by virtue of the provisions of section 3717 of the same code, it became a lien on any real property of the taxpayer, which lien attached as of the same date. In view of these statutory provisions, there can be no question but that the tax here sought to be recovered was imposed as of the first Monday of March, 1935. Plaintiff, however, seeks to invalidate its imposition and collection by reason of the subsequent enactment of the Personal Income Tax Act (Stats. 1935, ch. 329, p. 1090), effective by its terms on June 13, 1935, approximately three months after imposition of the ad valorem tax here involved. As shall more fully hereinafter appear, the income tax was intended as a substitute for and was to be in lieu of the ad valorem tax theretofore imposed on intangible personal property (other than solvent credits) under the provisions of section 3627a, supra. While approved by the governor on June 13, 1935, and by its terms effective immediately, the income tax was to be computed retroactively upon all income received or accrued on or after January 1, 1935. It is this retroactive feature of the income tax that underlies and constitutes the basis of the plaintiff's contention that said tax superseded and vitiated the ad valorem tax already imposed (and in many instances paid) prior to the enactment of the income tax statute.

[1] The parties hereto are in agreement upon the proposition that the income tax was intended as and is a substitute for the ad valorem tax formerly imposed under section 3627a, supra, on intangible personal property, except solvent credits. The amendment of the latter section at the same session of the legislature, effective September 15, 1935, three months after the enactment of the income tax statute, definitely indicates that the method of ad valorem tax therein provided for was to be abandoned and superseded if and when an income tax "shall be passed or adopted". In Pacific Co. v. Board of Supervisors, 8 Cal. 2d 611, 613, 67 P.2d 335, this court declared the income tax to be a substitute or in lieu tax for the tax theretofore imposed by section 3627a, except as to solvent credits, not here involved. Neither party to this litigation questions the correctness of that decision. However, that case is distinguishable from the present one for it involved a tax for the year 1936. The parties hereto agree, as already indicated, that the income tax superseded the old ad valorem tax for that and subsequent years. They disagree as to the year 1935. It is the plaintiff's theory, as indicated above, that inasmuch as the substituted income tax was operative upon and measured by income derived on or after January 1, 1935, though the act imposing such tax was not effective until June 13, 1935, it served to nullify the ad valorem tax theretofore imposed under section 3627a on the first Monday of March, 1935, prior to the enactment of the income tax act. The defendant county, on the other hand, while generally conceding the income tax to be in lieu of the former ad valorem tax imposed by section 3627a, urges that the 1935 amendment of the latter section after declaring the income tax to be a substitute for the ad valorem tax theretofore imposed under its provisions, by express proviso or "saving clause" made all taxes theretofore imposed thereunder "fully collectible and distributable". It is the defendant county's theory that said proviso or saving clause referred solely and alone to the tax imposed under the section as of the first Monday of March, 1935, which would include the tax here sought to be recovered by the plaintiff. Inasmuch as the solution of this problem turns on a construction of the 1935 amendment of section 3627a it is well that we have the same before us. It reads: "The property aforesaid, except solvent credits, shall no longer be taxable under the provisions of this section if and when a net income tax shall be passed or adopted in this State. Upon the passage or adoption of such tax and from the time such income tax becomes effective such net income tax shall be in lieu of the tax herein provided for upon notes, debentures, shares of capital stock, bonds, deeds of trust, mortgages and any legal or equitable interest therein. Provided, however, that any and all taxes imposed herein on such property prior to the passage or adoption of such net income tax and the effective date thereof shall remain fully collectible and distributable hereunder." Stats. 1935, p. 2251.

In her effort to preclude the foregoing proviso or saving clause from applying to the ad valorem tax imposed as of the first Monday of March, 1935, the appellant argues that the effective date of the substituted income tax, as distinguished from the effective date of the act imposing the same, was fixed retroactively so as to be prior to the date of the ad valorem tax imposed by section 3627a on the first Monday of March, 1935. From this she reasons that the latter tax was not a tax "imposed * * * prior to the passage or adoption of such net income tax and *the effective date thereof*" so as to "remain fully collectible and distributable" under said proviso or saving clause.

[2, 3] We cannot accept the appellant's reasoning. It confuses the date from which the substituted income tax was to be computed with the effective date of the

enactment of such tax or act imposing the same. It distorts the obvious intention of the legislature and undertakes to give effect only to the italicized phrase "the effective date thereof" to the utter and complete exclusion of the thrice-repeated phrase "upon the passage or adoption" of the substituted net income tax. This latter phrase is peculiarly appropriate to the effective date of the act imposing the new or substituted tax and not to the asserted effective date of the tax itself. It is a cardinal rule of statutory construction that in attempting to ascertain the legislative intention effect should be given, whenever possible, to the statute as a whole and to every word and clause thereof, leaving no part or provision useless or deprived of meaning. As appears from the above chronological statement, a tax was "imposed" upon the plaintiff's stocks and bonds by the express language of section 3627a on the first Monday of March, 1935. At the time such tax was "imposed" there was no income tax act in existence. The latter act was not effective until June 13, 1935, though the tax therein provided for was to be computed on income derived on or after January 1, 1935. In view of this chronology, we think the conclusion is inescapable that the proviso or "saving clause" in section 3627a relates specifically and solely to the tax which was "imposed" and became a lien on the first Monday of March, 1935. In adding the proviso, it was the undoubted purpose of the legislature to make it plain that the ad valorem tax so imposed in March, 1935, prior to the enactment of the income tax but subsequent to the date from which such substituted income tax was to be computed, was not to fall within the in lieu provision contained in the earlier portion of the 1935 amendment of section 3627a. This intention clearly appears from the language employed by the legislature.

[4] In City Inv. Ltd. v. Johnson, 6 Cal. 2d 150, 153, 56 P.2d 939, 940, where for a portion of the first year after the enactment of an in lieu or substituted tax there was an admitted overlap (as here) between the old ad valorem franchise tax there involved and the new or substituted franchise tax measured by net income, this court declared, in part, that "The ad valorem franchise tax had become a valid charge * * * prior to the 1928 amendment, and the 'in lieu' provision of that amendment cannot be given the effect of destroying the right to collect it." And this, without the presence of a "saving clause" such as is here involved. There, as here, the substituted tax was measured by and computed upon income derived in part during the period covered by the old or ad valorem tax. In passing, it should be pointed out that the cited case is also authority for the settled principle that the simultaneous imposition of an ad valorem tax on property and of a tax measured by the income from such property, does no violence to constitutional inhibitions against double taxation. Plaintiff's contention that the overlap here sanctioned represents unconstitutional double taxation is therefore lacking in merit.

[5] Aside from our conclusion that the legislature clearly evidenced its intention to save and to make "fully collectible and distributable" such ad valorem taxes as had been imposed on intangible personal property in March, 1935, prior to the enactment of the substituted income tax, we are also of the view that a statute (such as the 1935 amendment of sec. 3627a) releasing property from a particular form of tax should be strictly construed against the taxpayer. Hunton v. Commonwealth, 166 Va. 229, 183 S.E. 873. Such a statute differs from one imposing a tax which is construed liberally in favor of the taxpayer. Here we find no clear legislative expression vitiating the already imposed 1935 ad valorem tax on intangible personal property, assuming such power rests in the legislature. Such intention certainly should not be implied. In fact, as already shown, the legislative intention appears to be clearly to the contrary.

In addition to what already has been said, it might be stated that the proviso contained in the 1935 amendment of section 3627a would be useless and without meaning unless construed, as here, to have been added by the legislature out of an abundance of caution to make it plain that the already imposed ad valorem tax of March, 1935, was not to fall within the "in lieu" provision merely because the substituted tax was to be computed upon or measured by income partly accrued at a time antedating the imposition of such ad valorem tax. The proviso or saving clause was not needed to protect or render collectible ad valorem taxes imposed on intangible personal property in 1934 and prior years. City Inv. Ltd. v. Johnson, supra, 6 Cal.2d page 153, 56 P.2d 939; Riley v. Howard, 193 Cal. 522, 226 P. 393; 99 A.L.R. 1062,

1068. It necessarily must have been added merely to clarify the situation caused by the temporary overlap of the two taxes.

In our consideration of this cause we have examined not only the briefs of the parties hereto but those of amici curiae in support of the respective contentions advanced, as well as the briefs of the parties and amici curiae in the case of Dawson v. County of Los Angeles, Cal.Sup., 98 P.2d 495, involving the same issue, and decided this day.

Inasmuch as the tax here sought to be recovered was properly imposed and collected, it is unnecessary for us to determine whether the filing of a claim under section 4075 of the Political Code was a necessary prerequisite to the commencement of suit.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; GIBSON, J.; EDMONDS, J.; CURTIS, J.

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15 Cal.2d 77

DAWSON v. LOS ANGELES COUNTY.

L. A. 16854.

Supreme Court of California.

Jan. 26, 1940.

1. Taxation 🔑58

The ad valorem tax on intangible personalty imposed as of first Monday of March, 1935, did not fall within provision of amendment substituting the income tax for ad valorem tax, notwithstanding income tax was computable on income derived on or after January 1, 1935, where amendment contained proviso that all taxes imposed prior to passage or adoption of income tax and effective date thereof should remain fully collectible, and income tax statute became effective June 13, 1935. Pol.Code, § 3627a, as amended by St.1931, p. 2479, and as amended by St. 1935, p. 2251; St.1935, p. 1090.

2. Taxation 🔑40(3)

The "tax burden" within constitutional provision that no tax burden shall be imposed upon any personalty which shall exceed tax burden on realty in same taxing jurisdiction in proportion to actual value of such property is not determined by either the rate or assessment alone, but the "tax burden" is the rate times the assessment, and hence it is only when product of the two is excessive that property bears an undue "tax burden." Const. art. 13, § 14.

3. Taxation 🔑40(3)

The statute imposing tax on intangibles at rate of two-tenths of one per cent. of actual value did not impose a "tax burden" in excess of that on realty in the same taxing jurisdiction in proportion to value, in violation of constitutional provision, where realty was assessed at 50.2 per cent. of its actual value and computed upon rate of $1.21 for every $100 of such reduced assessed valuation, and hence tax on intangibles imposed a smaller tax burden than the tax on equivalent amount of realty. Pol.Code, § 3627a, as amended by St.1931, p. 2479; Const. art. 13, § 14.

4. Taxation 🔑535

When asserted error complained of is an error of assessment of personalty, resort must first be had to board of equalization, and, in absence of objection there, taxpayer is precluded from obtaining a refund, notwithstanding alleged error was the result of an asserted uniformly excessive assessment upon all property of the same class. Pol. Code, § 3627a, as amended by St.1931, p. 2479.

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by George Dawson against the County of Los Angeles to recover a tax, wherein defendant filed a demurrer. From a judgment for defendant after sustaining the demurrer without leave to amend, plaintiff appeals.

Affirmed.

Stater & Dawson and John H. Dawson, all of Los Angeles, for appellant.

Holbrook & Tarr, W. Sumner Holbrook, Jr., Miller, Chevalier, Peeler & Wilson, and Melvin D. Wilson, all of Los Angeles, amici curiae.

J. H. O'Connor, Co. Counsel, S. V. O. Prichard, Asst. Co. Counsel, and A. Curtis Smith, Deputy Co. Counsel, all of Los Angeles, for respondent.

Percy C. Heckendorf, Dist. Atty., and Rigmor O. Carlsen, Deputy Dist. Atty., both of Santa Barbara, amici curiae.

CARTER, Justice.

Plaintiff appeals from a judgment entered after demurrer to his complaint had been sustained without leave to amend.

[1] The action is one to recover a tax in the amount of $449.80 imposed on certain stocks owned by the plaintiff on the first Monday of March, 1935. Said tax was imposed under the provisions of section 3627a of the Political Code which then provided for the imposition of an ad valorem tax on intangible personal property. St. 1931, p. 2479. It is the plaintiff's theory that the tax was unlawfully imposed and collected because of the enactment on June 13, 1935, of the Personal Income Tax Act (Stats.1935, ch. 329, p. 1090) which tax concededly was substituted for and was to be in lieu of the former ad valorem tax contemplated by section 3627a, supra. (See amendment of latter section, Stats.1935, p. 2251.) In the case of Weber v. Santa Barbara County, 98 P.2d 492, this day filed, we held that the ad valorem tax on intangible personal property imposed as of the first Monday of March, 1935, did not fall within the "in lieu" provision substituting the income tax therefor. For the reasons there advanced, we are of the view that the appellant's contention in this particular lacks merit.

[2] In addition to the foregoing contention, which has failed of its purpose to work a return of the entire tax, plaintiff advances a second contention which, if meritorious, would necessitate a refund of only a portion of the tax. This latter contention is addressed to the manner of the assessment of his stocks. Briefly, it is the plaintiff's position that in the County of Los Angeles at all times pertinent to our inquiry real property was assessed at 50.2 per cent of its market or cash value while intangible personal property was assessed at 100 per cent of its market or cash value. As a result, plaintiff's stocks were subject to an assessment 49.8 per cent greater than the assessment on real property. He contends, therefore, that, regardless of rate, in so far as the "tax burden" imposed upon intangible personal property exceeds the "tax burden" on real property in the same taxing jurisdiction in proportion to the actual value of such property, to that extent the tax imposed is illegal and in violation of the 1933 amendment of section 14 of article XIII of the Constitution. Upon this premise, plaintiff seeks to recover 49.8 per cent of the tax alleged to have been excessively levied upon his stocks by reason of the asserted equivalent excessive assessment. The defendant county responds that the "tax burden" contemplated and referred to in the cited constitutional provision is not measured or determined by either the rate or assessment alone but that such "tax burden" is "the rate times the assessment" and that it is only when the product of the two is excessive that the property bears an undue tax burden. We are of the view that this latter reasoning is unanswerable and that the plaintiff in his argument has considered only the "assessment" factor to the complete exclusion of the "rate" factor.

At the time of the imposition of the tax here challenged, section 14 of article XIII of the Constitution, relied on by the plaintiff, authorized the legislature, among other things, to "classify any and all kinds of personal property for the purposes of assessment and taxation in a manner and at a rate or rates in proportion to value different from any other property in this State subject to taxation". The provision thus authorized the classification of personal property for "assessment" purposes, sanctioned a different manner of taxation for such personal property and approved a "rate or rates in proportion to value" different from that imposed on other taxable property. The only limitations upon this authorization was that intangible personal property shall not be taxed "at a rate in excess of four-tenths of one per cent of the actual value of such property" and that "no tax burden shall be imposed upon any personal property * * * which shall exceed the tax burden on real property in the same taxing jurisdiction in proportion to the actual value of such property".

[3] Neither section 3627a, supra, nor the tax imposed thereunder and here sought to be recovered, runs counter to either of these constitutional limitations. The first limitation declared that the tax should not be at a rate in excess of "four-tenths of one per cent of the actual value" of the property. The tax provided for in the statute and collected from plaintiff was exactly one-half thereof, viz., at the rate of two-tenths of one per cent of the actual value. Nor do we think said statute or tax im-

posed a "tax burden" in excess of that on real property in the same taxing jurisdiction in proportion to value. Considering both the assessment and rate factors which, as we have already stated, jointly determine the tax burden, it requires no mathematical demonstration to establish that a tax at the rate of two-tenths of one per cent of the actual value of intangible personal property imposes not a greater but a smaller tax burden than a tax on an equivalent amount of real property assessed at 50.2 per cent of its actual value and computed upon a rate of $1.21 for every one hundred dollars of such reduced assessed valuation. While the plaintiff failed to allege the rate of taxation on real property in Los Angeles County, an indispensable factor in determining and comparing tax burden, the defendant county in its briefs has stated the rate to be as above indicated. No denial or challenge of such stated rate is made by the plaintiff. We are satisfied, therefore, that the tax here authorized and imposed created no greater tax burden on intangible personal property than that on real property in proportion to value.

[4] Moreover, we are of the view that plaintiff having failed to object to the assessment before the board of supervisors sitting as a board of equalization is not now in a position to challenge it. When read in conjunction with the companion case of Mahoney v. City of San Diego, 198 Cal. 388, 391, 245 P. 189, the case of Luce v. City of San Diego, 198 Cal. 405, 406, 407, 245 P. 196, is authority for the proposition that when the asserted error complained of is an error of assessment, as here, resort must first be had to the board of equalization and in the absence of objection there the taxpayer is precluded from obtaining a refund, and this even though, as here, the alleged error was the result of an asserted uniformly excessive assessment upon all property of the same class. There can be no question that the requirement of preliminary objection to the board of equalization applies equally to an alleged excessive assessment of personal property. Southern Cal. Hardwood & Mfg. Co. v. County of Los Angeles, 49 Cal.App. 712, 194 P. 62.

What we have said sufficiently disposes of the issues involved.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; GIBSON, J.; EDMONDS, J.; CURTIS, J.

15 Cal.2d 42

AMERICAN TRUST CO. v. CALIFORNIA WESTERN STATES LIFE INS. CO.

S. F. 15797.

Supreme Court of California.

Jan. 22, 1940.

1. **Insurance** ⚷47

Where, pursuant to what purported to be a general offer to give cash and stock for stock in another corporation, insurance company effected consolidation but stockholders of other company and insurance commissioner and certain directors were not informed by president and two directors who had knowledge and interest in agreements of agreements to repurchase stock given to certain stockholders of other company which agreement was ratified at a meeting in which truth of entire transaction was not disclosed, to other directors, and interested directors participated in ratification and misrepresentations, and agreements materially impaired capital of consolidated company, repurchase agreements were void on account of fraud; it being immaterial that consolidated company subsequently became financially sound. Civ.Code, § 1710, subd. 3.

2. **Corporations** ⚷307

A corporation director owes to the corporation the highest fiduciary obligation and the fullest duty of disclosure.

3. **Corporations** ⚷307

Where director of a corporation speaks, he must speak the whole truth and not by partial suppression and concealment make the utterance untruthful and misleading. Civ.Code, § 1710, subd. 3.

4. **Insurance** ⚷47

Where, pursuant to purported general offer to give cash and stock for stock in another company, insurance company effected consolidation, but president and certain directors did not inform stockholders of such other company of agreement to repurchase stock given to certain of stockholders of other company, and misstatements were made for purpose of accomplishing transfer of assets and fastening the secret liability upon consolidated company to be formed, consolidated company, to whom all choses in action of other company were assigned, was a "proper party" to sue for fraud on stockholders of other company.

[Ed. Note.—For other definitions of "Proper Party," see Words & Phrases.]

5. Assignments ⚷24(3)

The right to recover money or property obtained by fraud may be assigned.

6. Insurance ⚷47

Where, pursuant to purported general offer to give cash and stock for stock in another company, insurance company effected consolidation but stockholders of other company, insurance commissioner, and certain directors were not informed by president and directors, who had knowledge, of agreement to repurchase stock given to certain stockholders of other company, agreement to repurchase was not enforceable on ground that there was no discriminatory treatment of stockholders but that stockholders with whom agreement to repurchase had been made received a different kind of agreement because president wanted right to repurchase.

7. Insurance ⚷35

A life insurance company is something more than an ordinary business corporation, and its policyholders are not "ordinary creditors," and the directors cannot say that they owe fiduciary duties only to the corporate entity as such.

8. Insurance ⚷10, 37

It is the public policy to protect policyholders from abuses by directors intrusted with the management of their company, and the insurance commissioner acts as policyholders' representative in regulating insurance companies.

◆

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by the American Trust Company against the California Western State Life Insurance Company for a declaratory judgment with respect to agreement to repurchase certain stock given on consolidation of insurance companies. From a judgment for the defendant, plaintiff appeals.

Affirmed.

For prior opinion see, 76 P.2d 201.

Brobeck, Phleger & Harrison, of San Francisco, for appellant.

Williamson & Wallace, of San Francisco, Ware & Ware, of Chico, Downey, Brand & Seymour and Stephen W. Downey, all of Sacramento, and James D. Adams and McCutchen, Olney, Mannon & Greene, all of San Francisco, for respondent.

Neil Cunningham, Dep. Atty. Gen., amicus curiae for Attorney General.

George H. Downer, Asst. Atty. Gen., amicus curiae for Insurance Commissioner of Washington.

CARTER, Justice.

This is an action for declaratory relief with respect to an agreement of defendant and respondent to repurchase shares of its own stock previously sold to plaintiff and appellant. The case involves substantially the same issues as California Western States Life Insurance Company v. Pacific American Company, Ltd., 98 P.2d 511, and California Western States Life Insurance Company v. Tucker, 98 P.2d 511, this day decided. We are accordingly presenting the background of these three actions in this opinion. The essential facts, as found by the trial court in each case are practically undisputed and are amply supported by the evidence in the record. Since these facts are largely determinative of the issues, we set them forth in some detail.

Preliminary to any discussion of the transactions involved, it is necessary to identify the principal parties concerned. California State Life Insurance Company (herein called "California") was, prior to August, 1931, a life insurance corporation organized and doing business under the law of California. Its main office was in Sacramento. Western States Life Insurance Company (herein called "Western") was also a California life insurance corporation prior to August, 1931. Its main office was in San Francisco. Defendant and respondent, California Western States Life Insurance Company (herein called "California-Western" or the combined company"), is the former California State Life Insurance Company which changed its name after its purchase of the business and assets of Western States Life Insurance Company in 1931, this purchase having effected a practical consolidation of the two companies. J. Roy Kruse was the president of California who wished to acquire the business of Western, and acted for California during the period of the negotiations leading toward consolidation. The shares of Western were owned by some 1400 persons, including the following four large stockholders, who held in the aggregate 45 per cent thereof: Pacific American Company, Ltd., and American National Company, wholly owned subsidiaries of Goldman-Sachs Trading Corporation, owning 25 per cent of the shares. (American Trust Company, plaintiff herein, acquired the interest and rights of American National Company prior to this action.) Mrs. Nion Tucker, owning 5 per cent. (Mrs. Tucker took no active part in the transactions, being represented at all times by her husband.) A. D. King, president of Western and a director thereof, owning 15 per cent. Nion Tucker was president of Tucker, Hunter, Dulin & Co., a brokerage firm, also a wholly owned subsidiary of Goldman-Sachs Trading Corporation, president and a director of Pacific American Company, a director of American National Company, and a director of Goldman-Sachs Trading Corporation, during the period of most of the transactions; he was also a director of Western, and after the consolidation, a director in the combined company.

The transactions begin in the early part of 1931, when Kruse, president of California, desired to acquire the business and assets of Western, the larger company. He needed the consent of two-thirds of the shares, and therefore approached Tucker, who was not only a director of Western but associated in various ways with the other large stockholders, and who represented them in these negotiations. The two placed a valuation of $7,000,000 on the business and assets of Western, and with its 100,000 shares, this amounted to $70 for each share of Western stock. Kruse was unable to raise the cash, and thereafter proposed an alternative plan to pay $4,000,000 in cash, and stock in his company (California) of the par value of $500,000. The par value of California stock was $5 per share, but its market value at this time was $40 per share. The contemplated method of payment was to give each Western shareholder $40 cash, plus one-half share of California stock worth $20 at that time, or the equivalent of $60 for each Western share (which then was selling at between $46 and $56. California did not have the $4,000,000 in cash and it was intended that this sum should come from two sources: first, a new issue of California stock at its then market value, $40 per share (or $20 per half share), and second, (the major portion), from the cash and liquid assets of California itself and of Western after its acquisition. The plan thus outlined eventually became the general offer to the Western shareholders.

This plan, however, meant a valuation of $60 per share of Western instead of the original valuation of $70, and although this was considered acceptable in so far as the general offer to stockholders was concerned, Tucker and his principals refused to sell for less than the original $70 price. Accordingly, it was agreed between Kruse and Tucker that the four large stockholders would sell their stock for the regular price, namely, $40 cash plus one-half share of California stock then worth $20, but that California would agree to repurchase the California stock of these four at $30 per half share, $10 more than its market value at this time. The repurchase was to take place within two years, with 6 per cent interest to be paid by California on the repurchase price. The four stockholders owned 45 per cent of the Western stock, or 45,000 shares, for each of which they were to receive a half share of California stock to be eventually repurchased at $30, with interest. California, therefore, was to undertake a liability under the repurchase agreements of $1,350,000, or with interest, approximately $1,400,000.

Tucker, Hunter, Dulin & Co., for its brokerage services in negotiating the deal, was to receive a commission of $200,000 if it succeeded. This was ultimately paid, and thereafter part was divided by Tucker, Hunter, Dulin & Co., between two of its principals, namely, Mrs. Tucker, who received $25,000, and King, president of Western, who received $100,000.

The plan outlined above was then reduced to writing and carried out in several agreements and proposals as follows:

1. *Agreement between California and Tucker, Hunter, Dulin & Co.* On June 10, 1931, an agreement was made between California and Tucker, Hunter, Dulin & Co., in which California offered to pay for each share of Western stock deposited under the offer, $40 per share and one-half share of California stock, provided that at least 66,667 shares (being 2/3) of the stock of Western were deposited before October 1, 1931. This agreement provided in substance, (1) that California would make a general offer to Western stockholders (see infra); (2) that Tucker's firm as broker was to attempt to obtain deposit of as many Western shares as possible, for which California was to pay a commission of $200,000; (3) that California would issue 100,000 additional shares, of which a maximum of

50,000 would be available for the purchase of the Western shares on the one-half share basis, and the rest should be offered for subscription at $40 per share, the incoming Western shareholders being entitled to subscribe to 20,000 of the new shares on the basis of 2 new shares for every 5 California shares acquired under the purchase; and (4) the offer was subject to the condition that the transaction be approved by the state insurance commissioner (see below).

2. *General offer to Western stockholders, to buy their stock.* This document stated (1) that a plan of consolidation of the two companies had been devised, and offered to buy shares at the above mentioned price; it further stated (2) that the offer was subject to the condition that the insurance commissioner approve the transfer of Western's assets under a proposed agreement of sale and reinsurance; (3) that after consolidation there would be over $260,000,000 of insurance in force, over $45,000,000 of assets, and a paid-up capital of $1,750,000. This offer was, on June 12, 1931, sent to all Western stockholders by Western's secretary. Later, about July 1, 1931, the secretary addressed a further notice to stockholders, in which he said with reference to the general offer theretofore made: "The complete terms of the offer are set forth in that letter."

3. *General offer to Western stockholders of subscription rights in California.* This document recited the plan already described, and informed Western stockholders that if they sold their stock and received cash and California stock under the general offer, they would have the right to subscribe to two additional shares of California stock for every five shares they received. This offer was sent out by California.

4. *Agreement of sale and reinsurance.* This contract was made between California and Western, in which Western agreed to sell all its business and assets of every kind, in consideration of the payment by California for the credit of Western stockholders of $4,000,000 in cash, and 50,000 shares of California stock, which should be held by American Trust Company as depositary, for distribution to Western stockholders under the purchase agreement. California agreed to assume all liabilities of Western and to reinsure all policies. The agreement was made subject to approval of the insurance commissioner. Later, on August 19, 1931, he endorsed his approval thereon, finding the same to be in accordance with the law "and such as to protect the interest of all policy holders" of Western.

5. *Repurchase agreements.* Four agreements were made on June 10, 1931, contemporaneously with the Tucker, Hunter, Dulin & Co. contract, between California and each of the four large Western stockholders, providing that in the event that they sold their shares to California in accordance with the general offer, California agreed to repurchase them within two years at $60 per share (i. e. $30 per half-share) plus 6 per cent of the total sum (as interest), less any dividends declared on the repurchased shares.

We have thus far described the negotiations, the plan of purchase, and the instruments devised to carry it out. In all of the discussions Kruse acted by himself, without prior authorization by the California board of directors. Tucker also acted for his principals without authorization by the directors of Western. It therefore became necessary on June 10, 1931, when the Tucker, Hunter, Dulin & Co. contract and the repurchase agreements were signed, to obtain the approval of the two companies, and this constitutes the second stage of the transactions. For this purpose, Kruse met with the directors of California on June 12, 1931, and they authorized the Tucker, Hunter, Dulin & Co. agreement and the agreement of sale and reinsurance. At later meetings the issuance of the new stock was authorized. No one but Kruse and the then attorney for the company knew of the repurchase agreements, and Kruse made no mention of them. Some of the directors were led to believe that the company had or would receive an *option* to acquire stock, but no suggestion of an obligation to purchase any stock was made. Nor did Kruse enter these agreements in the corporate records or keep them with other documents of the company. He placed them in a private safe in his office to which he alone had access, and never disclosed their contents until 1933. The liability of about $1,400,000 under these agreements never appeared on the company's statements to stockholders, nor on the books, and was not disclosed to the insurance commissioner's representatives at the time of their examination of the books of the company.

Tucker met with the directors of Western on June 10, 1931. The plan was described, the general offer to purchase discussed, and the directors adopted a resolution ordering the secretary to send the same to the stockholders. At a subsequent meeting the agreement of sale and reinsurance was authorized. Of the thirteen directors who approved the purchase offer, only Tucker and those associated with him knew of the repurchase agreements. These were King, the president (one of the parties to the repurchase agreements), Lochead, vice-president and a director of plaintiff (American Trust Company), and Ford. They voted for the plan, but made no disclosure of the repurchase agreements.

The only record of these commitments which appeared anywhere was the entry by Pacific American Company in its books, and a general item in the Goldman-Sachs 1932 statement to its stockholders, which found its way into Moody's Manual, that the California-Western stock of Pacific-American Company was held "at contract sales price" of $60 per share. There was no mention of the repurchase agreements of the other stockholders, nor of the fact that California-Western was the buyer obligated under the contract referred to. None of the California-Western stockholders or directors other than those mentioned ever learned of the facts through these sources.

With approval of the companies thus obtained, the plan went into operation. Four directors of Western became members of California's board: Tucker, King, and Lochead (all of whom had knowledge of the whole transaction), and Hawley, holder of the proxy to vote the deposited Western stock (who did not have such knowledge). The four large stockholders deposited their holdings, and practically all the other Western stockholders also came in, so that by August 19, 1931, California owned substantially all of the outstanding Western shares. A meeting of Western stockholders was held and the sale of the business approved. The name of the combined company was changed to California-Western States Life Insurance Company. No disclosure was made to the stockholders of the repurchase agreements or the liability of the combined company under them. The plan was presented to the insurance commissioner and he approved the agreement of sale and reinsurance, but no disclosure of these facts was made to him. The capital stock was increased from 75,000 shares to 175,000 shares of the same par value and a permit was obtained from the insurance commissioner to issue the additional shares to subscribers, without disclosure of the repurchase agreements. The purchase was consummated by the deposit in escrow with American Trust Company, for Western stockholders, of 50,000 shares of stock and payment of the $4,000,000 in cash to Western. Of this sum, $2,000,000 was raised by the issuance of the new stock; $1,350,000 was taken from the assets of Western; and $400,000 of the balance was borrowed from American Trust Company.

The third development occurred in 1932 when Pacific American Company, needing money, entered into an agreement through G. Parker Toms, its then president, with Kruse, to satisfy its repurchase contract in advance of the due date at a discount. The agreement was evidenced by a letter from Kruse to Toms, dated July 8, 1932, in which Kruse, on behalf of California, stated that Pacific American Company's 5,025 shares of California-Western stock would be taken up not later than July 22, 1932, at $50 per share (or $25 per half share, instead of the $30 called for under the agreements), a total of $251,250. At this time the market price of the stock was $30 per share. Kruse made no disclosure of this proposed transaction to his company, and in order to carry it out made use of Westerlic corporation, a wholly owned subsidiary of California-Western, as a conduit. Westerlic corporation had been used by California-Western in occasional business transactions, but had no assets. The arrangement was that Westerlic corporation bought the shares and paid the money to Pacific American Company. Then Kruse had a loan made by California-Western to Westerlic in the amount of the purchase price. Later in 1932 Westerlic obtained a bank loan to repay California-Western. The details of the repurchase thus did not appear on the books or financial statement of California-Western, nor in its report to the Insurance Commissioner, and consequently the repurchase agreements still remained secret.

The fourth stage begins in 1933. The repurchase agreements were to become due June 10, 1933, and California-Western was financially unable to perform. In a letter dated May 31, 1933, to Lochead of American Trust Company, Kruse listed various losses of the company in its operations, stating that "we cannot afford to make any disbursements at the present time that will in any way have a possible bearing upon the security of the policyholders," and adding that "It is almost imperative that we secure the relief asked for." Discussions followed, and an agreement was reached under which California-Western was to pay one-half the amount due under the repurchase agreements of American Trust, King and Mrs. Tucker, and receive an extension of time as to the balance, giving its promissory notes therefor to become due on March 1, 1934, and January 1, 1935. Toms, president of American Trust Company, sent Kruse copies of the proposed agreements and promissory notes drafted by its counsel. Toms also requested, on advice of counsel, that California-Western adopt a resolution reciting that California-Western had earned surplus equal to the full amount of the purchase price and that the stock was being purchased from earned surplus, and further, that the resolution comply with section 421 or the Civil Code relating to investments of life insurance companies, calling for a ⅔ vote of directors, with entries in the minutes of the names of approving directors and other data.

To carry out this agreement a directors' meeting of California-Western was held on June 13, 1933, at which two-thirds, or seventeen directors were present. At this meeting the repurchase agreements were first disclosed to the board of California-Western, and the new agreement calling for partial payment was explained. The directors who had previous knowledge of the facts were Kruse, Tucker, Lochead, and a few others who had learned of them from Kruse at times prior to the meeting. The other directors were without any prior knowledge. In response to objections and protests by directors Gibbons and Grimshaw, Kruse stated that the repurchase agreements were binding and that the company had no alternative. The then counsel for the company was present and likewise advised that they were binding and it was necessary to comply with them. Thereupon the board voted to adopt the resolutions authorizing the partial payment and promissory notes for the balance in conformity with the agreements drawn by counsel for American Trust Company. The agreements were signed, the part payment made, and the notes delivered, following which the three stockholders (American Trust Company, King and Mrs. Tucker) turned in their stock. Half of the stock was, however, deposited with American Trust Company in pledge to secure the promissory notes. The cash with which the half-payment was made was procured in part as a loan from American Trust Company. At the time of this transaction involving the partial performance of the repurchase agreements calling for a price of $60 per share, the market price of the stock was $20 per share.

The fifth and final stage began at the end of 1933 when other stockholders discovered the facts surrounding the repurchase agreements. In response to their demands the directors authorized suits to recover money paid under the repurchase agreements. Accordingly, California-Western, on December 5, 1933, disaffirmed the repurchase, the payments and the notes, gave notice of cancellation of the agreements, offered to return the certificates and to pay any dividends thereon from June 13, 1933. This was refused, and California-Western thereupon, as plaintiff, filed two actions, one against Pacific American Company, and the other against Mrs. Tucker. American Trust Company filed the present action as plaintiff, against California-Western, seeking declaratory relief with respect to the agreements. No suit was brought against King, for in 1933 he voluntarily agreed to set aside his contracts, and restored the money he had received, including his share of the commissions obtained through Tucker, Hunter, Dulin & Co. for the original negotiation of the deal.

The three cases were tried separately, separate findings were made in each, and separate appeals were taken. Nevertheless, as we have already stated, the basic issues and the evidence are the same and we have chosen to discuss them fully in this opinion.

The trial court in the instant case made comprehensive findings setting forth the facts summarized above, and further found as follows:

That it was not the intention or understanding of the parties that the agreements of June 10, 1931, should constitute one contract, or that the performance of the Tucker, Hunter, Dulin & Co. contract of sale and reinsurance contract were dependent on consummation of the repurchase contract; but the intention and understanding was that these several agreements were independent, severable, and to be performed separately.

That Kruse was not authorized to enter into the repurchase agreement on behalf of the corporation, and that California's board of directors did not at the meeting of June

12, 1931, or at any other time authorize, approve or ratify the repurchase agreement.

That none of the other stockholders of Western, when depositing their stock or subscribing for shares of the new issue, knew of the repurchase agreements, but all believed and were not otherwise advised or informed, that the four large stockholders were depositing and subscribing strictly according to the terms of the general offer and on the same basis as the others.

That the repurchase agreement with American National Company was a secret and undisclosed stipulation modifying its subscription to the 7150 additional shares, to the detriment of all the other subscribers, and to the detriment of defendant, California Western States Life Insurance Company, and its creditors and was prohibited by statute and was a fraud upon said defendant and all of its stockholders.

That the repurchase agreement became effective and irrevocable on July 14, 1931, when over two-thirds of the Western stockholders deposited their shares; and that up until August 14, 1931, said agreement to repurchase was in violation of section 354 of the Civil Code, and void for illegality.

That at the directors' meeting of June 13, 1933, Tucker and Lochead who voted for the resolution were both at that time directors of American Trust Company (plaintiff), which company was interested in the repurchase both of its shares and those of Mrs. Tucker which it held as collateral security.

That at said directors' meeting of June 13, 1933, there was no disclosure of the interests of Lochead and Tucker, nor were they noted in the minutes; nor, despite their knowledge of the facts, was it disclosed that the repurchase agreements had never been authorized or ratified by the directors or stockholders; or that defendant did not have at this meeting date adequate earned surplus to make the purchase; or that the expenditure of these sums would seriously impair its financial condition and embarrass it in its operations; or that it would be necessary to borrow (and it did borrow) $400,000 from plaintiff (American Trust Company); or that the purchases would amount to more than 25 per cent of defendant's capital and surplus and would exceed 30 per cent of its total capital; or that defendant had suffered heavy losses and the market price of its shares was not over $20 per share.

That on said date of June 13, 1933, the combined company did not have any earned surplus at all; that the price paid for the stock was three times its market value; that this payment amounted to more than 25 per cent of the capital and surplus and more than 30 per cent of the total capital of the company.

That the repurchase agreements were not reported to the insurance commissioner or approved by him at the time; nor were they reported to or approved by the stockholders, nor known to all of the directors.

That the resolution purporting to authorize the repurchase was not regularly or legally adopted and was void; that the payments and notes given are not binding, and are illegal and void; that the repurchase was a withdrawal and distribution of a substantial part of its assets to one stockholder to the exclusion of others, and was a fraud on the stockholders, its creditors, and against public policy and void.

That the consummation of the repurchase substantially reduced and depleted the assets of the combined company, entirely exhausted its surplus, undivided profits and reserves, necessitated a reduction in the capital stock by the amount of $875,000 and correspondingly reduced the value of its outstanding shares to the direct injury of the corporation and all other stockholders and creditors, and rendered it unable to meet its obligations without said reduction of capital.

Judgment was accordingly rendered for California-Western in each case for the amount of the payments made under the repurchase agreements, with interest from June 13, 1933, and for the cancellation of the promissory notes. The stockholders were permitted to receive back the repurchased shares, together with dividends declared after the repurchase, with interest thereon.

Appeals were taken by each of the losing parties, and the attorney general also filed a brief on behalf of the insurance commissioner in support of the judgment. Various legal propositions have been discussed, but in our opinion, the controlling issue is that of fraud, and on that issue the sole question is whether the findings, based on practically undisputed evidence, support the judgment. On the issue of illegality, which was argued in considerable detail in the briefs, it may be noted that the repurchase agreements, which the court found were made before the 1931 Civil Code amendments went into effect, were illegal and void; but the amendment to section 365 of the Civil Code in that year limited the remedy to the setting aside of the purchase to the extent necessary to meet "existing liabilities of the corporation at the time of such sale". St.1931, p. 1816. What obligations constitute "existing liabilities" is greatly disputed. The trial court made no finding on this latter point, and the record is not, we believe, sufficiently clear for us to determine it without a retrial on the issue. Since, however, we hereinafter hold that the judgment is supported by the evidence and findings of fraud, it becomes unnecessary to decide this question of illegality. We therefore refrain from doing so, and proceed now to the discussion of the issue of fraud.

The manner in which the agreements, the subscriptions, and the transfer of assets, were procured, involving concealment and misstatement of material facts, relied upon by the stockholders and directors of both companies, and by the insurance commissioner, so clearly appears from the evidence and findings that fraud is an inevitable conclusion. Appellants, however, without disputing the essential facts, have presented a number of legal defenses thereto.

The chief defense is that there was no actual fraud, in the sense of active misrepresentation, but only nondisclosure, which does not amount to constructive fraud unless the party is a fiduciary with a duty to disclose the facts. They rely chiefly on Ryder v. Bamberger, 172 Cal. 791, 158 P. 753; McCord v. Martin, 47 Cal.App. 717, 191 P. 89; and Bacon v. Soule, 19 Cal.App. 428, 126 P. 384, which, they contend, stand for the general proposition that a corporation director owes no fiduciary obligation to the stockholder as such, but only to the corporation. Hence they conclude that nondisclosure by Kruse, Tucker and the others in their dealings with their own stock, and their nondisclosure of the repurchase agreements to the other Western stockholders, was not fraudulent because there was no duty to disclose.

The doctrine upon which appellants rely, which is said to be the majority rule, is in substance that a director is a fiduciary with respect to the corporation as an entity, and not to the stockholders as individuals. Otherwise expressed, it is that in dealings with or for the corporation, the director is exercising a corporate function, and is subject to the usual fiduciary duty to disclose all material facts; but that in personal dealings with stockholders he is not exercising a corporate function, and is free to deal with them at arms' length. Nearly all of the cases applying the rule are concerned with transactions for the purchase of stock between director and stockholder, and they hold that the director need not disclose to the stockholder his special knowledge affecting the value of the shares. See, generally, Carpenter v. Danforth, 52 Barb., N. Y., 581; Crowell v. Jackson, 53 N.J.L. 656, 23 A. 426; Connolly v. Shannon, 105 N.J. Eq. 155, 147 A. 234; Du Pont v. Du Pont, D. C., 242 F. 98; 13 Am.Jur. § 1010; 84 A.L.R. 615; Walker, 32 Yale L.J. 637. In sharp contrasts with this view is the so-called minority rule, which recognizes the director's obligation to the stockholders individually as well as collectively, and refuses to permit him to profit at the latters' expense by the use of information obtained as a result of his official position and duties. This view, while generally conceded to be in the numerical minority, is followed by able courts, and text-writers who have examined the subject. See, e. g., Dawson v. National Life Ins. Co., 176 Iowa 362, 157 N. W. 929, L.R.A.1916E, 878, Ann.Cas.1918B, 230; Oliver v. Oliver, 118 Ga. 362, 45 S.E. 232; Stewart v. Harris, 69 Kan. 498, 77 P. 277, 66 L.R.A. 261, 105 Am.St.Rep. 178, 2 Ann.Cas. 873; Ballantine, Private Corporations, § 125; Stevens on Corporations, § 145; 3 Pomeroy, Equity Jurisprudence, § 1090; 19 Corn.L.Q. 103; 45 Harv.L.Rev. 1388; 39 Yale L.J. 582.

But this simple statement of the majority and minority rules does not present the true picture, for a number of jurisdictions which are classed in support of the majority view have recognized a major exception in the so-called "special facts" doctrine: Conceding the absence of a fiduciary relationship in the ordinary case, they nevertheless hold that where special circumstances or facts are present which make it inequitable for the director to withhold information from the stockholder, the duty to disclose arises, and concealment is fraud. The leading case is Strong v. Repide, 213 U.S. 419, 29 S.Ct. 521, 53 L.Ed. 853, which points out that active participation in the negotiations for a transfer of the corporate property may constitute the special circumstances to raise the duty. This case has been followed by many others. Thus, in Poole v. Camden, 79 W.Va. 310, 92 S.E. 454, 457, L.R.A.1917E, 988, the court concedes the correctness of the majority rule, but holds that if the director, instead of remaining silent, gives information to the stockholder, i. e., "undertakes to speak or *become active in inducing the sale,* he must *speak fully, frankly, and honestly, and conceal nothing* to the disadvantage of the selling stockholder". To similar effect are Dutton v. Barnes, 162 Minn. 430, 203 N. W. 414; Bollstrom v. Duplex Power Car Co., 208 Mich. 15, 175 N.W. 492; Gammon v. Dain, 238 Mich. 30, 212 N.W. 957; McMynn v. Richardson-Phenix Co., 186 Wis. 442, 201 N.W. 272; Voellmeck v. Harding, 166 Wash. 93, 6 P.2d 373, 84 A.L.R. 608, all of which expressly recognize the majority rule as ordinarily applicable, but follow the exception declared in Strong v. Repide, supra. In Goodwin v. Agassiz, 283 Mass. 358, 186 N.E. 659, 661, the Massachusetts court, long committed to the majority rule, applied it where a director purchased shares on a stock exchange, but Rugg, C. J., added this warning: "On the other hand, directors cannot rightly be allowed to indulge with impunity in practices which do violence to prevailing standards of upright business men. Therefore, where a director personally seeks a stockholder for the purpose of buying his shares without making disclosure of material facts *within his peculiar knowledge and not within reach of the stockholder,* the transaction will be closely scrutinized and relief may be granted in appropriate instances" (citing Strong v. Repide, supra). See, also, notes, 47 Harv.L.Rev. 353; 19 Corn.L.Q. 103; 14 Minn.L.Rev. 530; 13 Am.Jur., § 1011; 3 Fletcher, Corporations, Perm.Ed., § 1171.

Having seen that the so-called "majority" rule for which appellants contend is subject to important limitations and exceptions even in jurisdictions which follow it, while the so-called "minority" rule has the strong support of a number of courts and distinguished writers, we proceed now to examine the three California cases so heavily relied upon for a reversal herein. Upon such examination we find that each case is entirely supportable on its facts, but is clearly distinguishable from the instant case.

In Bacon v. Soule, 19 Cal.App. 428, 126 P. 384, the first of the group, plaintiff Frank Bacon and his two sisters were the owners in equal shares of the entire capital stock of the Bacon Land and Loan Company, a small corporation, of which they were directors and officers. They quarreled bitterly over policy, maintained no friendly relations, and finally decided to abandon the business, dissolve the corporation and partition its properties. This was done and plaintiff received as his share a lot and dwelling house with an agreed valuation of $30,000. Thereafter he sued, alleging that the house had originally contained furnishings worth $2,000 which he believed were still in place but which had been previously sold by the corporation and removed, and that this fact had not been disclosed to plaintiff by defendants. He relied on theories of confidential relationship arising out of their blood relationship, and their business "partnership". The lower court sustained a demurrer to the complaint, and the decision was affirmed on appeal. The appellate court pointed out the following matters, all of which are in sharp contrast to the facts of the instant case: (1) The parties were hostile to each other for ten years, dealt at arm's length, had no personal communication or dealings with each other, and hence *plaintiff had no reason to place any confidence in the defendants,* and they had no reason to suppose that he did. (2) It did not appear that the defendants by words or artifice induced the belief that the property was in the same condition in which plaintiff originally saw it. (3) Plaintiff accepted the property without making any investigation or inspection of its contents, *which were entirely open to him.* The court then briefly mentioned the rule that directors are trustees only in respect of their acts relating to the property or business of the corporation, and concluded that the defendants were dealing with plaintiff *as individuals in a transaction purely personal to each of them.*

The next case is Ryder v. Bamberger, 172 Cal. 791, 158 P. 753. Plaintiff was a minority stockholder in the Salt Lake Oil Company of California. Defendants Wood, Bamberger and Price were officers and directors, owning a majority of the stock. Plaintiff's theory was that they conspired to incorporate the Amalgamated Oil Company, as a holding company, half the stock of which was to be owned by Associated Oil Company, a large and prosperous corporation; that they induced the minority stockholders of Salt Lake Oil Company to sell their stock for $2 per share, by depositing it with an escrow holder, representing that the Salt Lake Oil Company was in bad condition, and that they, the majority stockholders and directors, had accepted the same offer. Plaintiff sold his stock, and later the Amalgamated Oil Company prospered and its stock greatly increased in value. Plaintiff contended that the fiduciary relation between defendant directors and himself made it their duty to disclose the entire details of the Amalgamated Oil Company transaction, and that their failure in this respect was fraud. Judgment went for defendants, and was affirmed on appeal. Comparing this with the instant case, the following distinctions may be noted: (1) The trial court found that *every representation made by defendants was fair and true,* and that the company was in bad condition. (2) The evidence showed and the trial court found that the representative of Associated Oil Company, negotiating with defendants for the formation of Amalgamated Oil Company, had no interest in buying out the minority shares of plaintiff and others, but contemplated "squeezing" them out by subsequent assessments on their stock; and that *defendants insisted on the offer to the minority stockholders for the protection of such stockholders,* and refused to go into the deal until that offer was made. (3) The price received by defendants *was no greater than that received by plaintiff,* and the increase in value of the Amalgamated shares was largely due to a valuable gusher which developed on other land previously owned by defendants which they had transferred to Amalgamated Oil Company in which land plaintiff never had any interest whatsoever. (4) *Disclosure* of the details of the Amalgamated deal would have been *of no value* to the minority stockholders since they could not have come in had they wanted to; instead of sale of their stock being necessary, it was in fact not wanted at all, and only the insistence of defendants resulted in an offer to purchase, rather than a squeeze-out. These are the facts, as found by the trial court and related in the opinion. The court then goes on to say that it is "unnecessary" to consider such cases as Strong v. Repide, supra (which expounds the "special facts" exception), and that there is "as little need" to consider the line of authority that directors are not bound to acquaint stockholders with all the facts. In other words, the reference to the "majority" rule by the court is no more an approval of it than its mention of the rule of Strong v. Repide, and the case was actually decided on the evidence and findings, that defendants acted in good faith and for the interests of the plaintiff as well as for themselves, and that plaintiff suffered no damage as a result of the alleged nondisclosure.

The last case is McCord v. Martin, 47 Cal.App. 717, 191 P. 89. Plaintiff, a stockholder in Lost Hills Mining Company, alleged that defendant Martin knew that a prospective buyer wished to purchase 20,000 shares at more than $5 per share; that defendant Martin and appellant Lindemann represented to stockholders that they knew someone who would buy 20,000 shares at $5 per share, and that defendants would join with the others in pooling their shares to reach that amount; that the pool was made in reliance upon those representations, and that the buyer, under a secret agreement with defendants, bought all the stock at $8 per share, of which plaintiff and the others received but $5 per share. The court said: "If these facts had been shown and found it could hardly be seriously argued that plaintiffs were not entitled to a judgment against defendants. The proper legal characterization of the transaction might be in some doubt, but at any rate the principles of equity as formulated in the code and administered by the courts are ample to reach and defeat such iniquitous conduct." But the trial court found *against these allegations,* concluding that Lindemann knew nothing of the arrangement. It was further asserted by plaintiff that Lindemann was secretary of the corporation; that he received a letter from Mercantile Trust Company stating that if a client of theirs purchased a majority of the stock, the said client would pay Lindemann $15 per share for his shares. Subsequently this was done, and plaintiff contended that Lindemann should have disclosed to the other stockholders his receipt of this letter. But the court pointed out these facts, distinguishing it from our present case: (1) The stockholders placed *no reliance whatsoever on any representations of Lindemann,* but were influenced by Martin, and that Lindemann knew nothing of the plans of Martin and did not aid them in any way. (2) Lindemann was not even a director, but the secretary, a mere *ministerial officer.* The court does say that in Ryder v. Bamberger it was *held* that directors are not bound to acquaint the stockholders with facts concerning the shares, but, as we have already shown, the Ryder case does not so hold, nor does it even approve the rule by dictum, but merely refers to it in passing.

A brief reference to the above three cases was made in Robbins v. Pacific Eastern

Corp., 8 Cal.2d 241, 256, 65 P.2d 42, but the case was decided on other grounds.

These are the cases which appellants say will sanction the concealment and misrepresentation practiced in this case. We have already pointed out some of the more obvious differences in their facts; but there are other, more basic distinctions which we now come to consider. In this connection, we may observe that the question is still open in this state as to whether we shall follow the majority rule, the majority rule as modified by the "special facts" doctrine, or the minority rule; and a decision on this question would be immaterial here. For the purposes of this opinion, we may apply the strictest form of the majority rule, and still the conduct of the parties herein finds no justification. Appellants have, to make their case fit the rule assumed a state of facts at variance with the record, and we now proceed to an analysis of these fundamental differences which render their argument without substance.

[1, 2] In the first place, *this is not a case of individual dealings* by a director with a stockholder to buy his stock. Kruse and Tucker did not solicit the Western stockholders to sell or buy from them personally, concealing special knowledge which they had concerning the transaction. It was the corporation, California, which did the soliciting, buying, issuing of new stock, and later the repurchasing from the favored stockholders. Kruse and Tucker were acting for their corporations in these matters, not for themselves; they committed the corporations to the agreements, and fastened the liabilities upon them. Tucker was also acting for Western, and his activities resulted in that corporation's soliciting its stockholders to come into the deal. Nor was this a mere purchase or issuance of stock. The entire object was to *purchase the business and assets* of Western; the stock transactions were used as a means to accomplish that end. The general offer to Western stockholders, summarized above, characterized the proposal as one that the businesses "be consolidated", and declared: "The plan under which such a consolidation might be consummated has been carefully considered." The offer further asserted that certain business advantages would result "after the consolidation", and declared the intention to change the name of California thereafter to reflect the presence of both original institutions. Furthermore, an essential agreed condition to the entire transaction was the approval by the insurance commissioner of the transfer of assets, indicating clearly that the parties never had the slightest intention of buying and selling stock except as a means of accomplishing the real object, a merger of the two companies. It is impossible, therefore, to perceive any application of the doctrine relied upon by appellants, even in its most extreme form. Every important phase of the transaction herein involved corporate acts; in every development the corporations, as entities, were involved and their interests affected; and in each act prior to the 1933 discoveries, both corporations acted without knowledge of the material facts, which facts were concealed by these directors. The case therefore comes within the settled principle that a corporation director *owes to the corporation* the highest fiduciary obligation and the fullest duty of disclosure. To this doctrine there is no dissent whatever. See 3 Fletcher, Corporations, Perm.Ed., § 838, 884; Ballantine, Private Corporations, § 122a; Stevens on Corporations, § 142; 13 Am.Jur. § 997; 3 Pomeroy, Equity Jurisprudence, 4th Ed., § 1090; Dunnett v. Arn, 10 Cir., 71 F.2d 912.

This basic distinction between individual purchases from stockholders, and transactions for the purpose of acquiring the corporate assets, is illustrated in an important and well-considered case by the Circuit Court of Appeals, Dunnett v. Arn, supra, closely similar in its facts to the instant case. Plaintiffs were minority stockholders of Operators Oil Company. Defendants Cloud and Dunnett were president and secretary of the corporation and majority stockholders. Sunray Company wanted a valuable oil lease belonging to the corporation. Defendants devised a plan for Sunray Company to buy all its capital stock and contracted to deliver their own shares. Defendants then wired the minority stockholders that they had sold their own shares and advised the minority to accept an offer for their shares then being mailed to them. Various minority stockholders accepted, believing the majority had sold on the same basis. Later they sued on the ground that defendants had received a higher price per share. Relief was granted and on appeal the judgment was affirmed. The court mentioned the conflicting rules, characterizing the nondisclosure rule as the weight of authority, but pointed out that the case did not come within the scope of the rule *because the contract contemplated* *that Sunray Company should acquire all the stock of Operators Company.* The court said (71 F.2d at page 918): "While in form the plan provided for a sale by the stockholders of their individual stock, in substance it was a sale by the Operators Company of its assets to the Sunray Company. It was therefore in substance and effect a *corporate transaction.*" That this case is not a minority rule decision is made clear in the opinion, and also by a later decision of the same court, Roby v. Dunnett, 10 Cir., 88 F.2d 68, 69, which arose out of the same transaction. Referring to the majority rule the court said: "We noted that rule in our former opinion. We adhere to it."

The same analysis and conclusions appear in Commonwealth Title Ins. & Trust Co. v. Seltzer, 227 Pa. 410, 76 A. 77, 136 Am.St.Rep. 896, where defendants, president and a director of a corporation having its capital invested in a valuable piece of real estate, made a contract with an agent of another corporation giving him an option to buy the controlling shares, and thereafter defendants acquired the shares and sold them to the agent at a profit. The object of the purchaser was to obtain the land. In holding that defendants must account for their secret profits, the court said (227 Pa. 410, 76 A. at p. 79, 136 Am.St.Rep. 896): "It is quite true that the profits in the present case were made to appear on the surface as not coming from the sale of the property of the corporation; but, as all the facts show that the purchaser only wanted the real estate, and not the control of the franchise of the corporation, there is little or no doubt that the profits paid to the two defendants were considered by the purchaser as part of the cost of the real estate. * * * The conclusions of the court below were reached, and are here sustained, on the peculiar facts in this case, *with a full and express recognition of the general rule that a stockholder, even though he be one of the managing officers of a corporation, has the right to buy and sell its stock and to keep any profits which he may thus acquire.* But corporation officers *cannot under cover of this rule carry through a transaction such as appears in this case without accounting for profits thereby diverted from their corporation.*"

The second fundamental reason which makes the protection of the majority rule unavailable is that this is not a case of mere nondisclosure, but of *suppression* of facts and *active misrepresentations.* Appellants have assumed, in their assertion of the doctrine that the director owed no duty of disclosure here, that the only fraud charged was constructive nondisclosure by a fiduciary. In fact, the evidence established and the court found actual fraud. Kruse and his associates did not merely solicit these transactions without making any representations about their nature. On the contrary, they made or authorized a great many statements, to the directors, to the stockholders, and to the insurance commissioner; and in every important instance their description of the transaction was false. Kruse related the details of the deal to his board, and failed to tell all of the details; he spoke of options, knowing that these were in reality repurchase agreements; he authorized applications to the insurance commissioner which did not tell all the facts; and permitted the corporation books and financial statements to falsely represent the actual condition of its finances, and its commitments and liabilities. Tucker described the deal to his board without telling the whole truth, and permitted the secretary of Western to state to the stockholders that the complete terms of the offer were set forth in the general letter, knowing that this was not true, and that in fact the Western stockholders who subscribed to the new issue of stock were coming into a company with a concealed liability of $1,400,000, 80 per cent of the amount of paid-up capital ($1,750,000) represented in the general offer.

[3] This is actual fraud. Regardless of whether one is under a duty to speak or disclose facts, one who does speak must speak the whole truth, and not by partial suppression or concealment make the utterance untruthful and misleading. This doctrine is declared by our Civil Code (sec. 1710, subd. 3), and is everywhere recognized as a sound rule of law. See Harper on Torts, § 219; Sullivan v. Helbing, 66 Cal. App. 478, 226 P. 803. For example, in Sullivan v. Helbing, supra, where the parties were negotiating for an exchange of real property, defendants stated that their property was under lease for a rental of $155 per month. They failed to disclose the fact that they were regularly accepting a lesser sum from the tenant. The court held that the representation, though literally true, was actually rendered deceptive and fraudulent by the concealment. The

very cases which lay down the majority rule on lack of a duty of disclosure on the part of a director recognize the clear difference between mere nondisclosure of personal knowledge, and concealment or misrepresentation; and all concede that the latter is actionable. See the cases cited above, and 3 Fletcher, Corporations, Perm. Ed., § 1172; Stevens on Corporations, § 145; 13 Am.Jur., § 1011; note, 45 Harv.L. Rev. 1078.

The final distinction is that this is not merely a case of fraud between two parties to a transaction, whereby one was induced to act or enter into it by the fraud of the other. The transaction herein involves an *agreement* between several parties to defraud others. The plan of operation involved misrepresentation of the actual deal to the stockholders of Western. The representation that the general offer was the complete offer was deliberately made to induce them to come in; and a number of stockholders, including some directors and officers, testified that they relied on these representations and the apparent fact that the four large stockholders were accepting the same offer. This evidence was overwhelming, and the court so found, as above stated.

The evidence and findings bring the case within the general principle that an *agreement to defraud third persons* is illegal and void. See, generally, 6 Williston on Contracts, Revised Ed., § 1738, p. 4912, collecting the authorities; Bacciocco v. Transamerica Corporation, 2 Cal.App.2d 595, 38 P.2d 417; Clifton v. Tomb, 4 Cir., 21 F.2d 893, 900.

Other defenses raised by appellants on the issue of fraud, only two of which require discussion, are equally unsound.

[4] The first one is that California-Western, the combined company, is the wrong party to sue for the fraud on Western stockholders. The assumption here is that the only fraud was in paying the four favored stockholders a higher price, in effect, than the other stockholders, to the injury of the stockholders who get less than they were entitled. This is a misconception of the situation. The general offer was entirely fair and proper, and the general transaction, with the exception of the repurchase agreements, was approved by all, including the insurance commissioner. The Western stockholders were not entitled to any more; the favored four merely received too much, and the payments made under the repurchase agreements came from the combined company, California-Western, the assets of both of the original companies being used to raise the money. This part of the fraud consisted in fastening upon California-Western an unwarranted liability, and it was the corporation as such, and not the individual stockholders, who suffered the injury. It is true that some of the misrepresentations were to the stockholders generally, but others were to the directors of the two corporations. And regardless of whether the actual misstatements were made to individuals or to the directors acting for the corporation, all the misstatements were made for the purpose of *accomplishing the transfer of assets,* and concurrently fastening the secret liability *upon the combined company to be formed.* The objection that the combined company cannot sue is therefore without any force: the representations were intended to *induce action by that company.* The governing rule in such a situation was fully discussed by this court in Crystal Pier Amusement Co. v. Cannan, 219 Cal. 184, 25 P.2d 839, 91 A.L.R. 1357, where false representations concerning construction materials were made to officers of a corporation, which in reliance upon them built an amusement pier. Later the same individuals organized another corporation to build structures on the pier. It was held that the second corporation could sue for the fraud, notwithstanding the fact that it was not in existence at the time the representations were made. The court, upon a full review of the authorities, concluded that fraud, to be actionable, need not consist of representations made directly to the parties seeking recovery; but that representations made to one person, with the intention that they reach another and be relied upon by him, are actionable by that other.

[5] It should be noted that in the foregoing case there was not even an assignment of rights by the first corporation to the second. In the instant case, the agreement of sale and reinsurance assigned to California-Western all choses in action of Western. It is, of course, well settled in California that the right to recover money or property obtained by fraud may be thus assigned. Jackson v. Deauville Holding Co., 219 Cal. 498, 27 P.2d 643; see, also, Crystal Pier Amusement Co. v. Cannan, supra, 219 Cal. at page 187, 25 P.2d 839, 91 A.L.R. 1357. It should further be noted

that we hereinafter hold this transaction to constitute a fraud on the policyholders of the combined company, and it seems obvious that the corporation must be the proper party to sue in their behalf.

[6] The other contention is that there was no fraud because there was no discriminatory treatment of the Western shareholders; that the four large shareholders got no better bargain but only a different one, and that it was Kruse who wanted the right to repurchase, instead of the four shareholders who wanted the right to resell. It is sufficient to point out that all the evidence is against this interpretation, and the record shows clearly, as the court found that the agreements were a condition insisted on by the four large shareholders. It was all to their advantage, for the price was higher than the then market value. If the stock went down they were protected; if they believed it would go up they could simply buy more shares in the market (or subscribe to some of the new issue). In other words, they could subscribe to new stock at $40 per share, holding meanwhile the contract of California to repurchase the other stock held by them at $60 per share. And that is, in truth, what they did; they all subscribed to their allotted new shares at $40, and Pacific American Company immediately resold its new shares at a $2 profit.

[7, 8] There is finally, a much graver fraud committed in this case than that hereinbefore discussed, namely, the fraud on the policyholders of the companies. A life insurance company is something more than an ordinary business corporation, and its policyholders are not ordinary creditors. The directors of such a corporation cannot say that they owe fiduciary duties only to the corporate entity as such. The statutes of this state and the states generally contain the most positive assertion of duties owed to policyholders, and declare in unmistakable terms the public policy of this state to protect them from any such abuses by those entrusted with the management of their companies. The insurance commissioner, as their representative, is charged with the duty of regularly scrutinizing the financial affairs of the corporation, and of approving or rejecting plans for the issuance of stock, or the purchase of assets. See Vance on Insurance, 2d Ed., p. 29. In such a crucial change as the complete absorption of one company by another, it is of the highest importance that the commissioner be possessed of all facts concerning the assets and liabilities involved, and the law expressly requires the presentation of those facts to him, and his approval, before such action may be taken.

The instant case exhibits a course of fraudulent misstatement and concealment in reports, books, and records of the company, designed to procure the approval of the transaction by the commissioner, and ultimately succeeding in that object. As a result of the fraud, the commissioner unknowingly approved a deal involving a secret liability which impaired the capital of the company and seriously threatened the interests of its policyholders. Kruse admitted this danger in his letter to Lochead in 1933; the court below so found; and the fact that in 1933, despite the unexpected restoration by King of his share of the repurchase money and commissions, the company was compelled to reduce its capital from $1,750,000 to $875,000 to avoid a deficit, speaks for itself. The witness Rouble, chief examiner of the insurance commissioner, testified that if the repurchase agreements were known, and taken into consideration, the company's reserves would have been deficient in 1931. Instead, the report of the commissioner in 1932 showed a surplus of $1,000,000 which the $1,400,000 secret liability would have changed into a showing of impaired capital.

The fact that this condition no longer exists today, and that the corporation is today financially sound, is, of course, no defense for the appellants.

It is our conclusion, therefore, that the judgment of the trial court herein was correct, and it is hereby affirmed.

We concur: WASTE, C. J.; GIBSON, J.; SHENK, J.; CURTIS, J.; EDMONDS, J.; GOODELL, Justice pro tem.

CALIFORNIA WESTERN STATES LIFE INSURANCE COMPANY (a Corporation), Plaintiff and Respondent, v. PACIFIC AMERICAN COMPANY, Limited (a Corporation), Defendant and Appellant.

S. F. 16026.

Supreme Court of California.

Jan. 22, 1940.

Rehearing Denied Feb. 19, 1940.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Prior opinion, 76 P.2d 208.

Chickering & Gregory and Stephen R. Duhring, all of San Francisco, and Bauer, Macdonald, Schultheis & Pettit, Macdonald, Schultheis & Pettit, and Fred E. Pettit, Jr., all of Los Angeles, for appellant.

Williamson & Wallace, of San Francisco, Ingebretson, Ray, Rawlins & Christensen, of Salt Lake City, Utah, Ware & Ware, of Chico, Downey, Brand & Seymour and Stephen W. Downey, all of Sacramento, and James D. Adams and McCutchen, Olney, Mannon & Greene, all of San Francisco, for respondent.

Neil Cunningham, Deputy Atty. Gen., amicus curiæ for Attorney General.

George H. Downer, Asst. Atty. Gen., amicus curiae for Insurance Commissioner of Washington.

CARTER, Justice.

This is a companion case to American Trust Company v. California Western States Life Insurance Company, 98 P.2d 497, and California Western States Life Insurance Company v. Tucker, 98 P.2d 511, this day decided. The factual background and legal issues involved in the instant case have been fully discussed in the opinions in the foregoing cases, and are therefore not repeated here.

The appellants in these cases have called to our attention the case of Gallagher v. Pacific American Company, 9 Cir., 97 F.2d 193, in which a stockholder of California-Western brought a representative suit against defendant herein to recover the share of the commission which it had received from Tucker, Hunter, Dulin & Co. The complaint was dismissed for failure to state a cause of action. We are not concerned in the three present cases with the validity of the commission agreement or the right of those stockholders who received portions of the commission to retain the money. Consequently the Gallagher case is not relevant here.

For the reasons stated in the above-mentioned opinions, the judgment of the trial court herein is affirmed.

We concur: WASTE, C. J.; GIBSON, J.; SHENK, J.; CURTIS, J.; EDMONDS, J.; GOODELL, Justice pro tem.

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15 Cal.2d 69

CALIFORNIA WESTERN STATES LIFE INS. CO. v. TUCKER.

S. F. 16027.

Supreme Court of California.

Jan. 22, 1940.

1. Insurance ⚷47

Where, pursuant to purported general offer to give cash and stock for stock in another company, insurance company effected consolidation, but stockholders of other company, insurance commissioner, and certain directors were not informed by president and two directors who had knowledge of agreement to repurchase stock given to certain stockholders of other company, repurchase agreement was not enforceable on ground that consolidated corporation's stock was given to stockholders of other company as pledge to secure deferred payment of stock sold to effect the consolidation.

2. Action ⚷32

The form of action is immaterial if the cause of action is actually stated since the doctrine of "theory of the pleading" has been repudiated.

3. Insurance ⚷47

An action for money had and received against a shareholder who received money under a void agreement made with corporation to repurchase stock given shareholder in effecting consolidation of insurance companies was proper as against contention that action should be for damages, since form of action was immaterial as long as a cause of action was actually stated.

4. Insurance ⚿47

Where agreements to repurchase stock in consolidated insurance company were unenforceable and consolidated company was entitled to recover partial payments and stock, cancellation of notes given for the purchase price necessarily followed.

◆

In Bank.

Appeal from Superior Court, City & County of San Francisco; Daniel C. Deasy, Judge.

Action by the California Western State Life Insurance Company against Phyllis DeYoung Tucker with respect to the right of the plaintiff to recover payments made by it under contract to buy stock issued by it. From a judgment for the plaintiff, defendant appeals.

Affirmed.

Prior opinion, 76 P.2d 209.

Garret W. McEnerney and Andrew F. Burke, both of San Francisco, for appellant.

Williamson & Wallace, of San Francisco, Ware & Ware, of Chico, Downey, Brand & Seymour, of Sacramento, McCutchen, Olney, Mannon & Greene, of San Francisco, Stephen W. Downey, of Sacramento, and James D. Adams, of San Francisco, for respondent.

Neil Cunningham, Deputy Atty. Gen., amicus curiae for Attorney General.

George N. Downer, Asst. Atty. Gen., amicus curiae for Insurance Commissioner of Washington.

CARTER, Justice.

This is companion case to American Trust Company v. California Western States Life Insurance Company, 98 P.2d 497, this day decided. The factual background and basic legal issues involved in the instant case have been fully reviewed in the opinion in the American Trust Company case, and need not be repeated here. We shall, however, mention briefly two defenses made by defendant herein which were not discussed in the former opinion.

[1] The first is that the contracts under which California-Western was obligated to take back the stock originally issued to the four large stockholders were not in fact repurchase agreements. The theory is advanced that the appellants sold their Western stock for $70 per share; they were paid $40 cash, and were to receive $30 later, as a deferred payment; the California Western stock was given them in pledge, to secure the deferred payment; and the so-called repurchase by California-Western was merely a redemption of the pledged stock by payment of the debt. The difficulty with this theory is that it is contrary to all the evidence and the findings. The contracts, drafted by able counsel representing experienced business men, speak of repurchase and make no mention of a pledge; all the parties who participated in the negotiations referred to them as repurchase contracts; and there is no testimony whatsoever to support the interpretation sought to be placed upon the documents in flat contradiction of their express terms. With the record in this state, the findings of the trial court against this theory are conclusive.

[2-4] The other objection is that the form of the action in the instant case is improper, in that the suit was for money had and received, instead of for damages. This contention is plainly without merit. The form of the action is immaterial, if a cause of action is actually stated; the doctrine of "theory of the pleading" has long been repudiated in this state. See Von Schrader v. Milton, 96 Cal.App. 192, 273 P. 1074; Masero v. Bessolo, 87 Cal. App. 262, 262 P. 61; Feig v. Bank of Italy, Nat. Trust & Sav.Ass'n, 218 Cal. 54, 21 P.2d 421; Pascoe v. Morrison, 219 Cal. 54, 25 P.2d 9; 22 Cal.L.Rev. 208; 1 So.Cal.L.Rev. 369; see, also, as to propriety of pleading on a common count, Long v. Harrison, 113 Cal.App. 321, 298 P. 148. And the cancellation of the promissory notes is a logical and necessary consequence of the holding that the partial payment should be recovered and the stock returned.

For the reasons stated in the opinion in American Trust Company v. California Western States Life Insurance Company, supra, the judgment of the trial court herein is affirmed.

We concur: WASTE, C. J.; GIBSON, J.; SHENK, J.; CURTIS, J.; EDMONDS, J.; GOODELL, Justice pro tem.

36 Cal.App.2d 644

PEOPLE v. BOLJAT.

Cr. 2083.

District Court of Appeal, First District,
Division 2, California.
Jan. 19, 1940.

Hearing Denied Feb. 15, 1940.

See 98 P.2d 1025.

1. Criminal law 🔑742(1)

The credibility of witnesses is for the jury.

2. Criminal law 🔑13

The statute defining the infamous crime against nature is not void for uncertainty. Pen.Code, § 286.

3. Criminal law 🔑1165(1)

In prosecution for the infamous crime against nature, alleged uncertainty in the statute defining the crime would not constitute under the Constitution prejudicial error justifying reversal of a conviction, where defendant denied commission of act, and did not assert that indictment failed to define the offense. Pen.Code, § 286; Const. art. 6, § 4½.

4. Criminal law 🔑1036(1)

A defendant was not denied his constitutional privileges by failure to preserve marks made on a blackboard in illustration of testimony at preliminary hearing, where defendant failed to request that blackboard be received in evidence, or that, the writing being lost, a copy be substituted as permitted by the statute. Code Civ.Proc. §§ 1855, 1937.

5. Criminal law 🔑868

A defendant was not denied a "fair trial" by action of trial court in ordering that jury which was unable to reach a verdict be locked up for the night and then permitting jury to report back in a half an hour, where jury had spent many hours in deliberation, especially where defendant failed to object to any of the proceedings.

[Ed. Note.—For other definitions of "Fair Trial," see Words & Phrases.]

6. Criminal law 🔑1172(7)

In prosecution for commission of the infamous crime against nature with an animal, an instruction that defendant might be found guilty of assault with intent to commit such crime was error, but was not prejudicial, since instruction gave defendant an advantage to which he was not entitled. Pen.Code, § 286.

7. Criminal law 🔑1053

Reviewing court would not consider charges of misconduct of trial judge, where defendant failed to show that any of the instances were excepted to or assigned as misconduct, and failed to make any argument on any of the charges.

Appeal from Superior Court, Contra Costa County; Thomas D. Johnston, Judge.

Peter Boljat was convicted of the infamous crime against nature, and he appeals.

Affirmed.

Lyle E. Cook, of Berkeley, for appellant.

Earl Warren, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

The defendant was charged with a violation of section 286 of the Penal Code in having committed the infamous crime against nature "by then and there having carnal knowledge with the body of an animal, towit: a goat." He was tried with a jury, and from the judgment of guilty on the verdict and from the order denying a new trial he brings this appeal.

[1] The facts need not be stated in full. The arresting officer, who witnessed the entire transaction, testified fully as to the commission of the offense as well as to the defendant's resistance of arrest, his assault upon the officer, his flight from the scene of the crime, and subsequent arrest. The defendant made qualified denials of the essential facts in the state's case, but, with the incriminating admissions found in his testimony, he presents an extremely weak case on the evidence. There can be no doubt that the evidence is legally sufficient to sustain the verdict, and we do not understand that the defendant attacks the verdict on that ground. His charge that the testimony of the state's chief witness was a "multiplication of contradictions, evasions and discrepancies" goes to the credibility of the witness, a matter which was for the jury to decide. There is nothing in the testimony of the witness which would justify this court in holding that it was inherently improbable, false, or incredible.

[2, 3] The appellant argues that he has been deprived of his liberties because the

statute does not define the infamous crime against nature with sufficient clearness to have enabled him to know the nature of the offense. Since the days of Blackstone the ancient crime called sodomy has been referred to as the "infamous crime against nature committed with either man or beast." In People v. Williams, 59 Cal. 397, decided in 1881, our Supreme Court said that every person of ordinary intelligence knew what this crime was. There is here no case of uncertainty in the description of the offense as would support a claim that any of appellant's constitutional rights were invaded. The objection that a penal statute is void because it fails to define the offense with sufficient clearness, presupposes that, because of the lack of definition, a party might commit the offense not knowing that his act was one included in the statute. Here the appellant rested his defense on a denial of the commission of the act; it was not based upon an admission that the act was committed and a plea, that, because of the insufficiency of the statute, the appellant had no knowledge that the act committed was criminal. And he makes no claim that the indictment did not clearly define the offense with which he was charged. Hence, all legal and constitutional questions fall before the inhibitions of section 4½ of article VI of the Constitution which requires a showing that the error complained of was prejudicial in order to support a reversal.

[4] The appellant complains that some of his constitutional privileges have been denied him in that certain marks which had been made upon a blackboard in illustration of testimony at the preliminary hearing had not been preserved and offered in evidence at his trial. There is no showing that appellant requested that the blackboard be received in evidence, or that, the writing being lost, a copy be substituted as permitted by sections 1855 and 1937 of the Code of Civil Procedure.

[5] The appellant contends that he was not given a fair trial because of the following circumstances: The cause was submitted to the jury at 10:15 a. m. of May 29, 1939, at the close of a trial which commenced on May 18th. At 11:15 a. m. of the 29th the jury returned to the courtroom and asked that certain testimony be read. At 12 o'clock noon a recess was taken. At 1:30 additional testimony was read, and the jury again retired at 4:30 p. m. after both parties stipulated that they could take to the jury-room a transcript of the testimony given at the preliminary. During the colloquy in the courtroom prior to this retirement certain instructions were read at the request of individual jurors. The trial judge frequently admonished the jurors that, though the case had taken a long time to try, any juror might ask for the rereading of instructions or testimony, that the appellant's interests should not be jeopardized by any desire of the court or of any of the jury to get to his home. These proceedings were all had with the consent in open court of appellant's counsel. Specific objection is made now to the matters occurring when the jury returned to the courtroom at 10:20 p. m. and announced that they had not reached a verdict. We quote from the transcript (p. 588):

"Well, it is the judgment of the Court that further time should be given the jury and the Court is going to order the jury locked up for the night. * * * Mr. Healey and Mr. Robenson, any objection to the order?

"Mr. Robenson: Not on the defendant's part, Your Honor.

"Mr. Healey: No, Your Honor.

"The Court: It has taken a long time to try this case, and it has cost a lot of money. Very well, it is ordered and directed Mr. Bailiff that you lock this jury up for the night and this Court—the Judge will be available tomorrow morning at nine o'clock or thereafter." (P. 597.)

"The Court: All right, see you tomorrow morning.

"Juror: Suppose we reach a verdict—

"The Court: Do you want to come back in here in half an hour?

"Juror: We might try it.

"The Court: We'll give you half an hour. (Whereupon the jurors retire and at 11:30 return into Court.)"

The verdict of guilty was thereupon entered, and again no objection was made by appellant to any of these proceedings. In the final analysis the point raised by appellant is that if the court reminded the jury that the following day would be a holiday it might prevent a full and fair consideration of the case. But the record here shows many hours spent in deliberation and in the rereading of testimony and instructions while the jury was apparently divided eleven to one. We find that the record does not purport to show that appellant was denied a fair trial or that he was in any wise prejudiced through these proceedings.

[6] Respondent concedes the error in the instruction which advised the jury that it might find appellant guilty of an assault with the intent to commit the infamous crime against nature since there could not be a simple assault upon an animal. The instruction, however, gave appellant an advantage to which he was not entitled, and he cannot, therefore, claim prejudice.

[7] The appellant lists eleven charges of misconduct on the part of the trial judge with the bald statement that each constituted prejudicial error. He does not show that any one of the instances was excepted to or assigned as misconduct. He has not made any argument on any of the charges and has not shown any reason why any one of the instances should be held to be error. Upon such presentation no answer is required.

The appellant lists a number of charges of misconduct on the part of the district attorney. All are trivial and in each instance where a request for an instruction was made by the appellant such instruction was given.

Other points raised by appellant do not require consideration.

The judgment and the order denying a new trial are affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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36 Cal.App.2d 679

UPTON v. TOTH et al.

Civ. 2437.

District Court of Appeal, Fourth District, California.

Jan. 23, 1940.

1. Landlord and tenant 🔑95

Generally, a sale by lessor of realty during unexpired leasehold term under which tenant is holding where a condition is attached does not of itself abrogate lease, terminate leasehold estate, or authorize landlord to treat lease as at an end without offering to fulfill condition, but its effect is to substitute vendee of reversion to all rights of original lessor, and vendee becomes landlord by operation of law and tenant becomes a tenant of the vendee of reversion.

2. Landlord and tenant 🔑109(8)

Where tenant relying on claimed oral extension of written lease containing provision for termination in event of sale voluntarily surrendered premises to purchasers who entered into peaceable possession and refused to accept offer of payment by purchasers for plowing done on premises before sale, purchasers were not obliged to make further offer to tenant to pay for cost of plowing even if purchasers were obligated to reimburse tenant before termination of lease would be effective.

3. Landlord and tenant 🔑95

A clause in a written lease providing for termination of the lease on sale of the demised premises was intended to be a reservation for benefit of the lessor and was so interpreted. Civ.Code, § 1069.

4. Landlord and tenant 🔑95

Where written lease contained provision for termination in event of sale of the premises, purchaser of the premises, in order to obtain possession of the premises and obtain benefit of cultivation, was only obligated to make a bona fide offer to pay the tenant the amount expended by him in fallowing the land.

5. Landlord and tenant 🔑171(2)

Where written lease, alleged to have been orally extended, provided for termination of lease on sale of property, and purchasers of property made offer to pay tenant for plowing done on premises before sale, and tenant voluntarily surrendered premises to purchasers and refused to accept offer of payment for work done, and purchasers thereafter notified tenant not to trespass on the property, tenant had no cause of action for eviction as against purchasers, since he could not be "evicted" if he was not in possession.

[Ed. Note.—For other definitions of "Eviction," see Words & Phrases.]

6. Landlord and tenant 🔑1

Where a lease is for a term to begin in the future, the lessee is not regarded as a tenant until he enters upon the land and he is said to have an interesse termini.

7. Landlord and tenant ⚬=88(1)

Conversations between landlord and tenant concerning proposed extension or renewal of written lease constituted an agreement to make a lease rather than a verbal lease.

Appeal from Superior Court, Riverside County; H. G. Ames, Judge.

Action by Henry Upton against Steven Toth and others for eviction. From a judgment for the plaintiff, defendants appeal.

Reversed.

Albert H. Ford, of Riverside, and Purnell E. Bingman, of San Bernardino, for appellants.

Clay & Handy, of Los Angeles, for respondent.

GRIFFIN, Justice.

This is an action for damages for eviction. The Rugby Land Company, a corporation, owned the farm lands in question. In 1933, this land was leased by a written lease to Ora Upton. An assignment of this lease to respondent Henry Upton, although disputed, is claimed. By the terms of the lease it expired November 15, 1937, but it contained a provision for termination in the event of a sale. The Rugby Land Company sold the land to Joe Toth and Charlie Toth, appellants, for $5,000 cash in May, 1937. They went into possession, and planted a crop of barley, which was matured in May, 1938, at the time of trial. Respondent Henry Upton had plowed the 375 acres of tillable land in March and April, 1937. He claims that in March, 1937, before he plowed, he had requested a written lease for a term of years on the property and that Mr. Baker, secretary of the corporation, had promised a written lease. This lease was not given. Respondent also claimed that he had another conversation with Mr. Baker early in May, 1937, the date of which is not fixed, but which appears to have been after May 3, 1937, the date of the opening of the escrow on the sale to Joe and Charlie Toth, and prior to May 20, 1938, the date of the closing of the escrow.

When Upton learned of the pending sale he made an unsuccessful attempt to buy the land. The Toths offered to pay him for the plowing, but he did not accept. About June 23, 1937, he was notified not to trespass, and he filed suit alleging eviction as of that date. He recovered judgment against the new owners, Joe and Charlie Toth, and their father, Steven Toth, for the net value of the grain crop, fixed at $3,665.61.

The trial court found that on June 23, 1937, plaintiff "was in possession of said land pursuant to the written lease of December 20, 1933, the term of which was extended by the oral lease found" and that on said day "the defendants did unlawfully and without right evict plaintiff from said parcel"; "That it is true that on or about the 10th day of May, 1937, the plaintiff and the Rugby Land Company, which was then the owner of the said parcel of land, did enter into a *further lease* of the said parcel, the term of which was from the 15th day of November, 1937, to the end of the crop year of 1937-1938, and until on or about May 9th, 1938." (Italics ours.)

It is claimed first that this finding as to the oral lease is unsupported by the evidence. By respondent's own testimony an extension was necessary, as the lease would run out before the crop was harvested. In order to support a judgment for the net value of the grain crop respondent would have produced during the 1937-1938 season, it was obviously necessary to establish a lease extending until the end of that season.

Respondent was the only witness who testified that there was such a lease, and his testimony referred to two conversations with Mr. E. V. Baker, the secretary of the Rugby Land Company. His testimony was without any corroboration and was flatly contradicted by Mr. Baker. Conflict in the testimony is not the point, however. The point claimed is that respondent's own testimony does not support the finding and is contrary to the finding in several respects.

The conversation between Mr. Baker and respondent is claimed by him in reference to any oral lease or extension of the written lease herein to be in part as follows:

"Q. (By Mr. Clay to Mr. Upton): What was the subject of that conversation (of March, 1937)? A. I told Mr. Baker that my boys was ready to start plowing on his ranch, and that in order to protect me on the crop following, I would have to get an extension of the lease; that our present lease would run out before the crop was harvested.

"Q. What did he say? A. I continued and said, 'Do you want us to go ahead and farm the property?' He said '* * * yes; go ahead and farm it. What * * * do you think I keep it for?'

"Q. Was anything else said on that occasion about this matter? A. I asked him to have his attorney draw the lease and send it over.

"Q. What did he say? A. He said he would.

"Q. What did you do then? A. We went ahead and plowed the land. * * *

"Q. Did you have any further conversation with Mr. Baker? A. I did.

"Q. When was that? A. The first week in May, 1937. * * *

"Q. What was said? A. I asked him why he didn't send the lease over. He said, 'Well, I might sell that property. I want to sell it'. He said, 'Wait until after harvest; possibly we might get together.' But in the meantime I said, 'I want the lease.' Mr. Baker said: 'I would rather not tie up this property for a long period of time. I want to sell it. I will only lease it to you from year to year.'

"Q. What did you say? A. I said, 'That is fine with me. I can get my crop off there within a year if I cut it for hay.' * * *

"Q. (By Mr. Ford): In March you had a conversation with him, you say? A. Right around the first of March, yes, sir.

"Q. And in that conversation did you ask him for a written lease? A. I asked him to renew the lease.

"Q. For what period of time? A. Two to four years, either one; either two or four years.

"Q. He said he would do it? A. No; he didn't say at that time.

"Q. What did he say in March when you asked him for a two or four year renewal? A. He said, all right, he would go ahead and renew it; but he did not say whether for two or four.

"Q. Was this conversation in March, 1937, the first conversation you had had with him relative to any extension or renewal or further leasing? A. That was the first conversation pertaining to an extension of the lease in any manner.

"Q. The Court: What date was that? A. Around the first of March. I don't know whether the first or second or third, but around the first of March.

"Q. And that was not a one-year lease that was mentioned at that time? A. No. At that time I was under the impression I would either get a two or four, whichever was his option. * * *

"Q. (By Mr. Ford): In your conversation with Mr. Baker on the second occasion, when you say you had not received the desired lease for two to four years, and discussed the lease for a year, was the term or expression 'crop season' used? A. Yes, it was.

"Q. What did you say and what did he say in which the term 'crop season' was used? A. I wanted it to extend a sufficient length of time to protect me for the crop season.

"Q. Not what you wanted, please. What expression was used by you and by him? A. Well, he said he did not want to tie up the property for too long a period of time, but would rent it to me from year to year. I said, 'That is OK with me. That will protect me on my crop.'

"Q. Was the expression 'from year to year,' or the expression 'crop season' used in that conversation? A. 'From year to year' at that time, 'from year to year'."

It is quite apparent from the record that respondent had little if any confidence in his claim of an oral lease as of May 10, 1937. By his own admission he subsequently suggested to Mr. Baker that the lease be put in writing, and called on his attorney for an opinion whether a written lease, made after the deed to the Toth Brothers had been signed, would sever the oral lease, and the attorney stated it would be of no effect as far as stopping the sale of the land was concerned. He thereupon employed his attorney to write a letter to appellants dated May 18, 1937, in which the attorney stated:

"We are advised by our client, Mr. Henry Upton, that you are negotiating the purchase of certain lands near Perris from the Rugby Land Company.

"No doubt you have knowledge that Mr. Upton is farming the said property and has recently plowed the same. Of course, such knowledge is constructive notice to you that Mr. Upton has an interest in the said property, but that you may have actual notice of the said interest, I am now informing you that our client has a lease on the said property to farm the same during the crop year of *1927-1928*. This letter is written that you may have notice of Mr.

Upton's interest and that he, or you, will not be prejudiced in any transaction with the Rugby Land Company.

"Further, be advised, that although the lease has not been reduced to writing, I believe that Mr. Upton has an agreement with the Rugby Land Company to farm the said land for a period of three years from the close of the crop year of 1937-1938. As before noted, the same has not been reduced to writing but I am of the opinion it is valid and outside the Statute of Fraud for the reason certain consideration has passed between the Rugby Land Company and our client."

The legal effect of the May conversation was first alleged by respondent in his complaint to be an "*extension of the written lease*". After the trial and rendition of an informal opinion, an amendment to the complaint alleged "a new original and oral lease", the amendment being filed June 21, 1938. On January 17, 1939, being the date when findings were filed, another amendment to the complaint alleged "a further lease" had been made. The finding is of a "further lease" but the conclusion of law is that the term of the written lease "was extended by the oral lease". It is therefore apparent that if the trial court adopted the first allegation that the oral lease only extended the term of the written lease, the extension contained the same provisions as the original lease. The provision for termination of the written lease, on sale of the property, would apply to the oral lease.

The written lease, expiring November 15, 1937, contained the following provision: "The party of the second part agrees in case of sale of land or all of said property by said first party to release the land sold reserving only the crop thereon and reasonable compensation for work done in preparing seed bed for future crop not yet seeded."

[1] The general rule is that a sale by a lessor of real estate, during an unexpired leasehold term, under which a tenant is holding, where a condition is attached, does not of itself abrogate the lease, terminate the leasehold estate, or authorize the landlord to treat the lease as at an end without offering to fulfill the condition. Its effect is to substitute the vendee of the reversion to all of the rights of the original lessor. The vendee then becomes the landlord by operation of law and the tenant becomes a tenant of the vendee of the reversion. Otis v. McMillan & Sons, 70 Ala. 46, 53; Jones on Landlord and Tenant, p. 480, sec. 427; Diepenbrock v. Luiz, 159 Cal. 716, 115 P. 743, L.R.A.1915C, 234, Ann.Cas.1912C, 1084; McClung v. McPherson, 1905, 47 Or. 73, 81 P. 567, 82 P. 13.

From the record before us it appears that respondent apparently voluntarily surrendered possession of the premises, moved out of the house which was located on the land, and appellants peaceably went into possession thereof, and it was not until June 23, 1937, when appellants notified respondent not to trespass on the property and placed a "no trespassing" sign upon the premises that respondent considered himself evicted.

Thereafter, considerable negotiations between the parties ensued. Appellants, apparently in good faith, made an offer in writing to pay respondent for any work he had done upon the property. To this offer appellants received a reply from respondent's attorney containing the following: "* * * The reply of the Bank of Perris stated that Mr. Steven Toth wished Mr. Upton informed that he would pay for any work Mr. Upton had done on the property. In a conference with our client, he advised us to inform you that he does not wish to abandon his lease and as he has heretofore done a considerable amount of work in preparing for the 1937-38 crop, he intends to continue the same to harvest." However, after the date of the claimed eviction (June 23, 1937) respondent expressed a willingness to accept payment for the reasonable value of the work he had done on the property and stated that he would cancel any rights he might have. On July 28, 1937, Steven Toth again made a written offer to pay the reasonable charge of plowing the land and stated that he "thinks reasonable charge $1.00 per acre". Respondent did not consider or invite any further negotiations. The action for damages for eviction followed.

[2] From the actions and conduct of respondent it seems quite clear to us that on being advised of the facts, he removed voluntarily from the premises and he also later refused to accept any offer of payment but elected to rely on his claimed oral lease. It therefore would appear that if appellants were obligated under the lease, to reimburse respondent before a termination would be effective, appellants were no longer obliged under the circumstances to make any further offer to respondent to pay for the cost of the plowing. Pierce

v. Lukens, 144 Cal. 397, 77 P. 996; Boschetti v. Morton, 23 Cal.App. 325, 331, 137 P. 1085; Burg v. Harris, 72 Cal.App. 379, 237 P. 399; 24 Cal.Jur. sec. 3, p. 514; Druxinman v. Smith et al., 113 Wash. 124, 193 P. 224.

[3-5] The clause in the lease terminating it upon sale was intended by the parties to it to be a reservation in favor of, and for the benefit of, the lessor and is to be so interpreted. Civ.Code, sec. 1069; McVitty v. Flentge, 34 Cal.App. 781, 169 P. 666. Thus interpreted, it expressed briefly and somewhat vaguely, it is true, the evident intent of the parties that the owner of the premises should have the right to transfer to his grantee the right to possession thereof upon a sale, and thereby terminate the lease. The only limitation upon that right expressed in the clause conferring it had reference not to the time when the lease should be terminated but merely to the terms upon which the grantee of the premises might exercise his right to receive possession. If the land had been summer-fallowed, and it had, and the purchaser desired to obtain the benefit arising from such cultivation in the way of resultant crop, he was only obligated to make a bona fide offer to pay the lessee the amount expended by him in summer-fallowing the land, in order to obtain possession of the premises. This he must do immediately upon consummation of his purchase. McVitty v. Flentge, supra. A sufficient offer having been made, the rights of respondent under the written lease were thereby terminated, and on the date of the claimed eviction, respondent had no cause of action for eviction as against appellants. Walter v. Arnold, 50 Cal.App. 457, 195 P. 460; McVitty v. Flentge, 44 Cal.App. 426, 186 P. 610.

[6] The only remaining claim of respondent that he had been evicted from the premises must be based upon the alleged oral lease which the court found was to begin on November 15, 1937, and extend through the crop year of 1937-1938, and until on or about May 9, 1938. It has been repeatedly held that in the case of a lease for a term to begin in the future, the lessee is not regarded as a tenant until he enters upon the land, and he is said to have an interesse termini. Caldwell v. Center, 30 Cal. 539, 89 Am.Dec. 131; Tiffany on Landlord and Tenant, sec. 37, p. 290. Respondent could not be evicted under the oral lease unless he had entered into possession. Kline v. Guaranty Oil Company, 167 Cal. 476, 140 P. 1; Tiffany on Landlord and Tenant, p. 1268; 15 Cal.Jur., p. 679, sec. 89.

[7] From an examination of the testimony it appears to us that the conversation heretofore related, constituted an agreement to make a lease, rather than constituting a verbal lease, the terms of which were definite and certain. Regalia v. Mariani, 100 Cal.App. 1, 5, 279 P. 455. However, assuming but not holding the evidence sufficient to constitute an oral lease to begin November 16, 1937, under the authorities cited respondent, on June 23, 1937, the date of the claimed eviction, was not a tenant or in possession of the property under the oral lease, and a judgment for damages for wrongful eviction thereunder cannot be sustained.

Many other points are raised by appellants which have considerable merit. In view of the conclusion reached, however, we deem it unnecessary to decide them.

Judgment reversed.

We concur: BARNARD, P. J.; MARKS, J.

ROBINSON v. GEORGE et al.*

Civ. 12340.

District Court of Appeal, Second District, Division 2, California.

Jan. 24, 1940.

Hearing Granted March 21, 1940.

1. Automobiles 🔑197(7)

Where newspaper carrier had finished his duties for day and was on his way home when automobile driven by him struck and injured another, accident did not occur in "course of his employment," as required to authorize recovery of damages by injured person from carrier's employer.

[Ed. Note.—For other definitions of "Course of Employment," see Words & Phrases.]

2. Automobiles 🔑242(6)

In action for injuries to one struck by automobile driven by defendant's employee

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*For subsequent opinion see 105 P.2d 914.

defendant's denial of plaintiff's allegation of driver's agency for defendant cast burden on plaintiff to establish affirmatively that driver was defendant's agent engaged in performance of his duties at time of accident.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Harry T. Robinson against Melvin W. George, the Citizen-News Company, a corporation, and others, to recover damages for injuries suffered by plaintiff when struck by an automobile driven by defendant George. From a judgment of nonsuit as to defendant corporation, plaintiff appeals.

Affirmed.

Charles A. Son and Clarence G. Weisbrod, both of Los Angeles, for appellant.

Lyndol L. Young and Joseph H. Edgar, both of Los Angeles, for respondent.

WOOD, Justice.

This action was commenced by plaintiff and appellant to recover damages for injuries suffered when he was struck by an automobile driven by defendant Melvin W. George on West Adams street near Washington boulevard in the city of Los Angeles. It is alleged in the complaint that George was at the time of the accident an agent and employee of defendant and respondent Citizen-News Company. This allegation was denied by respondent in its answer. At the close of appellant's evidence the trial court granted the motion for a nonsuit made on behalf of the Citizen-News Company and the present appeal was taken from the resulting judgment.

[1, 2] From the evidence presented it appears that defendant George was employed to deliver papers on a newspaper route in the afternoons, his duties as a route-carrier being terminated before 6 o'clock p. m. An arrangement was made by and between George and respondent whereby after his work as a route-carrier George would be subject to telephone call by the district supervisor for respondent who would notify him of any subscribers making complaints that they had not received delivery of their papers. Thereupon George would deliver copies of the newspaper to the addresses from which complaints had come in. In doing so he furnished his own automobile and received compensation, referred to as "a commission", of 15 cents or 25 cents for each delivery according to the zones in which the deliveries were made. Sometimes George telephoned from his home to the supervisor to secure addresses for deliveries. The supervisor remained on duty until 7:30 o'clock p. m. only and the period during which George was thus subject to call was between the hours of 6 and 7:30 o'clock p. m. on each day. The accident in question occurred at about 8 o'clock p. m. in the evening of April 13, 1937. At that time George had finished all his deliveries and was on his way to his home from the point of his last delivery, which was several blocks distant from the scene of the accident. He had been furnished with no addresses for other deliveries.

Assuming that defendant George was an employee of respondent rather than an independent contractor, a question we need not determine, there is no escape from the conclusion that at the time of the accident defendant George had finished his duties and was on his way home. The supervisor's duties ended at 7:30 o'clock in the evening and George could not receive further instructions for deliveries on that date. Appellant relies upon Makins v. Industrial Acc. Comm., 198 Cal. 698, 247 P. 202, 204, 49 A.L.R. 411, wherein it was held that Makins was entitled to compensation under the terms of the Workmen's Compensation Act (St.1917, p. 831). Makins was employed to deliver newspapers within the limits of a defined district in the city of Oakland. At the time of receiving the injuries he had finished his deliveries but in going home was yet within the territorial limits of his district. It was held that, "under the facts of this case, the district thus established and controlled by the employer will be held to be the employee's place of employment". In the case before us the evidence does not disclose the location of George's home or the limits of any district in which he was called upon to make deliveries of newspapers. It was not shown that the accident occurred at the "place of employment". Since George had finished his duties for the day and was on his way home the accident did not occur in the course of his employment. Mauchle v. Panama-Pacific International Exp. Co., 37 Cal.App. 715, 174 P. 400; London Guarantee & Accident Co. v. I. A. C., 190 Cal. 587, 213 P. 977. Respondent having denied appellant's allegation of agency, it was incumbent upon appellant to affirmatively establish that George was at the time of the accident an agent of respondent engaged in the performance of his duties. Wilson v. Droege, 110 Cal.App. 578, 294 P. 726. This appellant has failed to do.

The judgment is affirmed.

We concur: MOORE, P. J.; McCOMB, J.

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36 Cal.App.2d 678

In re COHN'S ESTATE.

ANGLO-CALIFORNIA NAT. BANK OF SAN FRANCISCO et al. v. COHN.

Civ. 2503.

District Court of Appeal, Fourth District, California.

Jan. 23, 1940.

1. Appeal and error 🔑781(7)

An appeal from order directing administrators to pay inheritance taxes would be dismissed where it appeared that taxes had been paid and that questions presented by appeal were moot.

2. Costs 🔑232

Where appeal from order directing administrators to pay inheritance taxes was dismissed because taxes had been paid and questions presented were moot, neither party would recover costs of appeal.

◆

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

In the matter of the estate of Charles Cohn, deceased, wherein the Anglo-California National Bank of San Francisco and another proceeded against Bertha Cohn. From an order directing the administrators of the estate to pay inheritance taxes due the state of California, the Anglo-California National Bank of San Francisco and another appeal.

Appeal dismissed.

Joseph T. O'Connor, Joseph A. Brown, and Norman A. Eisner, all of San Francisco, for appellants.

Farnsworth, Burke & Maddox and James K. Abercrombie, all of Visalia, for respondent.

MARKS, Justice.

[1, 2] This case comes before us on an order to show cause. It is an appeal from an order made on November 26, 1937, directing the administrators of this estate to pay the inheritance taxes due the state of California.

It now appears that all such taxes have been paid and that the questions presented by the appeal are moot.

The appeal is dismissed. The order to show cause is discharged. Neither party will recover costs of appeal.

We concur: BARNARD, P. J.; GRIFFIN, J.

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36 Cal.App.2d 676

In re COHN'S ESTATE.

COHN v. COHN et al.

Civ. 2502.

District Court of Appeal, Fourth District, California.

Jan. 23, 1940.

1. Stipulations 🔑18(9)

A stipulation, that judgment on appeal from decree for partial distribution of testator's estate and order to withhold described realty from distribution until payment of inheritance tax in accordance with prior decree of partial distribution might be identical with judgment reversing such prior decree, requires reversal of order and decree appealed from.

2. Appeal and error 🔑781(7)

The questions presented on appeal from order directing executor of testator's estate to pay inheritance tax are moot, so as to require dismissal of appeal, where it appears that such tax has been paid in full.

◆

Appeal from Superior Court, Kern County; Allan B. Campbell, Judge.

In the matter of the estate of Charles Cohn, deceased. From an order setting apart real property to be withheld from partial distribution until payment of inheritance tax, an order instructing Irving Cohn, as surviving executor of deceased's last will and testament, to pay such tax, and a decree directing partial distribution of the estate to Bertha M. Cohn and others, the surviving executor appeals. On an order to show cause.

Order setting apart real property and decree of partial distribution reversed, appeal from order instructing the executor to pay inheritance tax dismissed, and order to show cause discharged.

Borton, Petrini & Conron, of Bakersfield, for appellant.

Farnsworth, Burke & Maddox and James K. Abercrombie, all of Visalia, for respondents.

MARKS, Justice.

This case comes before us on our order to show cause. It is an appeal from two orders and a decree of partial distribution of the superior court of Kern county, made on July 6, 1936, which were identified in the notice of appeal as follows:

"1. That certain order and decree of partial distribution made in the above-entitled matter on the 6th day of July, 1936, and recorded in Book 73 of Judgments at page 429 in the records of the Clerk of the Superior Court of the State of California, in and for the County of Kern.

"2. That certain order identifying properties to be retained in the estate, made on the 6th day of July, 1936, and recorded in Book 73 of Judgments at page 428 of the records of the Clerk of the Superior Court of the State of California, in and for the County of Kern.

"3. That certain order instructing Executor to pay balance of inheritance taxes due the State of California, made on the 6th day of July, 1936, and recorded in Book 73 of Judgments at page 431 of the records of the Clerk of the Superior Court of the State of California, in and for the County of Kern."

The orders and decree under attack here grew out of a decree of partial distribution, and to hold certain real property until the inheritance tax was paid, dated December 13, 1935, which was reversed by this court. Estate of Cohn, 20 Cal.App.2d 550, 67 P.2d 362.

The first order before us here identified and described the real property to be withheld from partial distribution until the inheritance tax was paid in accordance with the decree of December 13, 1935.

The decree of partial distribution now before us ordered distribution of the property described in the former decree of December 13, 1935, after eliminating therefrom the real property to be withheld until the inheritance tax was paid as that property was described in the last abovementioned order.

The second order before us for review directed the sale of certain of the estate properties and the payment of the inheritance tax. The appeal is only from that portion of the order directing payment of the tax.

[1] On April 30, 1937, counsel for all parties filed a stipulation to the effect that the judgment on this appeal might be identical with the judgment on the appeal from the decree of partial distribution of December 13, 1935, which was reversed in Estate of Cohn, 20 Cal.App.2d 550, 67 P.2d 362. This stipulation requires the reversal of the order to withhold real property and also the decree of partial distribution both of which were made on July 6, 1936.

[2] It is probable that the stipulation constitutes an abandonment of the appeal from that portion of the order directing that the inheritance tax be paid. Further, it is now made to appear that the inheritance tax has been paid in full which makes the questions presented on this appeal from that portion of the order moot.

It is ordered:

That the order dated July 6, 1936, setting apart real property to be held until the inheritance tax is paid, be and the same is hereby reversed.

That the decree of partial distribution dated July 6, 1936, be and the same is hereby reversed.

That the appeal from the portion of the order instructing the executor to pay the inheritance tax be and the same is hereby dismissed. The order to show cause is discharged.

Neither party will recover costs on appeal.

We concur: BARNARD, P. J.; GRIFFIN, J.

In re MURPHY'S ESTATE.

MURPHY et al. v. MURPHY.

Civ. 11223.

District Court of Appeal, First District, Division 1, California.

Jan. 23, 1940.

Rehearing Denied Feb. 21, 1940.

Hearing Denied March 21, 1940.

1. **Executors and administrators** ⚿510(6)

Service of notice of entry of a decree settling a revised final account of administratrix is not required under the statute to start the time for appeal running. Code Civ. Proc. § 939; Probate Code, §§ 1221, 1233, 1240, 1700.

2. **Executors and administrators** ⚿510(12)

An appeal from a decree settling a revised final account of administratrix would be dismissed as not filed within the time allowed by law although a formal motion to dismiss had not been filed, and point was not raised until filing of respondent's brief. Code Civ.Proc. § 939; Probate Code, §§ 1221, 1233, 1240, 1700.

3. **Appeal and error** ⚿356

The statutory requirements as to the time for taking appeals are mandatory and court is without jurisdiction to hear an appeal which is not taken within the time allowed by law. Code Civ.Proc. § 939.

4. **Appeal and error** ⚿356, 870(3)

Where an appeal is taken from several decrees, court is limited to a consideration of those entered within sixty day period allowed by law for taking appeals unless one not entered within that time is merely an interlocutory order or is so connected with others that an injustice would occur from its determination as separate from others. Code Civ.Proc. § 939.

5. **Executors and administrators** ⚿510(8)

If a decree in administration proceedings from which an appeal is not taken within time allowed is a final determination and is followed by a supplemental report covering a subsequent period or by an executory order directing partition of property to carry into effect judgment, order or decree, the first order or decree is conclusive and therefore "res judicata" and those following merely collateral as respects whether decrees are so interwoven that a determination of one requires reference to other, notwithstanding appeal therefrom may not have been timely entered. Code Civ.Proc. § 939; Probate Code, §§ 1020.5, 1104, 1106.

[Ed. Note.—For other definitions of "Res Judicata," see Words & Phrases.]

6. **Executors and administrators** ⚿510(12)

Reviewing court would affirm interlocutory judgment of partition in administration proceedings where all the parties requested a partition of the property.

7. **Judgment** ⚿545

In probate proceedings, an order is conclusive as to subject which it purports to adjudicate.

8. **Executors and administrators** ⚿510(8)

A revised final account of an administratrix was a final determination as to matters presented therein and could not be reviewed on appeal from an order settling a supplemental account, provided supplemental account involved only matters subsequent to revised final account.

9. **Executors and administrators** ⚿510(8)

A decree settling a revised final account of administratrix and a decree settling a supplemental account covering a period of time subsequent to that covered by former decree and determining whether orders contained in such decree had been carried out were not so interwoven, that an appeal from the latter decree, filed within time allowed, necessarily required a consideration of the former from which an appeal was not taken within time allowed by law. Code Civ.Proc. § 939; Probate Code, §§ 1221, 1233, 1240, 1700.

10. **Appeal and error** ⚿18

The rule of liberal construction so as to permit appeals to be determined on their merits cannot be used to confer jurisdiction on reviewing court where jurisdiction otherwise would not exist.

11. **Executors and administrators** ⚿506(3)

Evidence sustained action of trial court in allowing administratrix' supplemental account to which objections were filed by beneficiaries of the estate.

◆

Appeal from Superior Court, Contra Costa County; Warren Steel, Judge.

Proceeding in the matter of the estate of William H. Murphy, also known as W. H. Murphy, by Esther Murphy and Katie Murphy against Christiana Murphy, administratrix of the estate of William H. Murphy, also known as W. H. Murphy, deceased. From decrees settling a revised final account, an account supplemental thereto and from an interlocutory judgment of partition appointing and authorizing a referee to apportion respective interests of heirs of William H. Murphy, Esther Murphy and Katie Murphy appeal. Defendants filed motion to dismiss appeal from decree settling revised final account.

Appeal from decree settling revised final account dismissed. Decree settling supplemental account and interlocutory judgment of partition affirmed.

William H. Hollander and Van A. Neher, both of Oakland, (Nathan Kessler, of Oakland, of counsel), for appellants.

Ralph H. Wight, of Martinez, for respondent.

WARD, Justice.

An appeal from decrees settling a revised final account, an account supplemental thereto and from an interlocutory judgment of partition appointing and authorizing a referee to apportion the respective interests of the widow and five children in the matter of the estate of William H. Murphy, deceased. The revised final account was a final determination to August 1, 1937. It was approved on February 18, 1938, and filed the following day. A formal notice of the entry of this decree was not served upon appellants. However, on March 24, 1938, a notice of hearing of a supplemental account was served upon them, which notice contained references to the February 18, 1938, decree. In addition it may be noted that appellants actively participated in settling the revised final account. The supplemental account covering a period from August 1, 1937, to March 1, 1938, was approved April 13, 1938. The notice of appeal from the above decrees was filed May 4, 1938.

In the brief filed by Christiana Murphy, the respondent, there appears a motion to dismiss the appeal from the decree settling the revised final account on the ground that the notice of appeal was not filed within the time allowed by law.

[1] Section 1240 of the Probate Code provides for an appeal from an order settling an account of an administratrix, and section 939 of the Code of Civil Procedure fixes the time within which such appeal must be taken as sixty days from the entry of the judgment or order. This last section is applicable to appeals in probate matters by virtue of section 1233 of the Probate Code. Formerly section 1715 of the Code of Civil Procedure provided for appeals in probate matters, but this section has been omitted from the Probate Code. Stats.1931, p. 687; Prob.Code, sec. 1700. The filing of a signed decree is equivalent to entry "at length in the minute-book of the court". Prob.Code, sec. 1221. The statute does not require service of notice of entry of the decree settling the revised final account. Lawson v. Guild, 215 Cal. 378, 10 P.2d 459; Nagelmann v. McIntyre, 27 Cal.App.2d 621, 81 P.2d 466; Kocher v. Fidelity & Deposit Co., 137 Cal. App. 474, 30 P.2d 535; Cook v. Cook, 208 Cal. 501, 282 P. 385.

[2, 3] The appeal from the decree settling the revised final account must be dismissed notwithstanding a formal motion has not been filed and the point not raised until the filing of respondent's brief. The requirements as to the time for taking appeals are mandatory, and this court is without jurisdiction to consider the appeal from this particular decree. Estate of Smead, 12 Cal.2d 20, 82 P.2d 182; Estate of Vizelich, 123 Cal.App. 651, 11 P.2d 870; People v. Lewis, 219 Cal. 410, 27 P.2d 73; Estate of Brewer, 156 Cal. 89, 103 P. 486; Estate of Pearsons, 119 Cal. 27, 50 P. 929; Smith v. Questa, 58 Cal.App. 1, 207 P. 1036; Irving v. Sheetz, 26 Cal. App.2d 751, 80 P.2d 502.

[4, 5] Where an appeal is taken from several decrees, the court is limited to a consideration of those entered within the sixty-day period (Guaranty Trust & Savings Bank v. Los Angeles, 186 Cal. 110, 199 P. 35) unless one not entered within that time is merely an interlocutory order (Perry v. West Coast Bond & Mortgage Co., 136 Cal.App. 557, 29 P.2d 279) or is so connected and interwoven with the others that an injustice would occur from its determination as separate from and without reference to the others. But if the first is a final determination, followed perhaps by a supplemental report covering a subsequent period (Prob.Code, sec. 1020.-5) or by an executory order directing partition of the property (Prob.Code, sec. 1104) to carry into effect the judgment, order or decree, then the first order or decree is conclusive and therefore res judicata; and those following merely collateral. Duncan v. Superior Court, 3 Cal.2d 143,

44 P.2d 356. In this proceeding the first decree of February 18, 1938, was a final determination to August 1, 1937. The second, as of April 13, 1938, covered a period from August 1, 1937, to March 1, 1938, together with adjustments to conform to the decree previously made.

[6] Eliminating the appeal from the revised final account, the record discloses that the interlocutory decree appointing a referee to partition the property is only a directive order to make effective a decree of distribution. The allotment approved by the court, unless modified for good cause upon reasonable notice, is controlling, but reviewable on appeal. Prob.Code, sec. 1106. The record discloses that a demurrer and subsequently an answer were filed, the latter alleging in substance that a complete and satisfactory accounting had not been made. The interlocutory decree in partition sets forth that oral and documentary evidence was submitted but our attention has not been called to such evidence except by way of appellants' claim that the three decrees are so interwoven and interlocked that the evidence in one applies to each of the other two. Considerable evidence appears relative to the supplemental account covering a period from August 1, 1937, to March 1, 1938, but it does not appear to be particularly directed in opposition to the petition for partition. The transcript of evidence shows an objection to the selection of a referee but there is a statement by one of the attorneys for appellants that "I have a petition for partition there before the court now". In other words, each side requested a partition of the property.

[7-10] Appellants contend that the points raised in their opening brief with regard to the revised final account apply in toto to the supplemental account. As a rule, in probate proceedings an order is conclusive as to the subject which it purports to adjudicate. The revised final account is a final determination as to the matters presented therein and may not be reviewed on an order settling a supplemental account, provided the supplemental account involves only matters subsequent to the revised final account. Duncan v. Superior Court, supra. The decree settling the supplemental account is not so interwoven with the decree settling the revised final account that an appeal from the former necessarily requires a review of the matters involved on the latter. An examination of the two decrees demonstrates that they are independent of each other. What references appear in the decree settling the supplemental account are merely references to matters ordered performed by the decree settling the revised final account, and the supplemental decree determines whether these orders have been carried out. Under such circumstances appellants should have appealed from the first decree. The rule of liberal construction so as to permit appeals to be determined on their merits cannot be used to confer jurisdiction on this court where jurisdiction otherwise would not exist.

[11] Appellants filed specific objections to the supplemental account, setting forth that certain items of expenses contained therein were not incurred in the farming operations of the Murphy estate; that the administratrix had not charged herself with rents assessable to her, nor charged three of the children with amounts due from them; that the account did not accurately reflect the true status of the income and disbursements, or the assets, of the estate, nor the distributive shares of the respective parties; that certain advances or charges against appellants were incorrect and contrary to law, and likewise certain credits to the other children, and that the account did not contain a true and correct inventory of the physical assets of the estate. Finally an objection was made to the compensation allowed the administratrix and her attorney respectively. No vital legal question is presented in the objection to the settlement of the supplemental account. Great liberality was exercised by the court in permitting an exhaustive cross-examination of the administratrix. The record indicates some commingling of funds, but in the final analysis shows an accounting of the estate funds so commingled. The acting probate judge directed a fair and just disposition of the funds from a very practical standpoint without violating any legal rule.

The appeal from the decree settling the revised final account is ordered dismissed. The decree settling the supplemental account and the interlocutory judgment of partition are affirmed.

We concur: PETERS, P. J.; GOODELL, Justice pro tem.

36 Cal.App.2d 649

PEOPLE v. DEININGER et al.

Cr. 2106.

District Court of Appeal, First District, Division 1, California.

Jan. 23, 1940.

1. Indictment and Information ⚿59

The designation of offense charged is within grand jury's or prosecuting officer's discretion and may be controlled thereafter by trial judge.

2. Criminal law ⚿1023(1)

The fact that body of accusation charges greater degree of crime than offense designated by grand jury or prosecuting officer, and does not include lesser offense of which defendant might have been convicted, is not subject of appeal. Pen.Code, § 1237.

3. Larceny ⚿57, 62(2)

In trial for grand theft of automobile, evidence justified jury's finding that automobile was taken from its owner without his consent and was sufficient to establish felonious intent.

4. Larceny ⚿68(2)

The question of felonious intent, warranting conviction of grand theft, is for jury.

5. Larceny ⚿57

Felonious intent, warranting conviction of grand theft, may be inferred by jury from all circumstances of case.

6. Criminal law ⚿1159(1)

The appellate court will not substitute its conclusion for that of jury on question of felonious intent warranting conviction of grand theft, unless jury's determination does violence to reason.

* * *

Appeal from Superior Court, Alameda County; Edward J. Tyrrell, Judge.

Carl Deininger and Jack Turner were convicted of grand theft, and they appeal.

Affirmed.

Frank W. Creely and Ernest S. Leslie, both of Oakland, for appellants.

Earl Warren, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for respondent.

WARD, Justice.

This appeal taken by notice in open court by defendants Deininger and Turner, charged jointly with one Zimmerman, is from a judgment of conviction of grand theft and from orders denying motions of the two appellants for new trials.

The facts of the case are as follows: The complaining witness E. L. Mathewson conducted a used car business in the city of Oakland. On March 30, 1939, defendant and appellant Deininger, codefendant Zimmerman, and a seventeen-year-old boy, one Stratton, started in Zimmerman's car for Mathewson's place of business. About two blocks from the place, the Stratton boy was asked to get out and await the return of the others, which he did. Upon their arrival at Mathewson's place, Zimmerman parked his car along the curb in front of the premises, directly behind a Ford V-8 phaeton which was being displayed for sale. Deininger got out of the Zimmerman car and, entering the displayed Ford, started its motor, upon which Mathewson came over to the car and he and Deininger, representing himself as a prospective purchaser, talked about the car and the terms of purchase. A few minutes later a man named Turner stepped from across the street and asked Deininger whether he was thinking of buying a car. At Turner's approach Deininger got out of the car but continued his conversation with Mathewson regarding its purchase. Turner in the meantime entered the car, saying he would like to take a ride in it, and started the motor. Mathewson said "That is fine, but I will have to go along." Turner alternately raced and idled the motor and seemed generally to be much interested in the car. Deininger in the meantime started to reenter the car, whereupon Mathewson told Deininger that if he was the man who was going to purchase the car, he should "come over and arrange with us". At this time Mathewson's attention was diverted by the arrival of another car, and Deininger and Turner drove off. There is evidence that they called to Zimmerman, who had remained in his car behind the Ford, to wait a minute as they would be back. Zimmerman did wait about that length of time and then drove rapidly away. Turner and Deininger picked up Stratton and they drove to Zimmerman's house, where Zimmerman was already awaiting them. With tools supplied by Zimmerman, they removed the top, the fan, the air strainer, carburetor and radiator shield. Later Turner took the parties to their home in the car, and after his own dinner, picked up Deininger and Stratton again. Finding themselves out of gasoline, Deininger, representing to a gasoline service station attendant that he was on his way to his sick mother in Martinez, obtained the necessary gasoline after signing a credit slip, showing his driver's license, from which the attendant took his name and address, and leaving the side curtains from the complainant Mathewson's car as security, promising to return and pay for the gasoline the next day, which promise, however, he did not keep. The appellants and Stratton then drove to Martinez, returning about 10:45 p. m. to the home of Zimmerman, where they threw the top which they had earlier removed, into the car, replacing none of the other parts, however, and abandoned the car at Thirty-fourth street and Broadway, two blocks from Mathewson's place of business. Stratton later returned with an acquaintance of his and, throwing the car top on to the lawn of the house in front of which the car had been left, drove off, later again abandoning the car.

[1, 2] The contention on appeal is based: (1) Upon the ground that if there was a public offense committed, it was not grand theft, but a violation of section 499b of the Penal Code or of section 503 of the California Vehicle Code, St.1935, p. 174; and (2) that felonious intent was not proven in the grand theft charge.

The designation of the offense charged is within the discretion of the grand jury or the prosecuting officer, and thereafter may be controlled by the trial judge. The fact that the body of the accusation charges a greater degree of crime, and does not include a lesser offense of which the defendant might have been convicted, is not the subject of appeal (Pen.Code, sec. 1237), and we are therefore confined to a consideration of the second point. Incidentally, it may be mentioned that no contention is made of any error in the admission of evidence or in the court's instructions to the jury.

[3] From the evidence presented, a jury would be justified in determining that the Ford car in question was taken from its owner without his consent, and the existence of felonious intent is amply established by the testimony that the seventeen-year-old boy was not taken to the used car dealer but was told to wait in the street for Zimmerman and Deininger; by the inference that appellants could hardly have been considering the purchase of a car when they had not even sufficient money to buy gasoline, Deininger's earnings at the time being ten or fifteen dollars a week, and by the proof that in driving away from Mathewson's place of business Zimmerman was asked to await their return, thus to some extent pacifying and satisfying Mathewson for the moment; that Zimmerman drove away almost immediately in such an exhaust smoke from his car as to make it impossible for Mathewson to obtain his license number, and that they all met at Zimmerman's and stripped the car, leaving parts of it as security for the payment of gasoline which they needed to run it.

[4-6] The question of felonious intent is for the jury to decide and may be inferred from all of the circumstances of the case. Unless the determination does violence to reason, the appellate court will not substitute its conclusion for that reached by the "constitutional as well as the statutory arbiter thereof". People v. Perkins, 8 Cal.2d 502, 511, 66 P.2d 631, 635; People v. Gilbert, 26 Cal.App.2d 1, 78 P.2d 770.

The judgment and orders appealed from are, and each of them is, affirmed.

We concur: PETERS, P. J.; KNIGHT, J.

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36 Cal.App.2d 737

INGRAM v. BOARD OF EDUCATION, SAN FRANCISCO UNIFIED SCHOOL DIST.

Civ. 11203.

District Court of Appeal, First District, Division 2, California.

Jan. 26, 1940.

Limitation of actions 🔑61

Where resignation of probationary teacher was accepted effective August 14, 1927, and teacher was informed on June 18, 1928, when he sought to withdraw the resignation as being "forced," that withdrawal was impossible, cause of action, if any, accrued not later than 1928, and proceeding commenced approximately 11 years later to compel board of education to classify him

as a teacher with permanent tenure was barred by limitations. Code Civ.Proc. § 338, subd. 1.

◆

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Mandamus proceeding by William J. Ingram against the Board of Education, San Francisco Unified School District, to compel the board to classify petitioner as a teacher with permanent tenure in the public schools of San Francisco. Judgment for defendant, and petitioner appeals.

Affirmed.

M. Jas. McGranaghan, of San Francisco, for appellant.

John J. O'Toole, City Atty., and Walter A. Dold, Deputy City Atty., both of San Francisco (Irving G. Breyer, of San Francisco, of counsel), for respondent.

SPENCE, Justice.

Petitioner sought a writ of mandate to compel the respondent board to classify him as a teacher with permanent tenure in the public schools of San Francisco. The board interposed a demurrer which was sustained without leave to amend and judgment was entered ordering that petitioner take nothing by his action. Petitioner appeals from said judgment.

It appears from the allegations of the petition that petitioner was employed as a probationary teacher in 1925; that he submitted his resignation under date of June 16, 1927, to be effective August 24, 1927; that prior to tendering his resignation, and on June 8, 1927, the respondent board had accepted his resignation effective August 14, 1927; that on June 8, 1928, petitioner gave said board notice of the withdrawal of his resignation, claiming it was "forced", and demanding reinstatement; that in a letter of reply dated June 13, 1928, he was advised that it was impossible for him to withdraw said resignation; and that he has been refused employment by said board ever since August, 1927. His petition for a writ of mandate was not filed until April 20, 1939.

The respondent board interposed its demurrer setting forth as grounds therefor that the petition failed to state facts sufficient to constitute a cause of action and that said petition was barred by section 338, subdivision 1, and other sections of the Code of Civil Procedure and by laches.

Petitioner contends that the trial court erred in sustaining said demurrer and in entering judgment in favor of the respondent board. We find no merit in this contention. It is a sufficient answer to point out that it affirmatively appeared on the face of the petition that petitioner's cause of action, if any, accrued in 1927 or, in any event, not later than 1928. As his petition was not filed until approximately eleven years later, it was clearly barred by the provisions of section 338, subdivision 1, of the Code of Civil Procedure. Harby v. Board of Education, 2 Cal.App. 418, 83 P. 1081.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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36 Cal.App.2d 687

Ex parte MARTINEZ.

Cr. 2118.

District Court of Appeal, First District, Division 1, California.

Jan. 24, 1940.

1. Criminal law ⇨238

In proceeding before committing magistrate, a statement signed by two persons confessing robbery and implicating a third person, which statement was taken out of presence of such third person, was "hearsay" as to him and did not constitute lawful evidence tending to connect him with the crime. Pen.Code, § 872.

[Ed. Note.—For other definitions of "Hearsay Evidence," see Words & Phrases.]

2. Criminal law ⇨238

While a committing magistrate may hold a defendant to answer, although evidence before him would not support a verdict, under statute a defendant can only be held to answer when it appears that there is sufficient cause to believe that defendant committed the offense charged. Pen.Code, § 372.

3. Criminal law ⟹238

The term "sufficient cause," within statute providing that a defendant can only be held to answer when it appears from the evidence that there is sufficient cause to believe that defendant committed offense charged, means the same as "reasonable and probable cause," and hence a commitment based entirely on hearsay or incompetent evidence is unauthorized. Pen.Code, § 872.

[Ed. Note.—For other definitions of "Probable Cause," "Reasonable Cause," and "Sufficient Cause," see Words & Phrases.]

◆

Habeas corpus proceeding by Domingo Martinez on ground that he was held to answer for trial without reasonable or probable cause.

Writ issued.

Kenneth Carlton Zwerin, of San Francisco, for petitioner.

Matthew Brady, Dist. Atty., and Preston Devine, Deputy Dist. Atty., both of San Francisco, for respondent.

PETERS, Presiding Justice.

[1] Martinez petitions this court for a writ of habeas corpus on the ground that he was held to answer for trial without reasonable or probable cause. Attached to the petition is a complete transcript of proceedings taken before the committing magistrate. It is disclosed therein that petitioner, John Contreras and Jess Garcia were charged with robbery, to which charges they all pleaded not guilty. At the preliminary hearing, the complaining witnesses were unable to identify any of accused. Following his arrest, Contreras signed a written statement confessing the robbery, and implicating Garcia and petitioner. This statement was made out of the presence of Martinez and was not under oath. Garcia, prior to the hearing, signed the statement made by Contreras. This statement was admitted into evidence and was, of course, sufficient to hold Contreras and Garcia for trial. The petitioner, however, at the time of his arrest and up to the time of the preliminary hearing, denied that he had participated in the robbery. At the hearing, when Contreras' written statement was admitted into evidence, upon objection of counsel for the petitioner, the deputy district attorney stated that he was offering the statement only against Contreras and Garcia, and expressly stated that the statement was not offered as evidence against petitioner. The committing magistrate properly held that the statement, having been taken out of the presence of petitioner, was hearsay as to him, and did not constitute any lawful evidence tending to connect him with the crime. There was no other evidence offered in any way tending to connect petitioner with the offense charged. Nevertheless, the court below held petitioner to answer.

[2, 3] While it is true, of course, that a committing magistrate may hold a defendant to answer, although the evidence before him would not support a verdict of guilty (7 Cal.Jur., sec. 120, p. 983), under the provisions of section 872 of the Penal Code a defendant can only be held to answer when it appears from the evidence that "there is sufficient cause to believe the defendant" committed the offense charged. The term "sufficient cause" means the same as "reasonable and probable" cause. People v. Coombs, 9 Cal.App. 262, 98 P. 686. A commitment based entirely on hearsay or incompetent evidence is unauthorized. 7 Cal.Jur., sec. 120, p. 984. That is the situation presented on the present record. It is obvious, therefore, that the writ should issue.

It should be mentioned that the record shows that petitioner is also charged with another separate offense of robbery. This present proceeding applies only to the charge involved before the committing magistrate at the hearing of November 24, 1939.

At the time this cause was on this court's calendar for oral argument (January 22, 1940), the writ was ordered issued from the bench. This opinion is filed to conform with constitutional requirements.

We concur: KNIGHT, J.; WARD, J.

36 Cal.App.2d 730

PALM SPRINGS–LA QUINTA DEVELOPMENT CO. v. PALM SPRINGS LAND & IRRIGATION CO.

Civ. 2460.

District Court of Appeal, Fourth District, California.

Jan. 25, 1940.

1. Evidence 🔑450(5)

Where property covered by land contract was described as certain tract comprising approximately 1,000 acres of which vendor was the owner and no mistake or imperfection of the writings was put in issue by the pleadings, and validity of agreement was not in dispute, parol evidence to prove that contract was intended to describe not only property "owned" by the vendor but property which it was thereafter to acquire was inadmissible, since term "owned" is one of certain meaning and evidence would vary terms of written agreement. Civ.Code, § 1625; Code Civ.Proc. § 1865.

[Ed. Note.—For other definitions of "Own," see Words & Phrases.]

2. Evidence 🔑460(3)

Where the description in land contract so far as it goes is consistent but does not appear to be complete, it may be completed by extrinsic parol evidence provided a new description is not introduced into the body of the contract. Civ.Code, § 1625; Code Civ. Proc. § 1865.

3. Pleading 🔑381(2)

The complaint must contain the averments of such extrinsic matter as may be necessary to render the description complete before parol evidence is admissible to complete description in land contract. Civ.Code, § 1625; Code Civ.Proc. § 1865.

4. Evidence 🔑448

Where a description of land contract is ambiguous, parol evidence is admissible to determine what property was embraced within the description, but is not admissible if it would serve to contradict the unambiguous portion of the description. Civ.Code, § 1625; Code Civ.Proc. § 1865.

5. Estoppel 🔑37

Where property covered by land contract was described as certain tract comprising approximately 1,000 acres of which vendor was the owner, vendor was not estopped to deny that contract was intended to include property which was not owned by the vendor at the time of making of the contract but which might thereafter be acquired.

Appeal from Superior Court, Riverside County; George K. Scovel, Judge.

Action for declaratory relief by the Palm Springs-La Quinta Development Company, a corporation, against Palm Springs Land & Irrigation Company, a corporation. From an adverse judgment, plaintiff appeals.

Affirmed.

A. Heber Winder, of Riverside, and S. W. Newman, of Los Angeles, for appellant.

L. J. Difani, of Riverside, and Mitchell, Silberberg, Roth & Knupp, of Los Angeles, for respondent.

GRIFFIN, Justice.

This was an action in declaratory relief brought by plaintiff against the defendant for the purpose of having the court make its written declaration concerning the controversy between the parties regarding the fact as to whether or not a certain parcel of land described in the complaint was subject to the provisions of a contract entered into between plaintiff's assignors and defendant on February 1, 1936. The amended complaint alleges that certain real property described therein (hereinafter referred to as the property in dispute) "is part of the land generally described in said contract * * *". This allegation is denied in the answer and it is therein alleged that the property in dispute is not a part of the property described in the contract and was not owned by the defendant at the time the contract was executed, but was acquired some time thereafter.

The sole issue which the pleadings present for determination is whether the tract of land particularly described in the complaint is a part of the real property described in the written contract. The only description of the property thereby covered which is found in the contract of February 1, 1936, is contained in the following recitals and provisions, viz:

"Whereas, Seller is the owner of a certain tract of land, comprising approximately 1000 acres, situate in the County of Riverside, State of California, and known as La Quinta; and

"Whereas, said 'Seller' has, prior hereto, engaged in an extensive campaign of development, improvement and sale of lots from said tract; and * * *

"Whereas, said Buyers have organized a corporation under the name of Palm Springs-La Quinta Development Company, for the express purpose of exploiting and selling the said properties hereinabove referred to, * * *

"Now, Therefore, in consideration of the premises, * * * it is hereby agreed:

"1. Seller hereby grants to Buyers the sole and exclusive right and privilege to purchase and to sell said properties, upon terms and conditions following. * * *"

The property in dispute consists of approximately 160 acres, adjoining in the extreme southeast corner, the property owned by the defendant on February 1, 1936. The court found in favor of defendant's claim.

Appellant contends that for the purpose of identifying the land which would be the subject of the contract thereafter to be executed, two of the plaintiff's assignors and the president of the defendant company went upon the land and identified the same physically. It sought to show by parol testimony, that when the foregoing parties came to or upon the disputed parcel an extended discussion took place between them concerning its desirability and availability for subsequent sales purposes; that defendant's president particularly made it known that defendant did not then own the disputed property but that it could acquire it whenever it saw fit so to do; that the disputed property would be acquired by defendant in due course of business and hat when the time came for making it available for sales purposes defendant would acquire it and have it available to plaintiff for sales purposes under the terms of the contract thereafter to be executed; that following the physical examination of the property the contract of February 1, 1936, was executed. Defendant made many units of the property described in the contract available to plaintiff for sales purposes. However, it refused to make available to plaintiff the disputed property and on or about January 4, 1938, the controversy actively arose when plaintiff wrote to defendant, insisting that the disputed property be made available to it. Thereafter the within action was filed. During the trial the court received, over defendant's objections and subject to its motion to strike, testimony of certain witnesses. The testimony of Edward Glick and Frank Stone, president and secretary, respectively, of plaintiff corporation, was to the substantial effect that prior to the making of the contract of February 1, 1936, they, together with Harry Kiener, president of defendant corporation, went down to La Quinta, California, and examined in detail the land that was to be made subject to the terms of the contract; that during this examination, the disputed property was specifically pointed out and its availability for the purposes of the contract was thoroughly discussed; that it would be part of the subdivision project to be included and embraced within the terms of the contract later to be executed; and that when defendant actually did acquire it, it would be made available under the terms of the contract, to plaintiff, in orderly sequence following the subdivision of other property covered by the contract.

Kiener not only denied that the conversation to which the officers of plaintiff corporation testified ever occurred, but he also testified that he carefully showed them on a map the property which was covered by the contract and told them that the owner of the property in dispute had refused to sell and that such property could not be secured. Hale, the owner of the property in dispute, was in Kiener's office in October, 1935, and then told Kiener in the presence of Stone, secretary of plaintiff corporation, that he would not consider a sale of the property.

At the conclusion of the taking of the evidence, and pursuant to leave of court, defendant filed its written motion to strike the testimony of plaintiff's witnesses heretofore mentioned, and this motion was granted and the testimony ordered stricken. Appellant contends that the action of the trial court, in substantial effect, left plaintiff without any testimony to support the position taken by it under the pleadings. In other words, plaintiff, while it does not question the sufficiency of the evidence to support the findings, complains that certain evidence was stricken on motion of defendant, that the ruling of the court striking out such evidence was erroneous, and that had said evidence remained in the record the court might have reached a different conclusion on the question of whether or not the property in dispute was a part of the property referred to in the contract. The property is described in the contract as a tract of approximately 1000 acres owned by the defendant, situated in Riverside county, and known as La Quinta. The tract of real property in dispute was not owned by the defendant on the date of the contract nor had defendant any interest of any kind therein, all of which was known to appellant. However, many months subsequent to the date of the contract defendant acquired title to the property in dispute. No issue of fraud or mistake is presented by the pleadings nor is any ground for reformation of the contract alleged.

Appellant first argues that it was competent for the parties to contract for the sale of the disputed property even though at the time of the making of the contract defendant did not have an inchoate title and that plaintiff under such a contract would be compelled to accept the disputed properties and defendant was obliged to convey at the appointed time upon acquiring title thereto, citing Wheat v. Thomas, 209 Cal. 306, 287 P. 102, 106, wherein a contract for the sale of real estate was under consideration. In that case, at the time of the drafting of the contract the vendor did not have title to the property described therein. Specific performance was sought to compel the vendor to make a conveyance of the property described in the contract. The lower court decreed such specific performance and upon appeal it was contended by appellant that she was not bound by the terms of the contract to the extent that specific performance could be invoked for the reason that at the time of the making of the contract she did not have title to the property which was to be the subject of a later conveyance. Our Supreme Court upon this question, in affirming the decree, in providing for specific performance, said: "'It is the settled rule in this state that the vendor need not have even an inchoate title at the time of the contract; that he may sell land to which he has no title, and the contract will be valid and enforceable if, when the time for performance arrives, he is able to furnish the title he contracted to convey.' [Citing cases.]"

Respondent admits as a proposition of law that if the contract in question definitely described real property which the defendant did not own, the validity of the contract could not be questioned. The statement of the proposition of law above related, therefore, assumes that the defendant did, in fact, by its written contract of February 1, 1936, agree to convey property not then owned by it. This assumes the very fact in dispute. The controversy here centers upon what property the defendant, in writing, did agree to convey. In the solution of that problem, the mere fact that defendant might legally agree to convey property which it did not own is of no assistance. The cases cited by plaintiff under this point are not, therefore, helpful.

[1] The rule against admission of parole evidence, where such evidence has the effect of varying or contradicting the terms of a written contract, is expressed both in Civil Code section 1625 and Code of Civil Procedure section 1865. It is to be noted that no mistake or imperfection of the writing is put in issue by the pleadings, nor is the validity of the agreement in fact in dispute. The word "owned", or "owner" is one of fixed and definite meaning and gives rise to no such extrinsic ambiguity as will permit evidence that it was intended to include property thereafter acquired. Nor is any issue made by the pleadings with respect to which such evidence might be responsive. The complaint charges that the property in dispute is part of the property described in the contract. The only property described in the contract is property then owned by the defendant. To now permit evidence which would prove that the contract was intended to describe not only property owned by the defendant but property which it was thereafter to acquire would clearly and definitely alter and vary the terms of the written agreement and impart to the written agreement an additional term and an additional obligation on the part of the defendant. Thoroman v. David, 199 Cal. 386, 249 P. 513; Osborn v. Hendrickson, 7 Cal. 282; Empire Investment Co. v. Mort, 169 Cal. 732, 147 P. 960; Fraters G. & P. Co. v. Southwestern C. Co., 200 Cal. 688, 254 P. 1097; Parkford v. Union Drilling etc. Co., 118 Cal.App. 538, 5 P.2d 440; Rottman v. Hevener, 54 Cal. App. 474, 202 P. 329; Craig v. Zelian, 137 Cal. 105, 69 P. 853; Willmon v. Peck, 5 Cal.App. 665, 91 P. 164.

[2-4] In Marriner v. Dennison, 78 Cal. 202, 20 P. 386, 389, it was said: "But parol evidence cannot be heard to furnish a description. The only purpose for which such evidence can be heard is to apply the description given to the subject-matter. * * *" There are cases in which the statute of frauds has been held to have been satisfied by a description of the property as "my farm in Riverside County" or the land "owned by me" in a locality,

but in no such case has evidence been permitted except to identify "my farm" or the land "owned by me". No case can be found wherein it is held that the description is sufficient under the statute if parol evidence is necessary to supply a description rather than identify the land described. It is plain enough that here the plaintiff seeks to go beyond the provisions of the contract and solely by parol evidence to prove that the contract included property which defendant did not own but was thereafter to acquire. The rule, therefore, appears to be that where the description, so far as it goes, is consistent, but does not appear to be complete, it may be completed by extrinsic parol evidence, provided a new description is not introduced into the body of the contract, and the complaint must contain the averments of such extrinsic matter as may be necessary to render the description complete. Russell v. Ramm, 200 Cal. 348, 254 P. 532. The term "owned" is one of plain and certain meaning and the court was justified, under the language of the authorities above cited, in being guided by the language there used and construing the intention of the parties to have been in accordance with their agreement. The court, in the course of a written opinion, succinctly stated the proposition presented and in our opinion has adopted a reasonable interpretation which rightfully cannot be changed or altered by an appellate tribunal. Slama Tire Protector Co. v. Ritchie, 31 Cal.App. 555, 161 P. 25. The opinion of the trial court reads in part as follows: "Plaintiff contends that the description in the contract being ambiguous, parol evidence is admissible to determine just what property was embraced within the description. In general, this rule is correct; however, parol evidence is not admissible to so identify the land where the evidence offered would serve to contradict the unambiguous portion of the description. There is nothing ambiguous in that portion of the description which refers to the lands as being 'owned by the defendant'. The only ambiguity therein arises through the use of the words 'one thousand acres'. Parol evidence would unquestionably be admissible to show the definite description of the one thousand acres, but to admit additional evidence showing that the parties intended therein to include property not owned by the defendant would not only vary the terms of the written instrument and insert a new description not therein included but would also serve to add additional terms to the writing, to wit: an agreement on the part of defendant to sell lands not then owned by him. It is the opinion of the court that this would violate both the parol evidence rule and the statute of frauds. See Marriner v. Dennison, 78 Cal. 202 [20 P. 386]; Willmon v. Peck, 5 Cal.App. 665 [91 P. 164]; Craig v. Zelian, 137 Cal. 105 [69 P. 853]."

[5] The facts of the instant case do not justify the application of the rule of estoppel as announced and applied in the case of Work v. Associated Almond Growers, 102 Cal.App. 232, 282 P. 965.

For the reasons expressed the judgment of the trial court is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

36 Cal.App.2d 714

SILVER BURDETT CO. v. STATE BOARD OF EDUCATION OF CALIFORNIA et al. (two cases).

Civ. 11121.

District Court of Appeal, First District, Division 2, California.

Jan. 25, 1940.

Rehearing Denied Feb. 24, 1940.

Hearing Denied March 25, 1940.

1. Appeal and error 🔑801(1)

Where judgment and order were subject to affirmance on the merits, motion to dismiss appeal for failure to take appeal within prescribed time would be dismissed, since dismissal could not result in prejudice to moving parties.

2. Mandamus 🔑178

In mandamus proceeding to compel execution of contract by secretary of the state board of education, denial of motion by secretary for an order setting aside judgment granting writ as to him and permitting him to file an answer was not, under the circumstances, an abuse of discretion.

3. Mandamus 🔑154(4)

In mandamus proceeding to compel secretary of the state board of education to sign a contract prepared pursuant to resolution adopting certain text-books for use in elementary schools of the state, petition containing allegations showing that state curriculum commission had presented its report and recommendation at a public meeting of the board of education sufficiently alleged, as against demurrer, that commission had been given a "public hearing" as required by statute. School Code, § 6.265.

> The term "public hearing" has been defined in various ways and its meaning no doubt varies depending upon the subject of the hearing, the nature of the board or person holding the hearing and nature of the board or person to be heard.
>
> [Ed. Note.—For other definitions of "Public Hearing," see Words & Phrases.]

4. Mandamus ⟹143(2)

The mere lapse of time alone would not require denial of relief requested by petition for mandamus to compel secretary of state board of education to sign a contract prepared pursuant to resolution for adoption of certain text-books in elementary schools of the state, unless circumstances were shown to be such that delay had resulted in prejudice.

5. Mandamus ⟹143(2)

In mandamus proceeding to compel secretary of the state board of education to sign a contract prepared pursuant to resolution for adoption of certain text-books in elementary schools of the state, petition was not subject to special demurrer for "laches" in commencing proceeding, though more than a year had elapsed between time text-books were adopted and time proceeding was commenced, in absence of anything on face of complaint to indicate that prejudice had resulted, particularly where no such issue was tendered by proposed answer.

> [Ed. Note.—For other definitions of "Laches," see Words & Phrases.]

6. Mandamus ⟹7

The granting or refusing of a writ of mandamus rests to a large extent in discretion of court to which application is made. Code Civ.Proc. § 1085.

7. Mandamus ⟹176

Schools and school districts ⟹80(1)

A contract prepared pursuant to resolution adopting certain text-books for use in elementary schools of the state did not require compliance by board of education with its terms until it had been executed by secretary of the board, but in any event refusal to compel members of board by mandamus to recognize the contract and give it effect, in same proceeding in which writ was issued to compel secretary to execute the contract, was not an abuse of discretion. Code Civ. Proc. § 1085.

◆

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

Mandamus proceeding by the Silver Burdett Company against the State Board of Education of California, Walter F. Dexter, and others to compel Walter F. Dexter, as Secretary of the State Board of Education, to sign a certain contract, and to compel all of the defendants to recognize the contract and to do certain acts pursuant thereto. Judgment granting a peremptory writ as to Walter F. Dexter only, and both plaintiff and Walter F. Dexter appeal. Dexter also appeals from an order denying a motion for an order setting aside the judgment. The three appeals were consolidated. Certain of the defendants moved to dismiss the plaintiff's appeal.

Motion to dismiss the appeal dismissed; judgment and order affirmed.

Hearing denied; SHENK and CARTER, JJ., dissenting; GIBSON, J., not participating.

C. Harold Caulfield and Edward D. Keil, both of San Francisco, for plaintiff Silver Burdett Co.

Charles Kasch, of Ukiah, for defendants Carter and Kasch.

Earl Warren, Atty. Gen., and F. Walter French, Deputy Atty. Gen., for other defendants.

SPENCE, Justice.

Plaintiff sought a writ of mandate to compel the defendant Walter F. Dexter, as secretary of the State Board of Education, to sign a certain written contract on behalf of said board and also to compel all of the defendants to recognize said contract and do certain acts pursuant thereto. The proceeding was brought against defendants in their individual as well as their official capacities. Defendants, appearing in their individual capacities, filed a demurrer and further said defendants, appearing in their official capacities, filed a separate demurrer. After a hearing, the court "ordered the demurrer to the petition overruled", and entered its judgment granting a peremptory writ of mandate. In said judgment, it was recited that it appeared the writ should issue as to defendant Dexter, as secretary, and that the writ should not issue as to any of the other defendants. The writ was ordered to issue in accordance with said recitals. Defendant Dexter, as secretary, took an appeal from the portion of said judgment ordering the writ to issue. Plaintiff took an appeal from the portion of the judgment which denied any further relief to plaintiff. Prior to taking his appeal defendant Dexter, as secretary, has noticed a motion for an order setting aside said judgment and permitting him to file an answer. The proposed answer was attached to the notice. This motion was denied and defendant Dexter took a separate appeal from the order denying said motion. The three appeals above mentioned are consolidated herein. There is also before this court a motion of certain defendants to dismiss the appeal of plaintiff, which motion is grounded upon the claim that said appeal was not taken within the time prescribed by law.

[1] Our consideration of the questions presented upon the merits of the various appeals leads us to the conclusion that the judgment and order should be affirmed and we are therefore of the view that it becomes unnecessary to consider the question raised on the motion to dismiss plaintiff's appeal. Said motion may be dismissed as the dismissal thereof cannot result in prejudice to the moving parties.

The main controversy arises out of the refusal of defendant Dexter, as secretary, to sign on behalf of the board a certain written contract with plaintiff after said board had considered various text books submitted to it and had adopted certain text books submitted by plaintiff for use in the elementary schools of this state. The resolution of adoption set forth the terms and conditions and provided "that the officers of the board be directed to enter into a contract" with plaintiff. The contract was prepared pursuant to the resolution and was signed by plaintiff and by the president of the board acting on behalf of said board. Defendant Dexter, as secretary, refused to sign said contract and this proceeding was instituted.

Appeals of Defendant Dexter.

[2] On the appeal from the judgment, defendant Dexter contends that the trial court erred in overruling his demurrer to the petition and, on the appeal from the order, said defendant contends that the trial court abused its discretion in denying his motion to set aside the judgment and to permit said defendant to answer. These contentions are closely related for if the material allegations contained in the petition were sufficient as against the demurrer, no issue as to any material fact was made by the proposed answer and the entire controversy involved merely a question of law. Under these circumstances it was not an abuse of discretion to deny said defendant's motion. See Private Investors v. Homestake Min. Co., 11 Cal.App.2d 488, 54 P.2d 535.

[3] We therefore turn to the question of the sufficiency of the petition as against the demurrer interposed by said defendant. The main attack made by said defendant is that the petition failed to allege in so many words that the state curriculum commission had been given a "public hearing" by said board before making the adoption of said text books. This attack is based upon section 6.265 of the School Code, which reads, "The state board of education must give the state curriculum commission a public hearing before making any adoption of text-books for use in the elementary schools of this state." This attack is answered by plaintiff first, by the claim that the allegations of the petition, as well as the admissions of the proposed answer, were sufficient to show that the commission had been given a "public hearing" within the meaning of said section and second, by the claim that under the provisions of article IX, section 7, of the Constitution, the board had the power to adopt text books and that no statutory provisions relating to such adoption could be made mandatory upon the board. We are of the opinion that the first answer made by plaintiff is sufficient and that it is therefore unnecessary for us to pass upon the second.

Before considering the allegations found in the petition, it appears appropriate to consider the relationship which the statutes establish between the state curriculum commission and the state board of education. Said commission is of recent origin having been created in 1927. Stats. 1927, p. 376. It is conceded that the commission acts in a purely advisory capacity to said board, that it has the power only to make recommendations to said board and that such recommendations are in no way binding upon said board. School Code, secs. 6.263 and 6.264.

It was alleged in the petition that on or about January 22, 1937, the commission was notified at its regular meeting that the board had called a meeting for January 30, 1937, for the purpose of making an adoption of language text books for the elementary schools; that the commission adopted a resolution requesting additional time to prepare its recommendation; that in pursuance of the request of the commission, the board postponed its consideration of the adoption of said text books until February 27, 1937; that thereafter the commission duly adopted a report and recommendation and on February 27, 1937, the commission "presented its report and recommendation on the adoption of language text books for elementary schools to the state board of education at the regularly called and scheduled meeting of said state board"; and that thereafter and on said February 27, 1937, the board accepted the bid of plaintiff and directed its officers to enter into the contract with plaintiff.

We are of the opinion that these allegations were sufficient to show that the commission had been given a "public hearing" within the meaning of the statute. The meetings of the board are public meetings and it was alleged that the commission presented its report and recommendation at a regular meeting of the board. The term "public hearing" has been defined in various ways and its meaning no doubt varies depending upon the subject of the hearing, the nature of the board or person holding the hearing and nature of the board or person to be heard. It has been said that the meaning of a word may vary and so too may the meaning of combinations of words. In Towne v. Eisner, 245 U.S. 418, at page 425, 38 S.Ct. 158, 159, 62 L.Ed. 372, L.R.A.1918D, 254, the court, speaking through Mr. Justice Holmes, said, "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." In the present case, the term "public hearing" was not used with respect to a proceeding in which the constitutional rights of any person might be affected. The subject before the board of education was the adoption of text books for use in the public schools and no question of the right of any person to life, liberty or property was involved. For this reason, many of the authorities defining "public hearing" cannot be considered in point. The hearing here was one to be accorded by one administrative body, namely the board of education, to its purely advisory body, namely, the curriculum commission, and in our opinion the allegations showing that the commission had actually presented its report and recommendation at a public meeting of the board was equivalent to an allegation that the commission had been given the "public hearing" required by the statute.

[4] Defendant Dexter further contends that his special demurrer should have been sustained. He first argues this contention from the standpoint of alleged laches. He points to the fact that the complaint showed that more than a year had elapsed between the time of the adoption of plaintiff's text books by the board and the time this proceeding was commenced. But the mere lapse of time alone does not require the denial of the relief requested unless the circumstances are shown to be such that the delay has resulted in prejudice. Gallaher v. Iowa Oil Co., 139 Cal.App. 100, 33 P.2d 439. There was nothing on the face of the complaint to indicate that prejudice had resulted and furthermore no such issue was tendered by the proposed answer of defendant Dexter. Said defendant argues other grounds of his special demurrer but we find no merit in any of them. We conclude that there was no error in overruling said demurrer and that there was no abuse of discretion in denying the motion to set aside the judgment and to permit said defendant to answer.

Appeal of Plaintiff.

[5-7] As above stated, plaintiff appealed from the portions of the judgment denying further relief to plaintiff. Plaintiff states the relief denied was a direction to the board (1) to recognize the contract and give it effect; (2) to cause the books adopted to be published; (3) to issue an order requiring the uniform use of said books; and (4) to enforce the uniform use of said books. On the first page of its brief, plaintiff states the question on plaintiff's appeal as follows: "Where a contract has been entered into between the state board of education and petitioner for certain text books, will the purchase and distribution of such books in accordance with the school code provisions be enforced by mandate?"

This question and plaintiff's affirmative answer thereto are premised upon the statement that the contract has already been entered into. We cannot accept this premise as it is contrary to the facts as alleged by plaintiff in seeking to compel the execution of such contract by defendant Dexter. The writ of mandate may be issued "to compel the performance of an act which the law specially enjoins", Code Civ.Proc., § 1085, and until such contract is executed, the law does not enjoin the performance of the above-mentioned acts upon said defendants. In any event, the granting or refusing of the writ rests to a large extent within the discretion of the court to which the application is made, 16 Cal.Jur. 768, and we find no error or abuse of discretion in the refusal of the trial court to issue the writ directed to the defendants other than the defendant Dexter.

The motion to dismiss plaintiff's appeal is dismissed and the judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

CASNER v. DAILY NEWS CO., Limited, et al. [*]

Civ. 10785.

District Court of Appeal, First District, Division 2, California.

Jan. 25, 1940.

Rehearing Denied Feb. 24, 1940.

Hearing Granted March 25, 1940.

1. New trial 🔑159

Where trial court made no order disposing of motion for new trial, the motion was denied without court order. Code Civ.Proc. § 660.

2. Appeal and error 🔑110

Order denying motion for new trial was not appealable.

3. Appeal and error 🔑870(6)

Propriety of order denying motion for new trial could be inquired into on appeal from judgment entered in the case. Code Civ.Proc. § 956.

4. Dismissal and nonsuit 🔑81

Where an order vacating order of dismissal was entered, the cause of action stood as one pending and undetermined in the court, and procedure to be followed was a trial de novo. Code Civ.Proc. § 616.

5. Judgment 🔑197

Where defendants filed motions for directed verdict, but plaintiff dismissed without prejudice before motions were ruled on, and jury was dismissed, and subsequently defendants' motions to vacate order of dismissal were granted, and motions for directed verdicts were granted, judgments entered on the orders granting defendants' motions for directed verdicts were void because of absence of verdicts on which to base the judgment. Code Civ.Proc. § 616.

6. Appeal and error 🔑1074(1)

Where defendants filed motions for directed verdicts, but plaintiff dismissed without prejudice before motions were ruled on, and jury was dismissed, and subsequently defendants motions to vacate orders of dismissal were granted, error in causing judgments to be entered for defendants was prejudicial and resulted in a "miscarriage of justice," where there was no stipulation waiving a trial de novo or consenting to use of the record in the first trial, since judgments determined issues that had not been tried. Code Civ.Proc. § 616; Const. art. 6, § 4½.

[Ed. Note.—For other definitions of "Miscarriage of Justice," see Words & Phrases.]

7. Appeal and error 🔑356

Where notice of appeal was filed 78 days after entry of order vacating order of voluntary dismissal obtained by plaintiff, the appeal was required to be dismissed as not timely taken. Code Civ.Proc. § 939.

8. Appeal and error 🔑803

Where appeal from order vacating an order of voluntary dismissal obtained by plaintiff was not timely taken, the order remained in effect. Code Civ.Proc. § 939.

◆

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Cannie Casner against the Daily News Company, Limited, and another for death of plaintiff's husband who was struck by an automobile owned by the named defendant and thrown on the track of defendant Market Street Railway Company and run over by one of its streetcars. Plaintiff's motion to dismiss the action without prejudice was granted. From orders vacating order of dismissal, from judgments for defendants, and from order denying plaintiff's motion for new trial, the plaintiff appeals.

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[*] For subsequent opinion see 106 P.2d 201.

Judgments reversed, and appeal from orders dismissed.

Glikbarg, Wolf & Selig, Philip Barnett, Francis Gill, Freidenrich & Selig, and Philip Selig, Jr., all of San Francisco, for appellant.

George M. Naus and Donald Seibert, both of San Francisco, for respondents Daily News Co., Limited, and William Cohn.

Wm. M. Abbott, Cyril Appel, and Ivores R. Dains, all of San Francisco, for respondents Market St. Railway Co., and John Bartlett.

STURTEVANT, Justice.

As the surviving widow of Mark Casner, the plaintiff commenced an action for damages for his wrongful death. The complaint alleges that he was struck by an automobile owned by the defendant Daily News Company, thrown on the track of the defendant Market Street Railway Company and run over by one of its streetcars. The plaintiff sued both corporations. The trial was commenced in April, 1937, before the court sitting with a jury. After all parties had rested each defendant made a motion for a directed verdict. Before the motion was ruled upon the plaintiff moved to dismiss the action without prejudice. This motion was granted, whereupon, and on the same day, April 7, 1937, the jury was discharged. On April 26th the defendants respectively served and filed notices of motion to vacate the order of dismissal and for orders that their motions for a directed verdict be granted. These motions were granted on June 28, 1937. A formal judgment for the defendant Market Street Railway Company, and against the plaintiff was, on written direction of the trial judge, filed on June 29th, and entered on June 30, 1937. Also a formal judgment for the defendant Daily News Company was, on like written direction of the trial judge, filed July 1 and entered on July 2, 1937.

[1] On July 16, 1937, the plaintiff served and filed a notice of intention to move for a new trial, specifying all the statutory grounds. No order of the trial court disposing of this motion appears of record. It was therefore denied without order of the court under the provisions of section 660 of the Code of Civil Procedure.

[2, 3] On September 14, 1937, the plaintiff filed a notice of appeal: (1) from the order of June 28, vacating the order of dismissal of date April 7, 1937; (2) from the judgment entered June 30; and (3) from the judgment entered July 2, 1937. The notice also specified an appeal from the order denying the plaintiff's motion for a new trial. As the order denying the motion for a new trial was not an appealable order, no further notice need be taken of the attempted appeal therefrom. However, its propriety may be inquired into on an appeal from the judgments. Section 956, Code Civ.Proc.

[4] It is clear that no order directing a verdict was made and no verdict was rendered. When the order vacating the order of dismissal was entered, the effect was that the cause of action then stood as one pending and undetermined in said court. The procedure that should have been followed thereafter is set forth in section 616 of the Code of Civil Procedure. That section provides: "When prevented from giving verdict, the cause may be again tried. In all cases where the jury are discharged, or prevented from giving a verdict, by reason of accident or other cause, during the progress of the trial, or after the cause is submitted to them, the action may be again tried immediately, or at a future time, as the court may direct." By following such procedure the cause could have been completely determined on its merits.

[5] However, instead of following the procedure so provided, the trial court heard motions for directed verdicts, granted the same, and caused judgments to be entered on said orders in favor of the defendants. The effect of a judgment rendered under similar circumstances was under consideration in Vitimin Milling Corp. v. Superior Court, 1 Cal.2d 116, 33 P.2d 1016. At page 119 of 1 Cal.2d, at page 1018 of 33 P.2d, the court said: "In the first place, it appears without dispute that, although a motion for a directed verdict as to the petitioner was made and noted by the minute order as 'granted,' no instruction to return a verdict was submitted to the jury; no request was made by the petitioner for an instruction to the jury to return a verdict; and no verdict was returned either by the jury, by the court, or at all, and there is no show-

ing or intimation that the jury in this case would have refused to return a verdict for the petitioner, if it had been instructed so to do. That the court has the power to direct the jury to return a verdict in a proper case cannot be questioned. Nor is it disputed that the return of a verdict in such a case is a ministerial act. A verdict in any case must be in writing. Section 618, Code Civ.Proc. When the verdict is rendered, an entry thereof must be made in the minutes of the court. Section 628, Code Civ.Proc. As to these requirements there is no distinction between a verdict returned by the jury after deliberation and one returned by direction of the court. In each case the verdict serves as a basis for the entry of a judgment thereon. In the absence of a verdict entered as required by law, there is no finality to the proceedings. The order merely granting the motion for a directed verdict is not an appealable order. Section 963, Code Civ.Proc. And we know of no authority in law for the entry of a judgment which would, in the absence of a verdict, in any way constitute a judgment on a verdict. The purported judgment of May 4th was therefore void on the face of the record, and was properly set aside by the respondent judge." For the same reasons it is clear that the judgments appealed from, that is, the formal judgments entered respectively on June 30, 1937, and July 2, 1937, were void.

The defendants state several facts that were present in the Vitimin case which they claim distinguish that case from this. Conceding that those facts do distinguish it, nevertheless the clear language contained in that case shows it did not rest on the facts which defendants call to our attention.

[6] The defendants assert the error, if any, in causing the judgments complained of to be entered, was not prejudicial. Const. art. VI § 4½. However, we think that assertion cannot be sustained. When, on June 26, 1937, the order was made setting aside the order of dismissal, such order became effective at the moment it was entered and thereafter remained in force as an effective restoration of the cause as an action pending and undetermined in said court. Casner v. Daily News Co., Ltd., 12 Cal.2d 402, 405, 84 P.2d 1032. The procedure to be followed was a trial de novo. Code Civ.Proc. § 616. No such new trial was had. No stipulation waiving a trial de novo or consenting to the use of the record in the first trial was entered into. Therefore, the judgments appealed from determine issues that have never been tried. Such judgments are a miscarriage of justice. Palmer v. Tschudy, 191 Cal. 696, 703, 218 P. 36.

[7, 8] On September 14, 1937, the plaintiff filed a notice of appeal from the order made June 28, 1937, vacating the order of dismissal. That is, the notice was filed seventy-eight days after the entry of said order. The appeal from that order was not taken in time. Code Civ.Proc., § 939. Therefore said order is still in effect. Casner v. Daily News Co., Ltd., supra. The appeal from that order is dismissed.

The order denying a motion for a new trial is not an appealable order and the appeal from that order is also dismissed.

The judgments appealed from are reversed.

We concur: NOURSE, P. J.; SPENCE, J.

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36 Cal.App.2d 700

CASSELMAN v. HARTFORD ACCIDENT & INDEMNITY CO. et al.

Civ. 6156.

District Court of Appeal, Third District, California.

Jan. 24, 1940.

Rehearing Denied Feb. 23, 1940.

Hearing Denied March 21, 1940.

1. Negligence ⚷136(9)

Contributory negligence is a question of law only when reasonable men can draw but the one inference that negligence of plaintiff contributed to his injury.

2. Automobiles ⚷171(4)

A motorist whose automobile enters intersection first has the right of way over automobile approaching intersection, but if two automobiles approach intersection at approximately the same time the motorist to the right has right of way. Vehicle Code, § 550(a), St.1935, p. 186.

3. Automobiles ⚷206

A motorist who has entered intersection first has the right to assume that a motorist approaching intersection will obey the law and yield right of way. Vehicle Code, § 550 (a), St.1935, p. 186.

4. Automobiles 🔑208

A motorist approaching an intersection is negligent if he attempts to enter or cross intersection at any time when it would appear to the mind of any reasonable person that another automobile approaching intersection was near enough to constitute an immediate danger, even though such motorist was first to arrive at or enter intersection.

5. Automobiles 🔑245(80)

In action arising out of intersectional collision under evidence that plaintiff's automobile reached intersection before defendant's automobile, whether plaintiff was contributorily negligent in proceeding across intersection after seeing defendant's automobile approaching was for jury. Vehicle Code, § 550(a), St.1935, p. 186.

6. Automobiles 🔑242(8)

In action arising out of intersectional collision, the burden of proving that plaintiff whose automobile reached intersection first was negligent in proceeding across intersection after observing that defendant's automobile was near enough to constitute an immediate danger was on the defendant. Vehicle Code, § 550(a), St.1935, p. 186.

7. Appeal and error 🔑1001(1)

Reviewing court lacks power to disturb conclusion of jury based on the evidence.

8. Automobiles 🔑171(5)

"Through highways" on which a motorist has the right of way over motorist entering highway from side roads are not continuous in character, but under the statute are only such when running past an intersection at which stop signs have been erected. Vehicle Code, § 82.5, St. 1937, p. 413.

9. Automobiles 🔑208, 245(80)

A motorist approaching a main highway from a side road was not required as a matter of law to stop before entering intersection, but his rights as against motorist on main highway were governed by the statute requiring driver of vehicle approaching an intersection to yield right of way to a vehicle which has entered intersection from a different highway. Vehicle Code, § 550(a), St.1935, p. 186.

10. Appeal and error 🔑1004(1)

Reviewing court's power over excessive damages exists only when facts are such that excess appears as a matter of law or is such as to suggest passion, prejudice, and corruption of jury.

11. Death 🔑99(3)

$10,000 awarded to a father for death of his 17 year old daughter was not excessive.

12. Death 🔑103(4)

In a death action by father for death of his daughter, the pecuniary value of daughter's services, arising out of the loss of her society and comfort, must be committed to sound judgment of jury.

13. Master and servant 🔑316(1)

An "independent contractor" for whose negligent acts he alone is liable is one who in rendering services exercises an independent employment or occupation and represents his employer only as to results of his work and not as to means whereby it is to be done.

14. Master and servant 🔑316(1), 318(1)

Circumstances showing one to be an "independent contractor" and not an "employee" are independent nature of his business, existence of a contract for performance of a specified piece of work, agreement to pay fixed price for the work, employment of assistants by employee who are under his control, furnishing by him of necessary materials, and his right to control work while it is in progress, except as to results.

[Ed. Note.—For other definitions of "Employee" and "Independent Contractor," see Words & Phrases.]

15. Automobiles 🔑193(3, 8)

Where it is sought to charge a defendant with negligent operation of an automobile by another person, proof must be made that driver was employee of defendant for some purpose, that driver's use of automobile was a contemplated incident of his employment, and that driver at time of accident was operating automobile in the transaction of defendant's business.

16. Automobiles 🔑245(32)

Question whether driver of an automobile involved in an accident was employee of another or an independent contractor is generally for jury, and court is not justified in taking such question from jury unless evidence in regard to it is clear and unequivocal.

17. Automobiles ⚷245(32)

Evidence that manager of claims department of insurance company instructed attorney to make investigation of accident covered by a policy of company, that attorney was taking place of other regular employees of company, and that attorney could have been discharged if his work was unsatisfactory presented jury question as to whether attorney was an "independent contractor" or "employee" of company, so as to charge company with attorney's negligent operation of automobile while investigating accident.

18. Master and servant ⚷318(1)

The chief distinction between status of an "employee" and an "independent contractor" lies in matter of control and if party who is sought to be charged for conduct of another has right to direct manner in which work is to be done, then such other is an "employee," and it is not the actual exercise of control, but the right of control, that determines existence of the relationship.

◆

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action by James C. Casselman against Hartford Accident & Indemnity Company and J. A. Maguire to recover for injuries and for the death of his daughter in automobile accident. From a judgment for the plaintiff, defendants appeal.

Affirmed.

Neumiller & Ditz, of Stockton, for appellant Maguire.

Jesse H. Steinhart and John J. Goldberg, both of San Francisco, for appellant Hartford Accident & Indemnity Co.

Honey & Mayall, of Stockton, for respondent.

Mr. Justice TUTTLE delivered the opinion of the court.

This is an appeal by the defendants from a judgment entered (on a jury's verdict), in the total amount of $13,680, in favor of plaintiff James C. Casselman, and against both defendants, J. A. Maguire and Hartford Accident and Indemnity Company, a corporation.

The action arose out of an automobile accident which occurred on the 29th day of January, 1937, in the county of San Joaquin, state of California, at the intersection of the Lincoln highway (U. S. highway 50), and the so-called West Side highway and Banta county road. The accident resulted in personal injuries and property damage to plaintiff, for which plaintiff was awarded the sum of $3,680. The accident also resulted in the death of the 17-year-old minor daughter of plaintiff, for which plaintiff was awarded the sum of $10,000.

The complaint of plaintiff was in two counts; in the first, plaintiff sought to recover damages for the death of his minor daughter, and in the second, plaintiff sought to recover for his own injuries and loss of personal property. In each cause of action plaintiff charged the defendants with negligence in the operation of the automobile which came into collision with the automobile being driven by plaintiff, and in which the minor daughter of plaintiff was riding. In the separate answers of the two defendants, all negligence on their part was denied and contributory negligence of the plaintiff was affirmatively pleaded.

The accident occurred at about 4 o'clock on the afternoon of January 29, 1937. U. S. highway 50, or the Lincoln highway runs generally in an easterly and westerly direction at the place where the accident occurred. The so-called West Side highway intersects with U. S. highway 50 and extends generally south therefrom. Extending to the north of U. S. highway 50, and intersecting the same at somewhat of an angle to the intersection of the West Side highway on the south side of U. S. highway 50, is a small county road, which extends northerly a distance of a quarter or half a mile to the small town of Banta.

At the time of the accident in question there was no stop sign on the north side of U. S. highway 50 controlling traffic traveling south from Banta along the small county road. A stop sign has been erected at this entrance to the through highway since this accident.

The plaintiff at the time in question was traveling from Banta south along the county road, and intended to cross over U. S. highway 50 and proceed southerly on the West Side highway to his home a short distance south of the through highway. Plaintiff had resided in the vicinity of this intersection of highways for a number of years and was thoroughly familiar with the same. A few moments before the accident, plaintiff drove from his home north along the West Side highway and brought his car to a stop before entering and crossing U. S. highway 50. He proceeded to Banta, where he picked up his daughter when she arrived by bus from school. His daughter seated herself in the right front seat alongside of her father, who then began the short trip home, proceeding, as above indicated, southerly from Banta along the small county road toward the intersection thereof with U. S. highway 50. The other facts are given in the following testimony of respondent:

Respondent Casselman testified that at the time of the accident, he was driving a 1932 Ford sedan, and was on his way home. He then gave the following testimony with reference to his actions immediately before and at the time of the accident:

"Q. Now as you came down the highway going in a general southerly direction and approaching this intersection did you see Mr. Maguire's car before you got to the intersection here? A. Yes, sir.

"Q. Now, about how far away were you from this intersection when you first noticed Mr. Maguire's car approaching? A. I was approximately a block and a half.

"Q. And what is your best information as to how far away he was from the intersection when you were about a block and a half away from the intersection? A. Approximately three blocks.

"Q. In other words, he was approximately twice as far away? A. Yes, sir.

"Q. Now, at that particular time, Mr. Casselman, when you were about a block and a half away, about how fast were you traveling as you were going along the highway? A. Approximately 25 miles an hour.

"Q. And did you form an estimate as to how fast he was approaching the intersection? A. About 40 or 45 miles an hour.

"Q. By the way, from the time you first saw him in the opposite direction that far away until this collision occurred were there any other cars in the vicinity of this intersection approaching on any of these roads? A. No, sir.

"Q. In other words, there were just the two of you approaching that intersection at that time? A. Yes, sir, that is all.

"Q. At the time this collision occurred, Mr. Casselman, there was not any Stop Sign up there on the north side? A. Yes.

"Q. And you knew that at that time, did you not? A. I did. There never has been one there for a long time; never as I can remember.

"Q. And you were thoroughly familiar with this intersection prior to January 29, 1937? A. Yes, sir.

"Q. Did you continue to watch Mr. Maguire as he approached? A. Yes, sir; I was driving along but I noticed him coming.

"Q. What, if anything, did you do with reference to your speed as you entered the main highway here, did you increase or decrease your speed? A. I decreased it.

"Q. And just about how slow did you slow down your car, Mr. Casselman? A. I slowed down to approximately 20 to 15.

"Q. And then did you continue on and into the intersection after you slowed down? A. I seen at the right-of-way there, I looked up and seen the other car coming and then I proceeded on.

"Q. As far as you could tell, from the time you first saw Mr. Maguire's car until the time this collision occurred did his speed increase or decrease or did it maintain about the same rate? A. I figure it was about the same, 40 to 45.

"Q. Now, Mr. Casselman, as you got to the intersection, which would be the north edge of the concrete highway here (indicating on Plaintiff's Exhibit X), about where was Mr. Maguire's car at that time, that is was he into the intersection or was he over to your right approaching the intersection? A. He was at least seventy-five feet toward Tracy.

"Q. Away from the intersection? A. Yes, sir.

"Q. Now, just tell the jury in your own words, Mr. Casselman, what Mr. Maguire did, that is, how he began proceeding and how you got together? A. I proceeded out further to see if it was safe for a distance and I proceeded out further on but I did not see the danger until I got about here to the white line (indicating white line on plaintiff's Exhibit X) and I increased my speed and went over.

"Q. Did you at any time to your recollection swerve either to your right hand or to your left hand? A. I could not say; I may have swerved a little.

"Q. And you say you speeded up about the center of the intersection? A. Yes.

"Q. About what speed did you have your car at? About what speed did you have your car going up to the point of the collision? A. I think approximately 25.

"Q. And you were watching Mr. Maguire all the time up to where the two of you hit? A. I was watching him.

"Q. Did he turn his car over one way or the other before the collision occurred? A. No; it was straight on until I was over to him and he swerved.

"Q. Which way did he swerve, to his right or left? A. To his right."

Respondent further testified that he did not realize that there was any danger in his crossing the highway in front of defendant Maguire until he got about to the center of the highway on which Maguire was traveling. He stepped on the gas, thinking that defendant Maguire would go in back of him.

The physical facts of the accident show, without conflict, that the front end of Maguire's car was completely south of the Lincoln highway, and completely out of the intersection at the time of the accident, and that if he continued in a straight direction, or swerved slightly to his left, he could have easily passed to the rear of the plaintiff. The question is whether or not plaintiff's conduct, as described above, constitutes contributory negligence as a matter of law.

Taking up the appeal of defendant Maguire, it is contended that the evidence shows that respondent was guilty of contributory negligence as a matter of law.

[1] "Contributory negligence is a question of law only when the court is impelled to say that from the facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his injury." Reaugh v. Cudahy Packing Co., 189 Cal. 335–343, 208 P. 125, 128.

"If but one conclusion can reasonably be reached from the evidence, it is a question of law for the court; but if one sensible and impartial man might decide that the plaintiff had exercised ordinary care, and another equally sensible and impartial man that he had not exercised such care, it must be left to the jury." Wahlgren v. Market St. Ry. Co., 132 Cal. 656–663, 62 P. 308, 310, 64 P. 993.

In the case of Harper v. Knight, 15 Cal. App.2d 655–657, 59 P.2d 1080, 1081, it is said: "'The circumstances under which a court can declare that certain acts constitute contributory negligence as a matter of law are rare.' Enz v. Johns, 112 Cal.App. 1, 296 P. 115. The question is usually one of fact, and becomes one of law only when the evidence is of such a character that it will support no other legitimate inference. Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513."

That portion of the highway on which appellant Maguire was driving, and where the collision occurred, was not a "through highway", as there was no stop sign at the point where the road on which respondent was driving, entered it. As stated in section 82.5 of the California Vehicle Code, St.1935, p. 93, as added by St.1937, p. 413: "A 'through highway' is a highway or portion thereof at the entrance to which vehicular traffic from intersecting highways is required by law to stop before entering or crossing the same, and when stop signs are erected as provided in this code."

And as stated in section 550(a) of the same code: "The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection from a different highway."

[2, 3] The general rule governing the relative rights of drivers approaching an intersection is thus stated: "Plaintiff, having entered the intersection first, had the right of way over the defendant's car. Even had the two machines approached the intersection at approximately the same time, the plaintiff's machine, as it was to the right of the defendant's, had the right of way over the latter. Section 131, California Vehicle Act (St.1929, p. 541, § 55). It was therefore the duty of the defendant to yield the right of way to the plaintiff. Crabbe v. Rhoades, 101 Cal.App. 503, 282 P. 10; Wynne v. Wright, 105 Cal. App. 17, 21, 286 P. 1057; Couchman v. Snelling [111 Cal.App. 192], 295 P. 845, 847. Furthermore, the plaintiff as a reasonably prudent person had the right to assume that the defendant would obey the law and yield the right of way at the intersection." Leblanc v. Coverdale, 213 Cal. 654, 3 P.2d 312, 313.

[4] The record shows that respondent entered the intersection and had actually crossed the center of the main highway, when he was struck by the car of appellant Maguire. It was the duty of such appellant to "yield the right of way", under such circumstances. This he did not do, but continued to travel at an unabated speed of from forty to forty-five miles an hour. It is the contention of appellant Maguire

that while respondent may have entered the intersection first, the following rule in Pattisson v. Cavanagh, 18 Cal.App.2d 123, 127, 63 P.2d 868, 870, 64 P.2d 945, is applicable to the facts of this case: "* * * the law is also well settled that if it would appear to the mind of any reasonable person that the vehicle approaching the intersection on the arterial highway is near enough to constitute an immediate danger, and under those conditions the driver of the other vehicle attempts to enter or cross the arterial, he is negligent in so doing even though he was the first to arrive at or enter the intersection."

[5-7] We are then faced with the determination of whether or not respondent, as a reasonable man, thought that the car of Maguire was near enough to constitute an immediate danger. We are of the opinion that this question was a matter for the determination of the jury. We are not prepared to say, as a matter of law, that there was an immediate danger. The legal duty, upon the part of Maguire, to yield the right of way, was established. The burden of proving that he was absolved, by the conduct of respondent, from the consequences of his negligence resulting from this breach of duty, rested upon appellant. Whether or not he sustained that burden was properly within the province of the jury to determine, and we do not have the right or power to disturb the conclusion reached.

"Whether or not, therefore, plaintiff, after observing the approach of defendant's car, its position, and the rate of speed it was traveling, and keeping the same within his side vision, was justified in proceeding upon his rightful way across the intersection in advance of defendant presents a question upon which reasonable minds might differ, and was therefore one for the jury to determine." Page v. Mazzei, 213 Cal. 644, 3 P.2d 11, 12.

[8, 9] It is urged by appellant that, though no stop sign was erected at the intersection, the duty of stopping was imposed upon respondent as a matter of law, very much the same as the "stop, look and listen" rule is applied to one driving a vehicle across a railroad track. This is a novel contention, and apparently has some support from other jurisdictions. The rule has never been applied in California in respect to a highway intersection. The premise of the appellant is based upon the assumption that the highway on which Maguire was traveling, and on which the accident occurred, was a "through highway". As we have pointed out, this was not the fact. "Through highways" are not designated by law in this state as continuous in character. They are only such when running past an intersection at which stop signs have been erected. Where there is no sign, there is no such highway. In any event, it is the rule in California that one approaching an intersection of this character is governed by the provisions of the Vehicle Code, or, in the absence of any specific provision covering the situation, by the ordinary law of negligence. This case, as we have pointed out, is governed by a specific provision of such code. This appellant, in common with many users of the highway, seems to have the impression that every motorist who attempts to enter a main highway from a side road, does so at his peril. This misconception of the law is a prolific source of accidents. As we have shown, such motorist has very definite rights granted to him by the provisions of the Vehicle Code, and those users of the main highway who ignore such rights must be prepared to pay the penalty.

[10-12] Finally, it is contended by this appellant that the verdict is excessive as a matter of law. The rule in this respect is thus stated: "In every case of this character the soundness of the verdict must be determined by its own peculiar facts and circumstances. * * * 'our power over excessive damages exists only when the facts are such that the excess appears as a matter of law, or is such as to suggest at first blush, passion, prejudice, or corruption on the part of the jury (citing cases). Practically, the trial court must bear the whole responsibility in every case.'" Wiezorek v. Ferris, 176 Cal. 353, 167 P. 234, 236.

In the case of O'Meara v. Haiden, 204 Cal. 354, 268 P. 334, 60 A.L.R. 1381, an award of $10,000 for the death of a seven-year-old boy was held not to have been excessive. Here, the minor was seventeen years of age. It is extremely difficult to measure in dollars and cents the pecuniary value of her services to her father, arising out of the loss of her society and comfort. Manifestly, such matters must be committed to the sound judgment and discretion of the jury. We find no evidence which would lead us to the conclusion that the award was based in any degree upon passion, prejudice or corruption; therefore, we cannot say, as a matter of law, that the verdict was excessive.

Taking up the appeal of Hartford Company, it contends that there is no evidence to support an implied finding of the jury to the effect that defendant Maguire was in its employ when the collision occurred, or that Maguire was the agent of Hartford Company. More specifically, it is contended that the evidence shows Maguire was an independent contractor. This, like other facts in the case, was a matter for the determination of the jury, and if there is any substantial evidence which shows, or from which it can be reasonably inferred that he was then employed by Hartford Company, and acting within the scope of such employment, this contention cannot be upheld.

Defendant Maguire is and was, during all the times mentioned, an attorney at law engaged in the general practice in San Francisco. It appears he had had considerable experience in investigating accidents for insurance companies, but in each case, except one, he had acted as an attorney also. This appellant, at the time of the accident, was engaged in the business of issuing policies of insurance against public liability arising out of the use of automobiles. The person in charge of its claim department is William H. Hitchings, who is an attorney at law. Some forty-eight persons handle the investigation of claims under his directions, and twenty-eight of them are lawyers. On January 28, 1938, the company received word of an accident involving a bus of the Greyhound Company, near the city of Stockton. It was the insurance carrier for the latter company. The regular lawyer for this appellant, who investigated claims arising in the Stockton territory, was not able to attend to the matter, so Hitchings called Maguire on the telephone and the following conversation took place, as related by the latter:

"Q. And on that day, Mr. Hitchings called you up on the telephone, is that not true? A. He did.

"Q. And about what time did he call you up, Mr. Maguire? A. About five minutes to twelve, noontime.

"Q. And he called you at your office? A. Yes.

"Q. And will you relate, as nearly as you can recollect, the conversation that he had with you at that time? A. He told me who he was and asked me if I had seen the Chronicle this morning about the bad accident in Tracy involving a Greyhound bus and two other cars. I said, 'No, I haven't read the Chronicle, but I heard about the accident over the radio at breakfast time', and he said, 'Well, that is the case, and I would like you to go down on that for us, can you go?' I said, 'Yes'. He said, 'Have you a car?' I said, 'Yes'. He said, 'Can you start at once?' I said, 'Yes'. And he said, 'Well, buy a Chronicle and get the details from that, and when you get to Stockton go to Gianelli's office and see Paul Riordan and he will give you the leads and contacts on those that you are to see there'.

"Q. Was that all the conversation that you can remember, Mr. Maguire? A. Well, that is all that occurs to me now.

"Q. Well, is it also true, in that conversation, Mr. Maguire, that Mr. Hitchings made it clear to you that you were to see Mr. Riordan and get your introduction to the assured? A. Well, I think he said something about that. I am not sure that he did or didn't, but he said, 'See Paul Riordan for your leads and contacts.'

* * *

"Q. Now, Mr. Maguire, your sole purpose in leaving San Francisco on January 29th, and in coming up here to Stockton, was to investigate the accident for the Hartford, isn't that true? A. Yes.

"Q. You had no other business of any kind, did you? A. To investigate and report to them.

"Q. I mean you were out there just on their business at that time? A. That is the only piece of business I had."

Hitchings' version of the above conversation is practically the same:

"Q. What did you tell Mr. Maguire over the telephone on this particular occasion? A. Our operator located Mr. Maguire and told him who I was. He identified himself, and I asked him if he had seen the Chronicle's story of the accident which had occurred near Tracy. My recollection is he said he had not seen it, but that morning over the radio prior to coming down town he had heard a news article, and he assumed it was the case I had in mind. He did know that an accident had happened there.

"Q. Go ahead and repeat the rest of the conversation—that is, what you said and what he said, Mr. Hitchings? A.

What I said will have to be in substance, because I wouldn't attempt to use the exact words.

"Q. That is perfectly satisfactory. A. After saying he had heard that, I asked him if he could go to Stockton for us. He said he could. I asked him if he had an automobile. He said he did. I asked him if he could go now. He said he could. I said, 'All right, go ahead, and when you get to Stockton, you will call upon our agency there—the Gianelli Agency, which represents our Company; there is a Mr. Riordan there'—I might have said 'Paul', but anyway I used the word 'Riordan'—you get in touch with him, and he will arrange for your leads and contacts'. He said he would go."

[13, 14] The general rule is that, "An independent contractor is one who in rendering services exercises an independent employment or occupation and represents his employer only as to the results of his work and not as to the means whereby it is to be done. Generally the circumstances which go to show one to be an independent contractor, while separately they may not be conclusive, are the independent nature of his business, the existence of a contract for the performance of a specified piece of work, the agreement to pay a fixed price for the work, the employment of assistants by the employee who are under his control, the furnishing by him of the necessary materials, and his right to control the work while it is in progress except as to results. All these matters are to be taken into consideration in determining whether or not a party is an independent contractor." 39 C.J. p. 1315–16, sec. 1517. In 2 California Jurisprudence Supplement, page 491, section 314, it is said: "On the ground that the driver was his employee or using the vehicle in course of his business, a party defendant may be held liable for injury or damage which has resulted from the operation of a vehicle by another person."

[15] "Where it is sought to charge a defendant on the ground that the driver of the offending vehicle was his agent or employee, proof must be made, (1) that the driver was the employee of the defendant for some purpose, (2) that the driver's use of the vehicle was a contemplated incident of his employment, and (3) that the driver, at the time of the collision, was operating the vehicle in the transaction of the defendant's business. Similarly, a public officer is not liable for injury done by his deputy unless the latter was driving the offending vehicle in the line of his official duties and under color of office." 2 Cal.Jur.Supp. pp. 492, 493, § 315.

[16] "The question whether the driver of an automobile, whose negligence in driving is alleged to have caused an accident, was the servant, in so driving, of the owner or of the defendant sued on account of the accident, or was an independent contractor, is usually, on the facts, a question for the jury. Whether or not the right of control or the want of it, determinative of the relationship, exists, is ordinarily a question of fact for the jury, and is usually arrived at by inference from the terms of the contract, the character of the employment, and all the relevant facts and circumstances. And the court is not justified in taking such question from the jury unless the evidence in regard to it is very clear and unequivocal." 10 Blashfield Cyc. of Auto. Law and Practice, Permanent Edition, § 6641, pages 415, 416.

[17, 18] We are of the opinion that there is sufficient evidence to support an implied finding to the effect that Maguire was an employee of this appellant. The former was instructed by the agent of this appellant to go to Stockton and make an investigation of an accident which was covered by a policy of insurance issued by the Hartford Company. It is true that Maguire was a lawyer, but the jury could have reasonably inferred that upon this occasion the employment was merely in respect to the investigation of facts only, and that there was no contract of general employment as an attorney at law. Maguire was given instructions as to what he should do when he arrived in Stockton. The chief distinction between the status of an employee and an independent contractor lies in the matter of control over the acts of the party for whose conduct another is sought to be charged. If such power of control—such right to direct the manner in which the work is to be done—exists, then such party is an employee. In the case of Press Publishing Co. v. Industrial Accident Comm., 190 Cal. 114, 121, 210 P. 820, 823, it is said: "As previously indicated, it is not the actual exercise of control, but the right of control—that is to say, the potential power of control—which is important in a determination of whether or not the status of

an employee or independent contractor exists. Claremont Country Club v. Industrial Accident Commission, 174 Cal. 395, 163 P. 209, L.R.A.1918F, 177. One of the means of ascertaining whether or not this right to control exists is the determination of whether or not, if instructions were given, they would have to be obeyed."

The jury could readily have inferred that if directions were given to, and accepted by, Maguire in respect to one matter, they could have been given in respect to another, and that the potential power of control existed because it had been actually exercised. In addition to this factor indicating the presence of the power to control, another factor leading to the same conclusion is the existence of the right to discharge the employee and terminate the relationship. Smith v. Fall River Joint Union High School Dist., 118 Cal.App. 673, 5 P.2d 930. The rule was applied in the latter case, although there was a written contract of employment. The manager of this appellant testified that he could have discharged Maguire if his work was unsatisfactory. Another such element of control is the fact that Maguire was taking the place of other regular employees of this appellant. As stated in Press Publishing Co. v. I. A. C., supra, 190 Cal. at page 120, 210 P. at page 823 of the opinion: "In the absence of any express terms affirming or negating the power of control and direction, its existence must be determined from the reasonable inferences to be drawn from all of the circumstances surrounding and attending the making and execution of the contract, considered in conjunction with the nature of the contract and the duties ordinarily to be performed thereunder. The circumstances attending the hiring of Benefiel warrant the inference that he was subject to the direction and control of the Press Publishing Company in the performance of his work. The most significant fact in this regard, and one which points towards the relation of employee rather than to the status of an independent contractor, is the fact that Benefiel was hired on the same terms as the other carriers, and the Press Publishing Company had the right to exercise the same direction and control over Benefiel as it did over the other carrier boys, concededly employees."

We do not deem it necessary to discuss in detail the numerous authorities relied upon by this appellant. As stated in the case of Slater v. Friedman, 62 Cal. App. 668, 670, 217 P. 795, 796: "No subject in connection with the law applying to the operation of automobiles has given rise to more views than the question of the responsibility of an owner for the acts of his chauffeur and agents. The numerous cases upon the subject have been productive of much astute and interesting discussion in the courts, and eminent judges have differed widely in the application of the principles as applied to different cases. These cases are far from being in harmony on the subject, and it is not an easy task to reconcile them." Cal.Jur.Supp. vol. 2, p. 492.

The judgment is affirmed.

We concur: PULLEN, P. J; THOMPSON, J.

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36 Cal.App.2d 560

TEXAS CO. v. WIECZOREK et al.

Civ. 6323.

District Court of Appeal, Third District, California.

Jan. 12, 1940.

As Modified on Denial of Rehearing Feb. 9, 1940.

Hearing Denied March 11, 1940.

1. Appeal and error 🔑931(1)

Reviewing court must indulge in all inferences which will uphold findings of trial court.

2. Release 🔑38

A valid release conclusively estops the parties from reviving and litigating the claim released.

3. Estoppel 🔑78(2)

Where controversy arose between lessor and lessee, under an oil lease, whether, lessee having drilled three paying wells and thereafter ceasing to drill more new wells, the lease had terminated, and parties entered into an agreement stating that the lessee had fully performed all the obligations of the lease prior to the date thereof, lessor was "estopped" from thereafter asserting that the lease was terminated by lessee's failure to continue further drilling.

[Ed. Note.—For other definitions of Estoppel," see Words & Phrases.]

4. Mines and minerals ⚷77

Under oil lease, authorizing lessee after completion of certain wells at its election at any time to cease further drilling, and thereupon to surrender the lease, a mere physical cessation from drilling was sufficient to make the provision effective, and it was not necessary that there be a positive declaration from the lessee showing his mental attitude and evincing an intention to cease drilling.

◆

Appeal from Superior Court, Los Angeles County; Minor Moore, Judge.

Action for declaratory relief in respect to an oil lease by the Texas Company against Gertrud Wieczorek and the Security First National Bank of Los Angeles, wherein the defendants filed a cross-complaint. From a judgment in favor of the plaintiff and against the defendants on their cross-complaint, defendants appeal.

Affirmed.

Victor Ford Collins, of Los Angeles, for appellants.

Charles C. Stanley, J. A. McNair, J. A. Tucker, and E. S. Williams, all of Los Angeles, for respondent.

Mr. Justice TUTTLE delivered the opinion of the court.

This action was one for declaratory relief in respect to an oil lease. The trial court adopted the construction of the lease contended for by respondent, holding that the lease was not terminated, and was in full force and effect until the end of the term. It also found that defendant was estopped by a subsequent agreement, from contending and maintaining that the lease was terminated. Findings in favor of respondent upon all issues were made, and judgment was entered accordingly. Defendant now appeals from the judgment.

The complaint sets forth the controversy between the parties in the following allegations:

"That defendants on the 27th day of December, 1932, for the first time claimed, and do still claim, that if and when plaintiff ceases further drilling of additional wells upon the leased premises, it is obligated to surrender said lease except areas of five acres surrounding each producing well and excepting the producing wells and appurtenances thereto. Defendants also claim that plaintiff has ceased further drilling of additional wells upon the leased premises and that it must immediately elect and designate the five acres surrounding each producing well which it intends to retain, and thereupon, subject to the other provisions of the paragraphs of said lease last hereinabove quoted, surrender the said lease with the exceptions above mentioned.

"Plaintiff claims that the provisions of said lease quoted in Paragraph XVI of this complaint have no application after plaintiff has drilled and completed on the leased premises three 'paying wells'. Plaintiff further claims that by reason of its having drilled said paying wells as aforesaid and of the provisions of said lease, particularly the provisions thereof quoted in paragraph XI hereof, plaintiff is entitled to hold and retain the whole of said leased premises until July 20, 1940, and thereafter so long as petroleum oil and kindred substances are produced by plaintiff in paying quantities from the leased premises or any part thereof by means of any well or wells or other works constructed or in the course of construction on the 20th day of July, 1940, without drilling any additional wells.

"Plaintiff further claims, even though it be conceded that under the provisions of said lease it was obligated, as claimed by said defendants, to so surrender said lease upon the cessation of drilling additional wells, and even though it be conceded that plaintiff has ceased the drilling of additional wells, that then, such cessation of drilling occurred prior to the 6th day of October 1932, and that by said instruments of release hereinabove referred to defendants have forever discharged and released plaintiff from the duty to so surrender said lease, the leased premises, or any part thereof, and that by said instruments of release defendants are estopped from demanding or enforcing performance of any such alleged duty to so surrender said lease, the leased premises or any part thereof.

"Plaintiff further claims that defendants by permitting plaintiff from time to time to again commence drilling after a cessation of drilling for a long period of time, and by accepting the royalties accruing from the said wells so drilled, have forever waived all right to demand or to enforce performance of any such alleged duty to so surrender said lease, the leased premises, or any part thereof.

"Plaintiff further claims that it has fully and completely performed and kept each and every covenant and condition imposed upon it by said lease, and that it is not and never has been under any duty to surrender to defendants or either of them, said lease, the leased premises or any part thereof."

Defendant filed a cross-complaint. The first cause of action relates to the construction of lease No. 3, the one mentioned in the complaint. She alleges that there was a cessation of drilling, and that it is the duty of plaintiff to surrender the lease. She also asks that this lease be construed in respect to the rights of the parties (as fixed by the lease) when a termination of the lease takes place. The second cause of action is the same, except that it relates to lease No. 2. Other causes of action are stated, but they are not involved in this appeal.

We do not deem it necessary to dispose of the contentions which relate to a construction of the terms of the lease except as to those provisions which are necessarily involved in considering the question of estoppel.

On October 6, 1932, appellant, for a consideration of $100,000, executed an agreement with respondent, relating to said lease No. 3. This agreement, after reciting that:

"Whereas, a controversy has arisen and now exists between the parties hereto, as to the computation and payment of royalties and other matters; and

"Whereas, it is the desire of the parties hereto to forever settle said present controversy and claims, and to that end, they are desirous of reducing to writing their agreement of settlement," contains the following pertinent paragraph:

"Lessor hereby acknowledges full and complete performance by lessee of all of the terms, obligations, conditions and provisions of said leases, express or implied, which have matured or should have been performed by lessee prior to the date hereof. Lessor does hereby release and forever discharge lessee of and from all claims and demands which have heretofore arisen or been asserted or which lessor could or might assert growing out of any breach or alleged breach of any obligations, condition, liability or duty, express or implied, in connection with the operations under said leases, payment of royalties, drilling of wells, development of the leased premises, or any other matter or thing connected with said leases, and/or the operations of lessee * * * upon the leased premises. This agreement, however, does not release, and is not intended to release the lessee from performing the terms, obligations, conditions, and provisions of said leases, hereafter accruing in accordance with said leases. It is the intention and purpose hereof that the rights of the parties in the future shall be governed according to the terms, obligations, conditions and provisions of the respective leases above described. The lessee likewise hereby releases the lessor from any claims that lessee may have, or claim to have to date by reason of said oil leases above described. The release of the lessee herein contained is not intended to release it from payment of unpaid current royalties, payable on account of production as shown on statement dated August 31st, 1932, and subsequent thereto."

On the matter of the effect of this agreement, the trial court made the following finding: "That said defendants by said agreements of October 6, 1932, and of December 29, 1932, have, and particularly said defendant Gertrud Weiczorek by said agreement of October 6, 1932, has, forever discharged and released the lessee under said lease, to-wit: the plaintiff herein, from the duty to surrender said lease or said leased premises, or any part thereof, and are and is estopped from demanding or enforcing the performance of any alleged duty so to surrender said lease or said leased premises, or any part thereof, by reason of any alleged cessation of the drilling of new or additional wells upon said leased premises which prior to the date of the commencement of this action may have occurred."

[1-4] It will be observed that this controversy arose over the question whether or not, after respondent had drilled three paying wells, and thereafter had ceased to drill more new wells, the lease terminated. Respondent contended, and the trial court found, that after it had drilled three paying wells, the lease would be effective until the end of the term without any obligation on its part to drill more new wells, and it was optional with respondent whether it would drill further thereafter.

There is no evidence of the nature of the dispute which precipitated the execution of the agreement, other than the recitations contained therein, but it appears to be broad enough to cover any and all controversies over the terms of the lease and the performance of its terms. Under the familiar rule, it is our duty to indulge in all inferences which will uphold the findings. It may be fairly inferred that the matter here in controversy was in the minds of the parties when the agreement was executed. This is reasonable and plausible, because it is an admitted fact that all drilling of new wells ceased on August 2, 1930, and that there had been no such drilling for a period of some twenty-six months prior to the date of the agreement. Appellant does not contend that she had no knowledge of such cessation of drilling.

The agreement was a contract by the lessor that the lessee had fully and completely performed all of the terms, obligations, conditions and provisions of the lease, express or implied, which had matured or should have been performed by the lessee prior to the date thereof. This was a declaration that the lessee had not been under any duty to surrender the lease, or if the lessee had been, that duty now was released. Under the defendant's (lessor's) construction whenever there was a cessation of further drilling the lessee became obligated thereupon to surrender the lease except for the five-acre areas. The failure to do this would be a failure of performance of the terms and provisions of the lease and a breach of those terms and provisions. But the agreement of settlement declares and thereby contracts that the lessee has fully performed all terms and provisions. This contract provision also was a recognition that at that date the whole lease was in full force and effect and that by nothing which previously had occurred was the lease to be deemed defeated or forfeited in whole or in part. Certainly there is no hint in this agreement that any party thereto suspected that any part of the lease had terminated—rather quite the contrary. And that no new wells had been drilled since August 2, 1930, was a patent fact.

It is the rule that "a valid release conclusively estops the parties from reviving and litigating the claim released". 53 C.J., p. 1244, § 66. It thus appears that when the agreement was executed there had been a cessation of drilling by respondent for a period of over two years, and that this fact was known to appellant. It is contended by appellant that although the lease provides that "after the completion of the first well or any subsequent wells herein provided for, the lessee may at its election at any time, cease further drilling, but shall thereupon surrender this lease, and this lease shall thereupon terminate—", a mere *physical* cessation from drilling is not sufficient to make such provision effective, and that something additional must be proven—to-wit, a positive declaration from the lessee showing his mental attitude and evincing an intention to cease drilling. We do not believe the plain language of the lease can be thus frustrated, and hold that when, in fact, drilling ceased, the above provision would give appellant the right to insist upon a surrender and termination of the lease, provided that a consideration of the whole lease would impel a different construction—a matter we are not here deciding. Such a right, assuming, with appellant, that the entire lease should be thus construed, existed when the agreement was entered into, and its exercise was waived by the plain terms of such agreement. It is further contended by appellant that although there was a cessation of drilling within the contemplation of the lease, appellant was not called upon to take any positive action, for the reason that the lease terminated ipso facto when the drilling ceased. They urge that cessation created no default, but left the lease effective in respect to the wells already drilled, as expressly provided therein. This may be so, but nevertheless certain rights of respondent under the lease—the right to drill new wells in new ground—would be definitely cut off and nullified by the cessation. It was the power of appellant to insist upon the deprivation of this right which was waived and lost when the agreement was signed.

The finding that appellant is estopped from asserting that the lease was terminated from failure to continue further drilling is sustained by ample evidence, and accordingly the judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

On Petition for Rehearing.

It is strongly urged in the petition for rehearing that the "rights of lessor to take over certain undeveloped portions of the property on cessation of drilling were for the sole benefit of lessor, and were continuing rights that could be exercised by lessor at any time after cessation". Assuming this to be so, the right to exercise this option and demand a surrender of the lease, (with the exception of certain five acre tracts upon which there were producing wells), was waived by the instrument of release, there having been a complete cessation of drilling for some two years prior to the execution of said agreement. We held the trial court properly found that the release estopped defendant from thereafter asserting a right which had been thus waived.

The rehearing is denied.

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36 Cal.App.2d 739

MYERS v. MOOSE et al.

Civ. 12384.

District Court of Appeal, Second District, Division 2, California.
Jan. 26, 1940.

1. Appeal and error 🔑1002

The District Court of Appeal may not review a finding of a jury in case of a substantial conflict in evidence.

2. New trial 🔑72

The trial court may grant a new trial if the court is satisfied that the verdict is against weight of evidence, notwithstanding that there is conflict in the evidence.

3. Appeal and error 🔑979(2)

The action of trial court in granting new trial on ground that verdict is against weight of evidence will not be reversed unless it appears that there has been a manifest abuse of discretion.

4. New trial 🔑71

In action for injuries sustained in automobile collision wherein evidence was in conflict regarding whether collision occurred in defendants' or in plaintiff's traffic lane, order granting new trial to plaintiff on ground that evidence failed to sustain verdict for defendants was not abuse of discretion.

◆

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Alva D. Myers against Charles E. Moose and another, for injuries sustained in an automobile collision. Verdict was for the defendants. From an order granting plaintiff a new trial because of insufficiency of evidence to support the verdict, the defendants appeal.

Affirmed.

C. F. Jorz, of Los Angeles, for appellants.

Wood, Crump & Rogers, of Los Angeles, for respondent.

WOOD, Justice.

Plaintiff was on May 28, 1938, driving a Ford automobile in a southerly direction on the paved highway approximately 4 miles north of Mojave in Kern county. His automobile collided with an Oldsmobile car moving in a northerly direction, driven by defendant Moose and owned by defendant Clark. He commenced this action to recover damages for injuries suffered because of the collision and at a jury trial a verdict was returned in favor of defendants. Thereafter a new trial was granted "on the ground that the evidence is insufficient to support the verdict". The appeal is prosecuted from the order granting a new trial.

Defendants argue that there is "no evidence direct or indirect upon which an inference of negligence can be imputed legally to appellant". In the view of plaintiff, "not only is there ample evidence to sustain the court's order, but a contrary order so manifestly would have been an abuse of discretion as to have constituted reversible error".

The accident occurred at about 8 or 8:30 o'clock in the evening. The headlights of both cars were lighted. Plaintiff, who was alone in his car, testified that the cars collided while he was on his own half of the highway and to his right of the center line. His testimony was supported by that of the driver of a third car which was being driven northerly behind the car driven by defendant Moose. Defendant Moose testified that the collision took place on his own half of the highway and to his right of the center line. His testimony is supported by that of other occupants of his car and by a witness who was driving in front of him. Defendants also rely upon certain marks shown to have been made upon the highway. The briefs contain much discussion as to the details given by the various witnesses, the arguments being such as would ordinarily be directed to a jury. It would be inappropriate to here set forth the testimony in detail for the record clearly presents a substantial conflict in the evidence, and under well-settled rules the order of the trial court may not be disturbed.

[1-4] An appellate court may not review a finding of a jury in case of a substantial conflict in the evidence but this rule is not applicable to the trial court in passing upon a motion for a new trial. Notwithstanding there be a conflict in the evidence the trial court may grant a new trial if it is satisfied that the verdict is against the weight of the evidence. The action of the trial court in so doing will not be reversed unless it appears that there has been a manifest abuse of discretion on the part of the trial court. These principles are thoroughly established in this state. Gordon v. Roberts, 162 Cal. 506, 123 P. 288; Morgan v. Robinson Co., 157 Cal. 348, 107 P. 695; Morgan v. Los Angeles Pacific Co., 13 Cal.App. 12, 108 P. 735. We find no abuse of discretion in the action of the trial court.

The order is affirmed.

We concur: MOORE, P. J.; McCOMB, J.

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36 Cal.App.2d 623

In re MORRO.

MORRO et al. v. MORRO et al.

Civ. 12442.

District Court of Appeal, Second District, Division 2, California.

Jan. 18, 1940.

1. Courts 🔑202(5)

An order of superior court, sitting in probate, directing manner of compliance with previous orders which directed settlement of actions which had been brought by incompetent before his adjudication as incompetent against his two daughters by ordering two daughters to execute and acknowledge grant deed in which sole grantee should be incompetent, and to deliver grant deed to guardian of estate of incompetent, was not an "appealable order" within provision of Probate Code. Probate Code, § 1630.

[Ed. Note.—For other definitions of "Appealable Order," see Words & Phrases.]

2. Insane persons 🔑36

Orders of superior court, sitting in probate, which appointed guardians for person and estate of incompetent and gave instructions to guardians became final, where no appeal was taken therefrom.

3. Courts 🔑202(5)

The jurisdiction of an appellate court in probate matters extends only to such orders and judgments as are made appealable by the Probate Code, and the provision that an appeal may be taken from special order made after final judgment has no application to probate proceedings. Probate Code, § 1630.

4. Courts 🔑202(5)

Even if superior court, sitting in probate, acted in excess of its jurisdiction, a nonappealable order of court would not thereby be made appealable. Probate Code, § 1630.

5. Courts 🔑202(5)

An order of superior court, sitting in probate, directing manner of compliance with previous orders, which directed settlement of actions which had been brought by incompetent before adjudication as incompetent against his two daughters by ordering two daughters to execute and acknowledge grant deed in which sole grantee should be incompetent, and deliver grant deed to guardian of estate of incompetent, did not affect rights of any of parties, as respects right to appeal therefrom, but merely provided proper method of putting into effect orders which had been previously made. Probate Code, § 1630.

◆

Appeal from Superior Court, Los Angeles County; Ben B. Lindsey, Judge.

Proceeding in the matter of the estate and guardianship of Bartolomeo Morro, an incompetent person in which Dominic Morro was appointed guardian of the person of Bartolomeo Morro, an incompetent person, and Albert John Morro was appointed guardian of the estate of Bartolomeo Morro, an incompetent person. From order directing manner of compliance with previous order, by ordering Martha Morro and Madeline Rowe to execute and acknowledge grant deed to three parcels of real property, in which deed sole grantee shall be Bartolomeo Morro, an incompetent, and to deliver such deed to Albert Morro, as guardian of the estate of Bartolomeo Morro, an incompetent, Martha Morro and Madeline Rowe appeal.

Appeal dismissed.

Dan M. Critchley, of Los Angeles, and J. M. Hodgson, for appellants.

Ralph W. Evans and Alan G. Campbell, both of Los Angeles, for respondents.

WOOD, Justice.

This is an appeal from an order of the superior court, sitting in probate, made on September 29, 1938, directing the manner of compliance with an order made by the court, sitting in probate, on December 23, 1937, by ordering contestants and appellants "to forthwith execute and acknowledge a grant deed to the three parcels of real property hereinbefore referred to, in which deed the sole grantee shall be 'Bartolomeo Morro, an incompetent,' and to forthwith deliver said grant deed to Albert Morro as guardian of the estate of Bartolomeo Morro, an incompetent".

Bartolomeo Morro filed an action in the superior court on September 24, 1937, in which he sought to compel his two daughters, Martha Morro and Madeline Morro Rowe to return to him the sum of $3,250 which he alleged they had received to his use and benefit. He also filed an action against Martha Morro demanding that she reconvey to him three parcels of real estate which he had previously conveyed to her and which he claimed to be his property. Thereafter Dominic Morro, a son of Bartolomeo Morro, filed a petition in the superior court in which he alleged that Bartolomeo Morro was incompetent and asked that a guardian be appointed. The petition for appointment of a guardian came on for hearing and on October 14, 1937, Martha Morro and Madeline Rowe opposed the appointment, being represented by counsel. The matter was continued and on October 19, 1937, the court made the following order: "Court and counsel conferred in chambers, and on stipulation of attorneys court orders petition sustained and respondent Bartolomeo Morro declared incompetent and found to be the owner of certain real and personal property, and court finds it necessary that guardian of person and estate be appointed. Mrs. Madeline Rowe and Albert Morro appointed guardian of estate of said incompetent. Dominic Morro appointed guardian of person. * * * By stipulation of attorneys and order of court guardians Madeline Rowe and Albert Morro are ordered to accept offer now made to transfer $2,400.00 cash and deeds to three parcels of real property described in Los Angeles County S.C. case 420568, property being clear except taxes and encumbrances, on behalf of the incompetent and upon acceptance, which will settle all claims against Martha Morro and Madeline Rowe in said case, said case shall be dismissed by said parties. By stipulation of attorneys and order of court findings and conclusions of law and notice of entry of judgment are waived." A formal order in the guardianship proceedings was signed and filed by the judge on December 23, 1937, in which it was set forth that the court found that all of the allegations in the petition were true. The court appointed Dominic Morro guardian of the person of Bartolomeo Morro, and Albert Morro and Madeline Rowe guardians of his estate. The order further set forth: "The court having declared Bartolomeo Morro an incompetent and having made the above order appointing guardians, and Martha Morro and Madeline Rowe in open court having offered to settle the litigation pending in the Superior Court of this county wherein Bartolomeo Morro is plaintiff in cases No. 420565 and 420568 by conveying by grant deed to the guardians herein appointed of the estate of Bartolomeo Morro to belong to and be part of said estate the three parcels of real property described in the complaint in said case No. 420568 free and clear of all encumbrances except current taxes and assessments and to pay to said guardians to belong to said estate the sum of twenty-four hundred ($2400.00) dollars, and the court having accepted said offer on behalf of Bartolomeo Morro, and the court having inquired into the nature and extent of the estate of Bartolomeo Morro and his reasonable needs, and all parties present further consenting to the payment of counsel fees and costs of the said estate as hereinafter ordered; it is hereby further ordered, adjudged and decreed that Martha Morro and Madeline Rowe are and each of them is ordered and directed to forthwith execute and deliver to the guardians of the estate of Bartolomeo Morro a grant deed to the aforementioned three parcels of real property and to pay to said guardians the sum of twenty-four hundred ($2400.00) dollars."

Madeline Rowe failed to qualify as one of the guardians. On January 3, 1938, Martha Morro appearing by new counsel, filed a petition to set aside the order of December 23, 1937, supported by her affidavit in which she declared that on October 19, 1937, she was "ill to such an extent that she did not realize what was said in court in her presence or otherwise". She claimed that she had not in fact consented to the making of the order entered by the court. On January 27, 1938, the court denied the petition of Martha Morro by the following minute order: "The petition of Martha Morro to set aside the order heretofore made in this court on the 23rd day of December, 1937, having been heretofore submitted, is denied for the reason that the decree was a consent decree joined in by the petitioner and all parties to the cases pending in the Superior Court concerning Bartolomeo Morro, and certain conveyances alleged to have been made by him. By stipulation of petitioner and all parties to such cases it was agreed that those matters should all be heard and disposed of in connection with the case."

A petition was filed on April 14, 1938, by the guardians requesting that Martha Morro and Madeline Rowe be ordered to show cause why they should not be compelled to comply with the orders theretofore made and on June 2, 1938, the court made a minute order in part as follows: "Petition granted compelling execution of said grant deed to certain described real property to Bartolomeo Morro, incompetent." On July 18, 1938, counsel for Dominic Morro, guardian of the person and Albert Morro, guardian of the estate of Bartolomeo Morro, served a notice of motion for an order "directing manner of compliance with the order of December 23, 1937, pursuant to the minute order heretofore ordered as of June 2, 1938." Thereafter the court signed and filed the order from which the present appeal is taken.

Appellants rely upon the rule that the superior court sitting in probate is without jurisdiction to determine adverse claims of an incompetent against third parties. Respondents answer that the probate court did not exceed its jurisdiction in view of the fact that the contestants had consented to the delivery of the sum of $2,400 to the guardian and the reconveyance of the real estate. They also contend that the order from which the appeal was taken is not an appealable order. Our disposition of the last-mentioned contention disposes of the litigation.

[1-5] The orders from which appeals may be taken are set forth in section 1630 of the Probate Code: "An appeal may be taken to the supreme court from an order granting or revoking letters of guardianship; settling an account of a guardian; instructing or directing a guardian; or refusing to make any order heretofore mentioned in this section." It is apparent that the order from which the present appeal is taken is not included in the matters made appealable by the section. By the minute order of October 25, 1937, and the signed order of December 23, 1937, guardians were appointed for the person and estate of the incompetent and instructions to the guardians were therein given. No appeal was taken from either of these orders and they have become final. The jurisdiction of an appellate court in probate matters extends only to such orders and judgments as are made appealable by the Probate Code. In re Walkerly, 94 Cal. 352, 29 P. 719. The provision that an appeal may be taken from a special order made after final judgment has no application to probate proceedings. Estate of Allen, 175 Cal. 356, 165 P. 1011. Even if the court acted in excess of its jurisdiction, a question we find unnecessary to determine, the nonappealable order of the court was not thereby made appealable. In re Seymour's Estate, 15 Cal.App. 287, 114 P. 1023. Moreover, the order from which the appeal is taken does not affect the rights of any of the parties. It merely provides the proper method of putting into effect the orders which had been previously made. It will be noted that in the order signed by the court on December 23, 1937, appellants were ordered to execute and deliver "to the guardians of the estate of Bartolomeo Morro a grant deed". In the order from which appeal is taken appellants were ordered to execute a grant deed "in which deed the sole grantee shall be, 'Bartolomeo Morro, an incompetent', and to forthwith deliver said grant deed to Albert Morro as guardian * * *". Evidently the court was of the opinion that since Madeline Rowe had not qualified as guardian, leaving Albert Morro as the sole guardian of the estate of the incompetent, an order directing the manner of compliance with the

provisions of the order should be made in which the grantee should be named as Bartolomeo Morro, the deed to be delivered to the only guardian of his estate, who had qualified. By so doing the court merely clarified the previous order by supplying the name to be placed in the deed as grantee and directing its proper delivery.

The appeal is dismissed.

We concur: MOORE, P. J.; McCOMB, J.

C. S. SMITH METROPOLITAN MARKET CO. et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.*

Civ. 12427.

District Court of Appeal, Second District, Division 1, California.

Jan. 18, 1940.

Rehearing Denied Feb. 7, 1940.

Hearing Granted March 18, 1940.

1. Witnesses 🔑**16**

A "subpœna duces tecum" is available only for purpose of obtaining evidence, and it must appear from affidavit upon which subpœna is based that documents, records, or things sought to be obtained by subpœna duces tecum are material and admissible in evidence as exhibits.

[Ed. Note.—For other definitions of "Subpœna Duces Tecum," see Words & Phrases.]

2. Witnesses 🔑**16**

In action for injunction for alleged violations of Unfair Practices Act arising out of sales of certain merchandise below cost, "subpœna duces tecum" could not be issued to compel cost accountant, who had examined books of defendant, to produce certain work sheets and working papers in which he had recorded various figures and facts taken from books of defendant to prove defendant's cost of doing business, since facts sought to be proven could be established only by books of defendant and the work sheets were mere "hearsay." St.1913, p. 508, as amended; St.1937, p. 2396, § 3.

[Ed. Note.—For other definitions of "Hearsay Evidence," see Words & Phrases.]

3. Witnesses 🔑**256, 392(1)**

Private memoranda used by witness to refresh his recollection may be examined by opposing counsel, and if, upon cross-examination, a discrepancy develops from comparison of testimony of witness and memoranda, such memoranda then become admissible as evidence of such discrepancy.

4. Witnesses 🔑**254**

When it appears from examination of witness that such witness can testify only by refreshing his recollection from memoranda, court has power to order witness so to do.

WHITE, J., dissenting.

Prohibition proceeding by the C. S. Smith Metropolitan Market Company and Duncan W. Drucquer against the Superior Court of the State of California, in and for the County of Los Angeles, to prevent the Superior Court from enforcing the mandate of a subpoena duces tecum issued by it in action seeking injunction for alleged violations of Unfair Practice Act, in which the Smith Metropolitan Market Company was defendant.

Alternative writ made peremptory.

Rehearing denied; WHITE, J., dissenting.

Pierson & Block, of Los Angeles, for petitioners.

J. H. O'Connor, Co. Counsel, and Douglas De Coster, Deputy Co. Counsel, both of Los Angeles, for respondent.

DORAN, Justice.

This proceeding is for prohibition to prevent the superior court from enforcing the mandate of a subpoena duces tecum issued by it requiring one Duncan W. Drucquer to produce for the inspection of the party plaintiff who secured such subpoena certain documents, or be held in contempt of court.

The controversy arises out of a certain action commenced in the Superior Court of Los Angeles County, No. 44283, and entitled "Food and Grocery Bureau of Southern California, a corporation, Plaintiff, vs. C. S. Smith Metropolitan Market Co., Ltd., a corporation, Defendant", and which last-named corporation appears herein as one of the petitioners. The action just mentioned is one for an injunction for alleged violations of the California Unfair Practices Act (Stats.1913, ch. 276, p. 508, as amended by Stats.1935, ch. 477, p. 1546, and as further amended by Stats.1937, ch. 860,

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*For subsequent opinion see 105 P.2d 587.

p. 2395). The complaint therein charges that on divers and various dates during the year 1939 defendant offered for sale, advertised for sale and did sell certain merchandise below cost. Section 3 of the Unfair Practices Act, supra, defines "cost" when applied to distribution as meaning "the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor plus the cost of doing business by said distributor and vendor"; while the act defines the "cost of doing business" or "overhead expense" as "all costs of doing business incurred in the conduct of such business and must include without limitation the following items of expense: labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery costs, credit losses, all types of licenses, taxes, insurance and advertising". From the foregoing it is at once apparent that the main and vital issue in a case such as the one above referred to, where the defendant denies that the charged sales were made below cost, is for the plaintiff to prove and the trial court to determine the invoice or replacement cost and the "cost of doing business" of the defendant in question. Confronted with this problem, the plaintiff in the action procured a subpoena duces tecum in the superior court directed to Duncan W. Drucquer, one of the petitioners herein, who is concededly a cost accountant and who in such professional capacity admittedly made an examination of certain of the corporate defendant's books and records for the year 1939. As grounds for the issuance of such subpoena duces tecum, plaintiff in the action caused to be filed in the trial court an affidavit setting forth that the said cost accountant, Duncan W. Drucquer, had during the year 1939 "made an analysis and examination of the books and records of the defendant corporation for the purpose of determining, among other things, what the cost of doing business of said defendant was at and during the time or period covered by said examination and inspection; and affiant has likewise been informed that, during the course of said examination, analysis and inspection, said Duncan W. Drucquer, an accountant, made certain work sheets and working papers, in which he recorded various figures and facts taken from the books of said defendant corporation and appertaining to said defendant's cost of doing business, and that said working papers and work sheets of said witness Duncan W. Drucquer will contain said facts and figures, from which said witness Duncan W. Drucquer will be able to testify as to said defendant's cost of doing business, and that such testimony will therefore be material and relevant in proving what said defendant's cost of doing business is and was, at the time and during the period of time said defendant is charged with having sold said articles described in the complaint below its cost; and that said documents in the possession or under the control of said witness Duncan W. Drucquer contain said figures and facts, and will show said figures and facts appertaining to said defendant's cost of doing business.

"That said witness Duncan W. Drucquer is the only person who can establish said facts and figures contained in his said working sheets and working papers and the meaning of said figures and facts as applied to said defendant's cost of doing business. That one of the issues on said Order to Show Cause hearing which the plaintiff has the burden of establishing is the cost of doing business of the defendant corporation; and that said witness Drucquer, from said work sheets and working papers, will be able to testify and establish facts and figures relevant and material to what said cost of doing business is and was, at all times mentioned in plaintiff's complaint, and what said defendant's cost of doing business was on the articles and products said defendant is charged with having sold below cost." (Italics added.)

Upon the filing of such affidavit and pursuant to an order made by Kurtz Kauffman, court commissioner of Los Angeles county, the subpoena was issued commanding said Duncan W. Drucquer to appear before a designated notary public upon a definite date, then and there to testify as a witness and to give his deposition. Subd. 6, sec. 2021, Code Civ.Proc. Said subpoena further directed the witness to bring with him and to produce at the taking of his deposition certain documents described in said subpoena as follows: "The original work sheets and working papers of Duncan W. Drucquer pertaining to the analysis and examination by Duncan W. Drucquer of the books and records of C. S. Smith Metropolitan Market Co. Ltd., made in 1939." Following the issuance of such subpoena petitioner herein, C. S. Smith Metropolitan Market Co., Ltd., moved the superior court to "annul, vacate and recall subpoena duces tecum, and for an order staying the taking of deposition of Duncan W. Drucquer pending hearing of said motion". The motion was denied. Said Drucquer appeared pursuant to the terms of such subpoena and refused to answer certain questions propounded to him. Thereafter plaintiff in the action procured from the trial court an order entitled "Order to Show Cause Why Duncan W. Drucquer Should Not Answer Certain Questions In His Deposition And Should Not Produce For The Inspection of Plaintiff's Attorneys Certain Documents Or Be Held In Contempt of Court". Thereupon petitioner sought and obtained the alternative writ of prohibition herein, directed to said superior court.

[1, 2] Petitioner is entitled to the relief sought. It is elementary that a subpoena duces tecum is available only for the purpose of obtaining evidence and it must appear from the affidavit upon which the subpoena is based that the documents, records or things sought to be obtained by the subpoena duces tecum are material and admissible in evidence as exhibits. Assuming that the court commissioner is vested with authority to issue a subpoena duces tecum, it is evident that the affidavit upon which the subpoena herein was based was not only insufficient but in addition revealed on its face that the documents sought to be obtained were not evidence nor could they be used as such in the circumstances upon which affiant relied.

[3] The facts sought to be proven manifestly could be established only by the books of the corporation. The so-called "work sheets" of the accountant Drucquer at most were merely his private memoranda made during the examination by him of the books. Although they could be used by him to refresh his recollection, if necessary for such purpose when called as a witness, it does not follow that such memoranda are the proper object of a subpoena duces tecum. If used by the witness they may be examined by opposing counsel. If, upon cross-examination, a discrepancy develops from a comparison of the testimony of the witness and the memoranda used by the witness, such memoranda then become admissible as evidence of such discrepancy.

[4] When it appears from an examination of the witness that such witness can testify only by refreshing his recollection from memoranda, the court has power to order the witness so to do, and a refusal in the circumstances would amount to a contempt. Referring to the subject, Wigmore points out that: "The rule should apply, moreover, to a memorandum *consulted* for refreshment *before trial* and not brought by the witness into court; for, though there is no objection to a memory being thus stimulated, yet the risk of imposition and the need of safeguard is just as great. It is simple and feasible enough for the Court to require that the paper be sent for and exhibited before the end of the trial." (Italics included.) Wigmore on Evidence, vol. I, p. 855. The affidavit in support of the subpoena duces tecum as above noted also avers that Drucquer is the only person who can establish the facts and figures contained in the working sheets and working papers. So much may be conceded, but Drucquer is not the only witness who can testify as to the contents of the books of the corporation. With regard to records that are properly receivable in evidence, Wigmore sets forth the rule as follows: "In order to state the rule, then, in terms which will indicate in the rule itself what documents are included in its scope, it must be noted that the production required is the production of *the* document *whose contents are to be proved in the state of the issues.*" (Italics included). Wigmore on Evidence, supra, vol. II, p. 1476.

Drucquer's private memoranda are not to be proved "in the state of the issues". The books of the corporation are the best evidence, and as to them Drucquer's private memoranda are merely hearsay.

In the circumstances, the court exceeded its jurisdiction in the first instance in issuing the subpoena, and in the second, in ordering the witness to show cause why he should not "Produce for the *Inspection of Plaintiff's Attorneys* Certain Documents". (Italics added.)

For the foregoing reasons, the alternative writ is made peremptory.

I concur: YORK, P. J.

WHITE, Justice (dissenting).

I dissent. Conceding, as stated in the prevailing opinion, that "a subpoena duces tecum is available only for the purpose of obtaining evidence", I cannot agree with my colleagues in their statement that the documents herein sought by such subpoena "were not evidence nor could they be used as such in the circumstances upon which affiant relied".

It seems to me that the accountant's "work sheets" might well be admissible under the provisions of subdivision 5 of section 1855 of the Code of Civil Procedure, to prove as set forth in the affidavit for issuance of the subpoena "what said defendant's cost of doing business is and was, at the time and during the period of time said defendant is charged with having sold said articles described in the complaint below its cost". Section 1000 of the Code of Civil Procedure authorizes what is commonly known as a bill of discovery, which accords to either party to an action the right to inspect material or pertinent entries of accounts or documents in the possession or under the control of the other party. Union Trust Company of San Diego v. Superior Court, 11 Cal.2d 449, 81 P. 2d 150, 118 A.L.R. 259. Surely a party is not compelled to bring into court all of his adversary's books of account when there is in existence evidence of the "general result of the whole" thereof in the form of an accountant's "work sheets" showing the "cost price" and "cost of doing business" with reference to the particular commodities in connection with the sale of which the complaint charges a violation of the Unfair Practices Act. Again, the documents here sought under the subpoena might well possess evidentiary value in the matter of possible impeachment of the witness who made them and who has such documents in his possession. I am impressed that where, as here, the documents sought to be subpoenaed possess potential evidentiary value it does not lie within the power of an appellate court to determine their admissibility or non-admissibility in advance of their production. To my mind that is a question addressed in the first instance to the trial court for determination when the documents are produced. The only way in which the materiality of the documents can be determined is through examination of them by the trial court and the only method by which such examination can be brought about is through the medium of the subpoena duces tecum.

If the foregoing be a correct statement of the law upon the issue therein treated then there are several questions presented in the petition for the writ and by respondent court's demurrer thereto which in my opinion should receive consideration. The sufficiency of the facts stated in the petition to warrant the issuance of a writ of prohibition is challenged by respondent court, in connection with which it is urged that such a writ cannot legally be granted by an appellate court to prevent a superior court from proceeding in a contempt matter merely upon the ground that the inferior tribunal has erred in the proceeding out of which the alleged contempt arose, citing Monhar v. Superior Court, 12 Cal.2d 715, 87 P.2d 694; Wessels v. Superior Court, 200 Cal. 403, 253 P. 135; and Commercial Bank v. Superior Court, 192 Cal. 395, 220 P. 422; that in such case the remedy of the one aggrieved is to first present his defense upon the hearing of the contempt proceeding and if there adjudged guilty of contempt to make application to a higher court for a writ of certiorari or habeas corpus. But that is not the situation in the instant case, because, if the contentions of the petitioners are true, the superior court was without power or jurisdiction to either issue the subpoena duces tecum or proceed further toward enforcing by contempt proceedings or otherwise the mandate contained in the subpoena. In my opinion petitioners have not mistaken their remedy. At most, under the facts of this case, the question is mainly one of discretion and I feel it is the better policy to dispose of the questions raised on their merits rather than put the parties to further vexation and expense. Davis v. Superior Court, 184 Cal. 691, 696, 195 P. 390. Prohibition is the proper procedure by which to arrest the proceedings of an inferior judicial tribunal or officer when such proceedings are without or in excess of the jurisdiction of such tribunal or officer and where there is not a plain, speedy or adequate remedy in the ordinary course of law. Code Civ.Proc., secs. 1102, 1103; Havemeyer v. Superior Court, 84 Cal. 327, 389, 24 P. 121, 10 L.R.A. 627, 18 Am.St. Rep. 192. Where, as here, petitioners allege that the respondent court by the issuance of the subpoena duces tecum invaded their constitutional right to be secure against unreasonable or unnecessary seizure of their private papers and documents, Const. of Cal., art. I, sec. 19, it would seem that prohibition is the proper proceeding to restrain such invasion, because if the order in question contravenes the constitution then it must of necessity be without and in excess of jurisdiction. Especially is this true where, as here, petitioners made an effort to obtain relief in the court which it is now sought to enjoin by moving said court to recall and annul the subpoena duces tecum in question.

The first claim urged by petitioners is that the subpoena duces tecum is void because it was issued upon the order of a court commissioner when, assert petitioners, the issuance of such process requires a judicial determination. In this contention my opinion is that petitioners cannot be sustained, because subdivision 1 of section 259a of the Code of Civil Procedure expressly confers upon the court commissioner the power "to hear and determine ex parte motions, for orders * * * in the superior court of the county * * * for which he is appointed"; while section 14 of article VI of our state Constitution authorizes the legislature to provide for the appointment of court commissioners and to grant to such commissioners authority to perform chambers business of the judges of the superior courts. The case of Southern Pacific Co. v. Superior Court, 93 P.2d 276; Id., 93 P.2d 1055, recently decided by this court, is not controlling, for the reason that a hearing thereon was granted by the Supreme Court and also because in that case the subpoena duces tecum was issued by the clerk of the court without an order of either a judge or a court commissioner. Under the aforesaid constitutional and statutory provisions, the making of an order directing the issuance of a subpoena duces tecum is clearly within the powers of a court commissioner in Los Angeles county.

Coming now to a consideration of petitioner's final contention, which is that the facts set forth in the affidavit in support of the motion for issuance of the subpoena duces tecum were insufficient to warrant the issuance thereof, requiring as the process did the production of private books, papers and documents of petitioners for inspection by plaintiff in the lawsuit when such plaintiff corporation was composed of competitors of the corporate petitioner in business. That the right of the people to be secure against unreasonable or unnecessary seizure of their private papers and documents is regarded as a highly sacred one, is established by the fact that the people themselves have written into the organic law of the commonwealth terms which guarantee and safeguard the perfect enjoyment of such right. California Const., art. I, sec. 19. As was so explicitly pointed out in Ex parte Clarke, 126 Cal. 235, 238, 58 P. 546, 547, 46 L.R.A. 835, 77 Am.St.Rep. 176, "To compel a person to deliver his books and papers to another who does not claim any ownership in them is to violate the sanctity of most important private rights, and is not to be tolerated except when warranted by some law clearly not inconsistent with the constitutional provision." In Ex parte Clarke, supra, it is further said: "The privacy of private books and papers is not only of inestimable value to the owner on account of various personal and sentimental reasons, but is of the greatest value also from mere business considerations. The exposure of a man's methods of business would frequently be highly injurious to him, and, although really solvent, might produce such embarrassments as would ruin him. His right, therefore, to the sole possession and knowledge of his private books and papers is not to be violated except where the power to do so clearly appears."

However, the cases seem to hold that the search and seizure clause of the Constitution was not intended to interfere with the power of the courts to compel, through a subpoena duces tecum, the production, upon a judicial proceeding, of documentary evidence in proper cases. In the exercise of their inherent power to elicit evidence in the trial of a cause judicial tribunals should be limited only by that which might constitute in the specific instance "unreasonable" search and seizure. A court may therefore require a person to deliver up for examination in a judicial proceeding his private books and papers when two essential facts are made to appear by clear and unequivocal proof, viz.: (1) that such person has a book, paper or document containing evidence material to the issue before the court, and (2) that the precise book, paper or document containing such evidence is designated or so described that it may be identified. With these rules in mind, let us turn to the record to ascertain therefrom whether the affidavit upon which the subpoena duces tecum herein was issued meets the prescribed tests. As heretofore pointed out, the principal and vital issue in the case under consideration is to determine both the invoice or replacement cost and the "cost of doing business" of the defendant in such litigation. It was therefore essential and material that the trial court be informed as to what said costs were. Read in the light of the complaint in the main action, the affidavit heretofore quoted clearly established the materiality to the main issue in the action of the documents sought to be subpoenaed. That courts may, in determining the materiality of the documents, resort to the pleadings in the action is established in Union Trust Company of San Diego v. Superior Court, supra.

The second of the prescribed rules, requiring a specific designation or description of the documents sought to be subpoenaed, was squarely met by the terms of the affidavit when it designated the documents as "The original work sheets and working papers of Duncan W. Drucquer pertaining to the analysis and examination by Duncan W. Drucquer of the books and records of C. S. Smith Metropolitan Market Co., Ltd., made in 1939", followed by the further cogent description of them as being the documents upon which the witness "recorded various figures and facts taken from the books of said defendant corporation and appertaining to said defendant's *cost of doing business.*" (Italics added.) The term "working sheets and working papers" has a definite and well established meaning, very familiar to accountants and businessmen. The meaning thereof was thus referred to by the supreme court of Massachusetts in Ipswitch Mills v. Dillon, 1927, 260 Mass. 453, 157 N.E. 604, 605, 53 A.L.R. 792, "It was found by the trial judge that work sheets meant papers on which original compilations, computations and analyses are made by accountants, which later are gathered together in a summary form and the figures rendered in a schedule, exhibit, report or return upon which the accountant is working." The affidavit here in question unequivocally shows that the documents sought were work sheets and working papers within the definition just set forth.

Petitioners' claim that the subpoena duces tecum was so broad in its terms that it would permit plaintiff in the action to embark upon a so-called "fishing expedition", thereby obtaining private information and valuable trade secrets of petitioning corporation and exposing such private information to the latter's competitors, all to its irreparable injury, finds a complete answer in the following quotation from the case of Union Trust Company of San Diego v. Superior Court, supra, 11 Cal.2d at page 464, 81 P.2d at page 158, 118 A.L.R. 259, "Furthermore, in the case of Dalton v. Calhoun County District Court, 164 Iowa 187, 145 N.W. 498, Ann.Cas.1916D, 695, where this protective provision was urged as a bar to the issuance of an order of inspection, it was stated * * * that as a rule the provision 'has reference to criminal or quasi criminal proceeding, or to forfeiture and not the statutory methods for obtaining evidence'. The court, in the latter case, went on to say that, '* * * we must presume that the trial court in exercising the discretion granted to it in such matters, and in the fairness which may be expected to control its acts in the matter, will permit no examination or discovery not necessary to the case, nor want in proper regard for the rights of both litigants'. In every case, much must necessarily be left in the first instance to the sound discretion of the trial judge."

By reason of the foregoing, I am of the opinion that the petition before this court does not state facts sufficient to warrant the issuance of the writ of prohibition prayed for and that the demurrer of respondent court thereto should be sustained, the alternative writ hereinbefore issued discharged, and a peremptory writ denied.

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36 Cal.App.2d 633

CHINNIS et al. v. POMONA PUMP CO. et al.

Civ. 2285.

District Court of Appeal, Fourth District, California.

Jan. 18, 1940.

Rehearing Denied Feb. 6, 1940.

Hearing Denied March 18, 1940.

1. Appeal and error 🔑418, 1074(3)

A notice of appeal filed on behalf of a minor plaintiff was sufficient to indicate that appeal was from whole judgment, including portion denying plaintiff damages for death of her mother, where notice stated that appeal was from the judgment in plaintiff's favor and in favor of a named defendant and against two named defendants, and where no prejudice to adverse parties was claimed. Code Civ.Proc. §§ 377, 940.

2. Appeal and error 🔑417(1)

Notices of appeal are liberally construed.

3. Appeal and error 🔑1074(3)

Technical objections to the presentation of appeals are not favored and should not be sustained, in absence of a showing of prejudice to some right of adverse parties.

4. Master and servant 🔑318(1)

A "master and servant relationship" exists so as to charge master for acts of servant if one has the right to select and control another to perform a service and direct his method or mode of doing the service, but if he has no right to direct method of accomplishing the result by the other, then the other is an "independent contractor." Civ. Code, § 2009.

[Ed. Note.—For other definitions of "Independent Contractor" and "Master and Servant," see Words & Phrases.]

5. Automobiles 🔑244(29)

Evidence that defendant in action arising out of automobile accident installed pumps for company at a fixed price for each installation, purchased materials from and made repairs for company, but that company did not exercise any control over defendant as to performance of his work, sustained finding that defendant was an "independent contractor" and not an "agent" of company, and hence it was not liable for negligent acts of an employee of defendant in operation of a truck. Civ.Code, § 2009.

[Ed. Note.—For other definitions of "Agent," see Words & Phrases.]

6. Master and servant 🔑301(1)

The control by one person over another necessary to make the relationship that of "master and servant" must be a complete control or unqualified right to control and direct details of work or means by which work is to be accomplished.

7. Automobiles 🔑244(43)

Evidence sustained finding that driver of automobile involved in intersectional collision was barred from recovery by his contributory negligence in failing to keep a careful lookout for approaching automobiles.

8. Negligence 🔑93(3)

A father's negligence in operation of an automobile could not be imputed to his minor child who was riding in the automobile. Code Civ.Proc. § 377.

9. Death 🔑23

In death action, decedent's contributory negligence bars recovery. Code Civ.Proc. § 377.

10. Appeal and error 🔑1010(1)

In death action wherein allegations of lack of contributory negligence of plaintiff were denied by defendants who affirmatively alleged contributory negligence of decedent, a finding that allegation of complaint that decedent died from injuries was true, but that other allegations were false, was equivalent to a finding that decedent's negligence proximately contributed to her death, which could not be disturbed by reviewing court if supported by the evidence.

11. Appeal and error 🔑996, 1010(1)

A judgment cannot be disturbed if evidence supports finding on which it is based, or if conflicting inferences could reasonably be drawn from the evidence.

12. Automobiles 🔑224(1)

As regards contributory negligence, a guest who has no control, supervision, or management over the automobile is not placed in same legal situation as driver.

13. Negligence 🔑135

The burden is on defendants who charge contributory negligence to prove it by a preponderance of the evidence, where it is not shown by, or may not be inferred from, evidence of plaintiffs.

14. Death 🔑58(1)

In death action, in absence of evidence of decedent's contributory negligence, plaintiffs may rely on presumption that decedent did take ordinary care for her own safety, which is a species of "evidence." Code Civ. Proc. § 1963, subd. 4.

[Ed. Note.—For other definitions of "Evidence," see Words & Phrases.]

15. Automobiles 🔑244(56)

In action for death of a guest who was riding in front seat of automobile which struck truck at intersection, evidence was insufficient to sustain finding that decedent's contributory negligence barred recovery, in absence of evidence as to whether decedent requested driver to slow down, warned him of impending danger, or took any other precautions for her own safety.

16. Damages 🔑132(15)

$750 was inadequate for injuries to a 10 year old girl consisting of fractured cheek

bone, skull, hip bone, rib, and a nose wound, causing permanent disfigurement of face and necessitating medical treatment for approximately five months.

17. Damages 🔑132(15)

$750 was inadequate to compensate a 5 year old girl for injuries consisting of fractures of the collar bone, arm, shoulder blade, and leg, and causing permanent injury to the left leg and left foot.

18. Appeal and error 🔑1058(1)

Error in exclusion of evidence offered to show agency relationship existing between two defendants was not prejudicial, where other evidence covering same subject matter was admitted.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by E. G. Chinnis, Nellie Louise Chinnis, and Mary Frances Hilderbrand, minor children of E. G. Chinnis, their guardian ad litem, against the Pomona Pump Company, R. F. Schwortz, C. M. Diehl, Loren Minnick, Ray S. Brown, Oscar Forsell, and others, to recover for injuries suffered in an automobile accident, and by E. G. Chinnis and Nellie Louise Chinnis for wrongful death. From a judgment in favor of Nellie Louise Chinnis and Mary Frances Hilderbrand against C. M. Diehl and Loren Minnick, denying recovery to E. G. Chinnis and Nellie Louise Chinnis for wrongful death, and in favor of other defendants, plaintiffs appeal, except as to that part of the judgment in favor of R. F. Schwortz, Ray S. Brown, and Oscar Forsell.

Affirmed as to defendant Pomona Pump Company and as to plaintiff E. G. Chinnis. Judgment reversed and cause remanded as to Mary Frances Hilderbrand and Nellie Louise Chinnis.

Hearing denied; CARTER, J., dissenting.

Hugo McKinley, of Delano, and Joseph A. Brown, of San Francisco, for appellants.

Brittan & Mack and Victor H. Parry, all of Bakersfield, for respondents.

THOMPSON, Justice pro tem.

This action arose out of a collision between an automobile and a truck at the intersection of two highways two miles south of Shafter in Kern county, on March 7, 1937. Plaintiff E. G. Chinnis was driving his automobile and riding with him in the car were his wife Verna Mae Chinnis, who died as a result of injuries sustained in the collision, their daughter Nellie Louise Chinnis, aged 10 years, and their niece Mary Frances Hilderbrand, aged 5 years. The truck was driven in the course of his employment by defendant Minnick, an employee of defendant Diehl, who owned the truck. Six causes of action are contained in the amended complaint. The husband and daughter sought damages under Code of Civil Procedure, section 377, for the death of the wife and mother, respectively, and each minor sought to recover damages for her individual personal injuries. The defendant Pomona Pump Company was made a defendant on the theory that Diehl was its agent and servant. The case was tried by the court without a jury and judgment rendered in favor of each minor for $750 damages against defendants Diehl and Minnick, and in favor of defendant Pomona Pump Company. Recovery was denied to E. G. Chinnis individually on the ground that he was guilty of contributory negligence. The general demurrers of defendants F. R. Schwartz (sued as R. F. Schwortz), Ray S. Brown and Oscar Forsell to the amended complaint were sustained without leave to amend, and judgment was entered in favor of said defendants, from which no appeal has been taken.

[1-3] The notice of appeal is attacked on the ground that its does not include an appeal by plaintiff Nellie Louise Chinnis from the judgment on her causes of action for damages on account of the death of her mother. The notice states in part that her appeal is "from the judgment * * * in favor of said plaintiffs Nellie Louise Chinnis and Mary Frances Hilderbrand, and in favor of the defendant Pomona Pump Company, and against C. M. Diehl and Loren Minnick". The Code of Civil Procedure provides that there may be an appeal from the judgment "or some specific part thereof" Code Civ.Proc., sec. 940; and if the notice of appeal, in identifying some specific part of the judgment, excludes other parts, it must be interpreted to relate only to the part so identified. But here the judgment did not identify any particular causes of action and we think the language of the notice is sufficient to indicate that the appeal is from the whole judgment, including the portion which denied her damages for the loss of her mother. Notices of appeal are liberally

construed. Technical objections to the presentation of appeals are not favored and, in the absence of a showing of prejudice to some right of the adverse parties, should not be sustained. No such prejudice is herein shown nor is any claimed. Estate of Smead, 215 Cal. 439, 440, 10 P.2d 462; Haydel v. Morton, 3 Cal.App.2d 364, 365, 39 P.2d 454; Gullick v. Interstate Drilling Co., 111 Cal.App. 263, 265, 295 P. 549.

[4-6] Appellants contend that the finding that defendants Schwartz, Diehl and Minnick were not the agents or servants of the defendant Pomona Pump Company is contrary to the evidence. So far as this finding relates to defendant Schwartz it is contrary to the evidence, as the uncontradicted testimony of Schwartz and Diehl was to the effect that Schwartz was the district manager of the Pomona Pump Company. Was there evidence or proper inference to support this finding as to the defendants Diehl and Minnick? The general rule is that, if one has the right to select and control another to perform a service and direct his method or mode of doing the service, it is the relationship of master and servant. But, if he has no right to direct the method of accomplishing the result by the other, then the other is an independent contractor. Stewart v. Cal. Imp. Co., 131 Cal. 125, 131, 63 P. 177, 724, 52 L.R.A. 205; Barton v. Studebaker Corp., 46 Cal.App. 707, 715, 189 P. 1025. The evidence as to the relationship between the Pomona Pump Company and Diehl is quite voluminous, but the following is a brief synopsis thereof. There was evidence to the effect that Diehl was the owner of the truck involved in the accident and Minnick was employed by Diehl and was driving the truck at the time. The Pomona Pump Company maintains a district office in Bakersfield. Diehl maintained his place of business at his residence in a different part of Bakersfield, and had his telephone there in his own name. He maintained this place and the telephone at his own expense. Diehl worked as a pump repair man for anybody who would employ him. Diehl had an oral arrangement with the Pomona Pump Company which could be terminated on thirty days' notice by either party, whereby Diehl got the work of installing pumps sold by the Pomona Pump Company in that vicinity, except where the purchasers did their own installation. Diehl received a fixed amount for each installation job from the Pomona Pump Company. Diehl also had an oral arrangement whereby he received a commission from the Pomona Pump Company if he sold a pump for that corporation. He also received a commission sometimes when Schwartz (district manager for said corporation) sold a pump to a customer to whom Diehl had previously sold a pump; and sometimes if Diehl gave Schwartz a prospect to whom Schwartz sold a pump the corporation paid Diehl a commission. On some such deals the pump company paid no commission to Diehl. On work which the pump company agreed to do for a pump owner to increase the efficiency of the pump and bring it up to the guarantee, they engaged Diehl to do that work and the pump company paid him for it. But Diehl did repair work for the owners directly on pumps sold by the Pomona Pump Company and on such jobs the pump company paid him nothing and exercised no control over his work. He purchased the materials from the pump company, being allowed a discount. Diehl charged the customer directly for such materials and for his labor. He employed helpers who worked with him, and Diehl paid them himself. Diehl furnished his own truck and paid all expenses of its operation. No one from the pump company told him when to work or quit, or how to perform any particular job. Of course, if his work for the pump company was not satisfactory to the company, it could terminate the oral arrangement. All of Diehl's jobs were carried out with his own helpers on his own time and with his own equipment. On his billheads he had Schwartz's name as salesman and Schwartz's address, and also "C. M. Diehl, Deep Well Turbine Pumps Dealer, Installing and Repairing". He did not have the name of Pomona Pump Company on any of his stationery. In the telephone book, under the name "Pomona Pump Company", said company had its own telephone number and under it a notice that, if there was no answer, to call a number which was Diehl's number. Diehl called at the Pomona Pump Company's office frequently about pump parts and while there occasionally answered the phone and took messages. He received no pay for this. Diehl and Schwartz each helped the other by suggesting prospects. A few days before the accident the California manager for the Pomona Pump Company sent out a circular letter to owners of Pomona pumps generally, advertising improved bowls for Pomona

pumps and advising their installation. A Mr. Cokely, who owned a Pomona pump near Shafter and who had received one of the circular letters, called on the telephone the number designated for the Pomona Pump Company in Bakersfield. There was no answer so he called the other number designated and got Diehl, who went out and made an agreement with Cokely to repair his pumping plant. This was not a job guaranteed by the company. He purchased some parts from the company at a discount and passed some of the discount on to Cokely. The Pomona Pump Company charged Diehl for the parts and Diehl paid the company. Diehl charged Cokely for the parts and labor and Cokely paid Diehl. Defendant Minnick, with two other employees of Diehl, was working on the Cokely job and on the day of the accident they were returning from the job in Diehl's truck, which Minnick was driving. The trial court found that Diehl and Minnick were not agents or servants of Pomona Pump Company. Section 2009 of the Civil Code (now sec. 3000 of the Labor Code, St.1937, p. 261) describes a servant as follows: "A servant is one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master." After reviewing the evidence in the present case disclosing the nature of the relationship between the Pomona Pump Company and Diehl, it is apparent that the relation of master and servant as defined by the code, did not exist between the Pomona Pump Company and Diehl at the time of the accident and, consequently, it did not exist between the company and Minnick, the driver of the truck, who was employed by Diehl. Under the evidence presented, Diehl was an independent contractor and Minnick was his employee, and the pump company had no authoritative control over them as to the manner in which the details of their work were to be performed, as distinguished from mere suggestion and advice as to details. The control necessary to make the relationship that of master and servant means complete control or the unqualified right to control and direct the details of the work or the means by which the work is to be accomplished. Barton v. Studebaker Corp., supra, and cases therein cited; Counihan v. Lufstufka Bros. & Co., 118 Cal.App. 602, 604, 605, 5 P.2d 694, and cases therein cited; Thompson v. Robinson-Roberts Co., 13 Cal.App.2d 166, 168, 56 P.2d 599. The finding of the trial court that Diehl and Minnick were not the agents of the Pomona Pump Company has ample support in the evidence and must be sustained and the judgment based thereon, in favor of said defendant and against all plaintiffs affirmed.

[7] Appellants next contend that the evidence does not support the finding of the trial court that plaintiff E. G. Chinnis, the driver of the automobile was guilty of contributory negligence. There is but little conflict in the evidence. In substance it discloses that Chinnis was driving southerly on Shafter highway, an oiled road, and the truck was traveling easterly on Burbank road, a dirt road. The intersection was unobstructed and Chinnis could see westerly on Burbank road a quarter of a mile. As he approached the intersection and was about 300 yards from it, he saw a cloud of dust on Burbank road about 400 or 500 yards west of the intersection. He just glanced at it, but did not realize what caused it. He did not notice it again but looked straight ahead. The sun was shining in his eyes some, not badly, but it bothered him. He did not slow down for the intersection. He knew there was an intersection there, but he was "just looking ahead". He said he was traveling 25 to 30 miles per hour. One witness testified Chinnis was traveling 40 to 45 miles per hour as he approached the intersection and he did not slow down. The vehicles entered the intersection at "a dead heat". Another witness fixed the speed of the plaintiff's car at 30 to 35 miles as it entered the intersection and the speed of the truck at 45 to 50 miles per hour about 150 to 200 yards west of the intersection. It was the duty of the plaintiff E. G. Chinnis to keep a careful lookout for approaching cars and to use ordinary care to avoid colliding with any such car. It is apparent that he did not do so and the court was justified, under all the circumstances of the case as shown by the evidence, in finding him guilty of contributory negligence.

[8–15] Appellants urge that the court erred in denying Nellie Louise Chinnis a judgment for the death of her mother. Counsel for plaintiffs suggest that judgment was denied her under Code of Civil Procedure, section 377, upon the theory that the contributory negligence of her father was imputed to her. The record does not indicate such reason for the judgment, but, of course, the father's negligence could not be imputed to this minor child. Bowen v. Kizirian, 105 Cal.App. 286, 288, 287 P. 570; Bowler v. Roos, 213 Cal. 484, 485, 2 P.2d 817. Counsel for respondent corporation, however, contend that this part of the judgment is based upon a finding that the decedent herself was guilty of contributory negligence and, therefore, the minor child cannot recover for the death of her mother. If such a finding has support in the evidence the minor cannot recover for such damage because the negligence of the decedent bars her heirs from recovery in an action for wrongful death. 8 Cal.Jur., pp. 988 et seq., and cases cited. The court did not make a finding specifically stating that decedent was guilty of contributory negligence. However, in paragraph IX of the first cause of action in the amended complaint, plaintiffs E. G. Chinnis and Nellie Louise Chinnis allege that "Verna Mae Chinnis (decedent) received serious injuries through no fault of her own nor due to any negligence on her part. * * *" All of the defendants deny this allegation and all defendants affirmatively allege contributory negligence on the part of the decedent. The court made a finding "that it is true that Verna Mae Chinnis received injuries and died * * * as a result of said injuries; that the other allegations to paragraph IX of the first cause of action of said amended complaint are untrue". This is equivalent to a finding that her negligence proximately contributed to her death and, under the rule governing appellate courts, a judgment based upon this finding cannot be disturbed if there is any evidence in the record supporting the finding, or if conflicting inferences could reasonably be drawn from the evidence. But what does the record disclose? There is no evidence whatever on the question except that she sat in the front seat of her husband's car just prior to and at the time of the accident. Respondents' counsel argue that there was nothing to prevent her from seeing the approaching truck and it must, therefore, be presumed that she did see it, and they cite the case of Hoffart v. Southern Pac. Co., 33 Cal.App.2d 591, 92 P.2d 436, June 30, 1939, to uphold this contention. However, that case lends no support to such contention and can easily be distinguished on the facts, for the evidence in that case described in detail and without conflict the conduct of the decedent, who was a passenger in the automobile prior to and at the time of the accident. A guest who has no control, supervision or management over the automobile is not placed in the same legal situation as the driver. Scherer v. So. Pac. Co., 140 Cal.App. 528, 534, 35 P.2d 356; Marchetti v. So. Pac. Co., 204 Cal. 679, 682, 269 P. 529; 3 Cal. Jur., pp. 853 and 854. If we assume that the decedent saw or should have seen the approaching truck, we cannot necessarily assume that she was aware of impending danger. The truck was not a menace until it was close to the intersection. There is no evidence to indicate whether or not she remonstrated with her husband, or requested him to slow down, or warned him of impending danger, or took any other precautions for her own safety. The burden is upon the defendants who charge contributory negligence to prove it by a preponderance of the evidence, where it is not shown by, or may not be inferred from, the evidence of plaintiffs. There is nothing in the proof to show that decedent did not reasonably believe her husband would slow down or take other precautions to avoid the danger. In view of the absence of proof on the issue, plaintiffs may rely upon the presumption that decedent did take ordinary care for her own safety, which is a species of evidence. Code Civ.Proc., sec. 1963, subd. 4; Crabbe v. Mammoth Channel G. Min. Co., 168 Cal. 500, 506, 143 P. 714. The evidence in this case does not support the finding that decedent was guilty of contributory negligence, and the judgment must be reversed. McKinley v. Dalton, 128 Cal.App. 298, 305, 17 P.2d 160.

[16] Another ground for a new trial urged by appellants is that the damages awarded for personal injuries to each of the two minors were inadequate. The only evidence relating to the injuries to the minor children was that of the attending physician and surgeon, who described the injuries, their nature and duration, and the treatment therefor. From this evidence it appears that the injuries sustained by Nellie Louise Chinnis were as follows: a fracture of the zycoma (cheek bone) on the right side of her face, with about one-fourth of an inch displacement of the fragments, this being a permanent injury, resulting in "a little displacement in the appearance of the face"; a fracture of the skull and concussion of the brain, the fracture being of the right parietal bone ("large bone covering side of head") a simple fracture (no fragments), with very little damage to the

brain; a fracture of the ilium (hip bone) extending about three and one-half inches; a fracture of the eleventh right rib; a puncture wound on the nose; some minor internal injuries and multiple contusions. She was in bed in the hospital twenty days and then confined in bed at home for a while and received medical treatment for about five months.

[17] The injuries sustained by Mary Frances Hilderbrand are as follows: a fracture of the right clavicle (collar bone); a fracture of the left fibre of the thigh bone; a fracture of the left femur (thigh bone), requiring treatment by adhesive strapping with weight attached for three or four weeks and requiring two casts on her body; a fracture of the right main humerus (bone in upper arm); and an incomplete fracture of the scapula (shoulder blade). She was in the hospital about five months and had subsequent medical treatment. Her permanent and incurable injuries consist of a slightly inward bowing of the left leg (knock-kneed) and a deformity of the left foot partly due to this inward bowing of the leg, which will make it difficult for her to wear a shoe on that foot.

We are of the opinion that the amount of damages $750 awarded to each child is inadequate to justly compensate her for the injuries sustained. With respect to appellant Nellie Louise Chinnis, we think the issues of negligence and damage are so inextricably interwoven that a new trial should be had on all the issues. As to appellant Mary Frances Hilderbrand, we think the issues are severable and a new trial should be granted as to the issue of damages alone. Tumelty v. Peerless Stages, 96 Cal.App. 530, 531, 274 P. 430.

[18] The trial court excluded certain evidence relating to the practice and course of dealings between the district manager of the Pomona Pump Company and defendant Diehl, offered for the purpose of proving agency between said corporation and Diehl. Although some of the questions asked of the witness were too general most of this evidence was admissible for the purpose for which it was offered. However, that subject was thoroughly explored by plaintiffs' counsel by means of evidence which was admitted and no prejudice was suffered by appellants.

The judgment is affirmed as to the defendant Pomona Pump Company and as to plaintiff E. G. Chinnis. As to plaintiff Mary Frances Hilderbrand the judgment is reversed and the cause is remanded for a new trial on the single issue of the amount of damages; and the trial court is directed to render judgment in her favor for the amount of damages which shall be so found upon a determination of that issue. As to plaintiff Nellie Louise Chinnis the judgment is reversed and the cause is remanded for a new trial on all the issues.

We concur: BARNARD, P. J.; MARKS, J.

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36 Cal.App.2d 658

KIRKPATRICK v. STELLING.

Civ. 10877.

District Court of Appeal, First District, Division 1, California.

Jan. 23, 1940.

Hearing Denied March 21, 1940.

1. Payment 🔑**3**

The statute limiting amount of deficiency judgment after sale of realty under trust deed to difference between entire indebtedness and fair market value of property at time of sale is not violative of constitutional provision prohibiting any state from making anything but gold and silver coin a tender in payment of debts, as applied to transactions entered into after its passage. Code Civ.Proc. § 580a, as added by St.1933, p. 1672, § 4; U.S.C.A.Const. art. 1, § 10.

2. Action 🔑**53(3)**

There can be but one action to recover a debt secured by mortgage or deed of trust. Code Civ.Proc. §§ 725a, 726.

3. Mortgages 🔑**1**

Where a debt is secured by mortgage or deed of trust, the land is deemed to be the primary security, and if remedy of foreclosure is sought the land becomes the principal debtor and the borrower becomes the surety. Code Civ.Proc. §§ 725a, 726.

4. Mortgages 🔑**386**

The foreclosure of mortgages and deeds of trust is a matter of purely equitable cognizance, and the controversy must be settled on equitable principles. Code Civ.Proc. §§ 725a, 726.

5. Evidence ⚷11

The court will take judicial notice that in 1933, at time of enactment of statute limiting amount of deficiency judgment after sale of realty under trust deed to difference between entire indebtedness and fair market value of property at time of sale, and of statute relating to alternative remedy of foreclosure, the market for real estate had almost entirely disappeared. Code Civ.Proc. § 725a; § 580a, as added by St.1933, p. 1672, § 4.

6. Mortgages ⚷330

The state may declare that land securing an indebtedness be sold for the fair market value, and that borrower as surety be held only for difference between fair market value and amount of indebtedness. Code Civ.Proc. § 725a; § 580a, as added by St. 1933, p. 1672, § 4.

7. Payment ⚷3

The statute limiting amount of deficiency judgment after sale of realty under trust deed to difference between entire indebtedness and fair market value of property at time of sale is not unconstitutional as a "tender statute" as applied to transactions entered into after its passage, but is merely a limitation on creditor's recovery in event creditor fails to sell at fair market value. Code Civ.Proc. § 580a, as added by St.1933, p. 1672, § 4; U.S.C.A.Const. art. 1, § 10.

8. Constitutional law ⚷50
Payment ⚷3

Emergencies do not create power to enact a statute although they may offer the excuse for its exercise, and hence statute violative of tender clause of federal Constitution would be prohibited irrespective of existence of emergency. U.S.C.A.Const. art. 1, § 10.

9. Constitutional law ⚷276
Mortgages ⚷330

The statute, limiting amount of deficiency judgment after sale of realty under deed of trust to difference between entire indebtedness and the fair market value of property at time of sale, does not interfere with "freedom of contract" as applied to transactions entered into after its passage. Code Civ. Proc. § 580a, as added by St.1933, p. 1672, § 4.

10. Constitutional law ⚷249

Real property mortgages and deeds of trust are a proper subject of classification.

11. Constitutional law ⚷249
Mortgages ⚷330

The statute limiting amount of deficiency judgment after sale of realty under trust deed to difference between entire indebtedness and fair market value of property at time of sale does not deny "equal protection of the laws," as applied to transactions entered into after its passage. Code Civ.Proc. § 580a, as added by St.1933, p. 1672, § 4.

[Ed. Note.—For other definitions of "Equal Protection of the Law," see Words & Phrases.]

12. Statutes ⚷172

Where statute limiting amount of deficiency judgment after sale of realty under trust deed to difference between entire indebtedness and the fair market value of property at time of sale was part of a statute adding several new sections to, and amending various other sections of the Civil Code, and Code of Civil Procedure, the statute was not limited as to time by reason of provision in independent section reciting that "this Act and the provisions of this section shall be effective to and until" a specified date. Code Civ.Proc. § 580a, as added by St.1933, p. 1672, § 4; § 2924½, as added by St.1933, p. 1674, § 8.

13. Mortgages ⚷330

The statute, as added in 1933, limiting amount of deficiency judgment after sale of realty under trust deed to difference between entire indebtedness and the fair market value of property at time of sale, if operative only until September 1, 1936, became an integral part of deed of trust and note executed in 1934, and measured the rights of the parties thereto, irrespective of when sale was held. Code Civ.Proc. § 580a, as added by St. 1933, p. 1672, § 4.

* * *

Appeal from Superior Court, Santa Clara County; Charles W. Davison, Judge.

Action by W. J. Kirkpatrick against J. Alice Stelling for the deficiency alleged to be due on a promissory note after default and sale of real property constituting the security therefor. Judgment for defendant, and plaintiff appeals.

Affirmed.

Louis Ferrari, G. D. Schilling, C. H. White, and D. Bianco, all of San Francisco, for appellant.

Owen D. Richardson, of San Jose, for respondent.

John H. Riordan, of San Francisco, amicus curiæ in support of appellant.

PETERS, Presiding Justice.

Plaintiff, as assignee of a promissory note secured by a deed of trust on certain real property, brings this action against defendant for the deficiency alleged to be due after default and a sale of the real property constituting the security. The note and deed of trust were executed on July 7, 1934. The note was in the sum of $45,925, and was payable one year from date "in lawful money of the United States of America". The complaint alleges that the security for the note was duly sold on January 8, 1938 (whether appellant or a third person was the purchaser does not appear), and that the net proceeds of the sale were applied on the note; that after the proceeds of the sale were so applied there remained, and still remains, due a balance of $13,164.13, for which judgment is sought. The complaint does not allege that the property constituting the security was sold for its fair market value as of the day of sale, or what such fair market value was on that date. Defendant demurred to the amended complaint on the ground, among others, that the complaint fails to contain the allegations required of section 580a of the Code of Civil Procedure as enacted in 1933 (St. 1933, p. 1672, § 4) and as in force in 1934 when the note and deed of trust were executed, and as in force in 1935 when the note became due. The plaintiff contended such section was unconstitutional. Defendant waived the other grounds of her demurrer, and both parties stipulated that the question of the constitutionality of section 580a would be the sole ground urged on appeal. The trial court held the statute constitutional, and accordingly sustained the demurrer without leave to amend. After judgment was entered for the defendant plaintiff prosecuted this appeal.

Section 580a of the Code of Civil Procedure, which defendant contends is unconstitutional, was added to that code in the legislative session of 1933, and became effective in that year. The statute requires that, in actions for deficiency judgments after sale under a power of sale in a deed of trust or mortgage, the plaintiff must set forth in his complaint the amount of the entire indebtedness, the amount for which the property was sold, "and the fair market value thereof at the date of sale". The section further provides that, upon the application of either party made at least ten days before trial, the court shall, and at any time upon its own motion may, appoint an inheritance tax appraiser to appraise the property; that such appraisal shall be admissible in evidence, and the appraiser may be called and examined as a witness by either party or by the court; that before the court shall render any judgment in the action the court shall find the fair market value of the real property at the time of sale; that the court "may render judgment for not more than the amount by which the entire amount of the indebtedness due at the time of sale exceeded the fair market value of the real property or interest therein sold at the time of sale with interest thereon from the date of the sale".

It has been uniformly held by the courts of this state that section 580a cannot lawfully be applied to any mortgage or deed of trust executed prior to its passage, whether the sale took place before or after the passage of the statute, because, to so apply it, would be to impair the obligation of the contract in violation of the federal Constitution (U.S.C.A.Const. art. 1, § 10). Bennett v. Superior Court, 5 Cal.App.2d 13, 42 P.2d 80; Central Bank of Oakland v. Proctor, 5 Cal.2d 237, 54 P.2d 718; Bank of America Nat. Trust & Savings Ass'n v. Dennison, 8 Cal.App.2d 173, 47 P.2d 296; Bechtel v. Nelson, 10 Cal.App.2d 66, 51 P.2d 99; Smith v. Davis, 10 Cal.App.2d 487, 52 P.2d 515; Rosenberg v. Janssen, 11 Cal.App.2d 15, 52 P.2d 952, 54 P.2d 721; Birkhofer v. Krumm, 27 Cal.App.2d 513, 81 P.2d 609; Bank of America Nat. Trust & Savings Ass'n v. Burg Bros., 31 Cal.App.2d 352, 88 P.2d 196; Drapeau v. Smith, Cal.App., 93 P.2d 157. None of these cases passed upon the constitutionality of the statute as applied to transactions entered into after its passage.

[1] Appellant contends that, as to its prospective operation, section 580a of the Code of Civil Procedure violates article I, section 10 of the federal Constitution, U.S.C.A., which provides in part as follows: "No State shall * * * make any Thing but gold and silver Coin a Tender in Payment of Debts * * *". It is the theory of appellant that section 580a of the Code of Civil Procedure brings about, in its oper-

ation, the substitution of property at a valuation in place of money in payment of a lawful debt, and that this violates the above-quoted provision of the federal Constitution. To illustrate appellant's argument: If a debtor owes $20,000, and the land given as security is sold, after default, for $5,000, and the trial court determines the fair market value at the time of sale was $12,000, the lender, under section 580a, is permitted to recover only $8,000 as a deficiency. Under such circumstances according to appellant, the lender is being compelled, by force of the statute, to accept in payment of his debt, $5,000, in cash received at the sale, *$7,000 in appraised value*, and an $8,000 deficiency judgment. It is urged that the operation and effect of such a statute is to substitute an appraised valuation for money. It is contended that the very purpose of the federal constitutional provision above quoted was to prevent any state from passing any statute that would compel a creditor to accept property at an appraised figure in lieu of money in payment of debts. On this point appellant has filed an interesting, exhaustive and scholarly brief, discussing, at length, the situation that existed prior to the adoption of the federal Constitution, and the evils that were intended to be remedied not only by the tender clause above quoted, but also the companion clause in the same section prohibiting any state from coining money or emitting bills of credit. It appears, therefrom, beyond doubt, that, after the Revolution, and prior to the adoption of the federal Constitution, economic chaos was threatened, not only because of the issuance of worthless paper money by some of the states, but because many of the states passed special laws on behalf of the debtors that practically wiped out existing debts. By some of these laws the due payment of debts was suspended; existing debts, in direct violation of the terms of the contract, by statutory mandate, were permitted to be paid in instalments; and by other statutes debtors were permitted to tender to the creditor property of any sort in payment of the debts, or the creditor was compelled to take property of the debtor seized in execution at an appraised figure. Typical of these statutes is one passed in Virginia in 1782 (Hening's Laws of Virginia, vol. XI, p. 178) providing in substance that whenever a creditor secured a judgment against his debtor, the latter may "tender to the creditor, or his attorney, lands in discharge of the said judgment" at an appraised figure fixed as provided in the statute. The same statute permitted judgments to be satisfied in whole or in part by the tender of slaves appraised as set forth in the statute. Other laws permitted tobacco, hemp and flour to be tendered in payment of judgments. A South Carolina statute of 1785, referred to in the briefs, permitted the debtor in the action brought to collect a debt, to tender any property in payment of said debt at three-quarters of its appraised value.

Mr. Justice Story, in his "Commentaries on the Constitution of the United States," volume 2, page 242, sections 1371 and 1372, discusses the matter as follows:

"Sec. 1371. The next prohibition is that no State shall 'make anything but gold and silver coin a tender in payment of debts'. This clause was manifestly founded in the same general policy which procured the adoption of the preceding clause. The history, indeed, of the various laws which were passed by the states in their colonial and independent character upon this subject, is startling at once to our morals, to our patriotism, and to our sense of justice. Not only was paper-money issued, and declared to be a tender in payment of debts; but laws of another character, well known under the appellation of tender laws, appraisement laws, instalment laws, and suspension laws were from time to time enacted, which prostrated all private credit and all private morals. By some of these laws the due payment of debts was suspended; debts were, in violation of the very terms of the contract, authorized to be paid by instalments at different periods; property of any sort, however worthless either real or personal, might be tendered by the debtor in payment of his debts; and the creditor was compelled to take the property of the debtor, which he might seize on execution, at an appraisement wholly disproportionate to its known value. Such grievances and oppressions, and others of a like nature, were the ordinary results of legislation during the revolutionary war and the intermediate period down to the formation of the Constitution. They entailed the most enormous evils on the county; and introduced a system of fraud, chicanery, and profligacy, which destroyed all private confidence, and all industry and enterprise.

"Sec. 1372. It is manifest, that all these prohibitory clauses, as to coining money, emitting bills of credit, and tendering anything but gold and silver in payment of debts, are founded upon the same general policy, and result from the same general considerations. The policy is, to provide a fixed and uniform value throughout the United States, by which commercial and other dealings of the citizens, as well as the moneyed transactions of the government, might be regulated. For it may well be asked, why vest in Congress the power to establish a uniform standard of value, if the States might use the same means, and thus defeat the uniformity of the standard, and consequently the standard itself? And why establish a standard at all for the government of the various contracts which might be entered into, if those contracts might afterwards be discharged by a different standard, or by that which is not money, under the authority of State tender laws? All these prohibitions are, therefore, entirely homogenous, and are essential to the establishment of a uniform standard of value in the formation and discharge of contracts. For this reason, as well as others derived from the phraseology employed, the prohibition of State tender laws will admit of no construction confining it to State laws which have a retrospective operation. Accordingly, it has been uniformly held, that the prohibition applies to all future laws on the subject of tender; and, therefore, no State legislature can provide that future pecuniary contracts may be discharged by anything but gold and silver coin."

It is to be noted that the statutes above referred to, and Mr. Justice Story's discussion above quoted, have no direct reference to debt secured by a real property mortgage or deed of trust. The arguments of appellant are fundamentally unsound in that they fail to give due weight to the fact that section 580a of the Code of Civil Procedure deals not with debts generally, but with a specialized transaction—a debt secured by a mortgage or deed of trust. We have no doubt that under the tender clause of the federal Constitution a state is prohibited from passing any statute providing, directly or indirectly, as to past or future debts, that the debtor may tender in total or partial discharge thereof property at an appraised valuation. But this is not the legal effect of section 580a. When a lending agency determines to lend money on the security of a specific parcel of real property, it is told by the statutes of California that in case of default, before it can secure a personal judgment against the borrower, it must first exhaust its security. Sec. 726, Code Civ.Proc. This it may do, in either of two ways—it may foreclose (and this is so whether the security transaction takes the form of a mortgage or deed of trust—sections 725a, 726, Code Civ.Proc.) or it may sell under the power of sale in the mortgage or deed of trust. Before the lending agency makes the loan, it sees and evaluates the property itself. That valuation is made by itself, at any figure it may determine. It is under no compulsion to lend any sum, and it, in its uncontrolled discretion, determines what value it will place on the property. Immediately upon the loan being made the lender secures a lien on that specific property—a lien which no act of the borrower can legally affect. This is a fundamental distinction between the type of statute that the tender clause prohibits and statutes of the nature of section 580a of the Code of Civil Procedure. It is one thing for a state by statute to provide that either as to past or future debts, in case of default, the creditor must accept property at a court appraisal in payment of the debt—property in which the creditor has no rights, legal or equitable, until he attaches or executes—property which the debtor may have when the loan is made, but which he may sell, transfer, or encumber before the debt falls due—and quite another to tell the lending agency by statute at the time that it makes the loan, that its primary security is a specific parcel of land which it may evaluate at any figure it may see fit, and that if, in the case of default, it desires to realize on the security by sale (or foreclosure as will later appear) it must secure at private or judicial sale the fair market value of the security, and if it does not its recovery in a personal action will be measured accordingly. Such a statute, in our opinion, is not a tender law at all, and is clearly not within the purview of the tender clause.

[2-4] In this state, as already pointed out, there can be but one action to recover a debt secured by a mortgage or deed of trust. The land is deemed to be the primary security. If the remedy of foreclosure is sought the land becomes the principal debtor and the borrower becomes the surety. Woodward v. Brown, 119 Cal. 283, 51 P. 2, 542, 63 Am.St.Rep. 108. The history of the law of mortgages demonstrates that equity has always extended its protective arm over foreclosure proceed-

ings to protect, if necessary, the rights of the borrower. It has always been held that the foreclosure of mortgages (and the same rule obviously applies to foreclosure of deeds of trust) is a matter of purely equitable cognizance and that the controversy must be settled on equitable principles. 18 Cal.Jur., p. 276, sec. 561.

This discussion of foreclosures is pertinent here. If the appellant herein, instead of selling under the deed of trust, had elected to foreclose the deed of trust as provided by section 725a of the Code of Civil Procedure (St.1933, p. 1673, § 7), added to that code at the same legislative session at which section 580a was adopted, then appellant would have been subjected to the provisions of section 726 of the Code of Civil Procedure regulating foreclosures, which section was also amended in 1933 (St.1933, p. 2118). As so amended, that section provides that in the foreclosure action the decree shall establish the amount of the deficiency, if any; that the plaintiff in the foreclosure action, within three months of the date of the foreclosure sale may petition the court; that upon such petition the court shall take evidence of the fair market value of the property sold as of the date of sale; that the court shall find on this issue and render its money judgment against the defendant borrower "for the amount by which the amount of the indebtedness with interest and costs of sale and of action exceeds the fair value of the property * * as of the date of sale". St.1937, p. 770. The section also provides that upon application of either party, or upon its own motion, the trial court may appoint an inheritance tax appraiser to appraise the property as of the date of sale and such report shall be admissible in evidence, but not conclusive, on this issue. This section, as amended in 1933, has been upheld even as to its retroactive operation in so far as it deals with the foreclosure of deeds of trust. Miller v. Hart, 11 Cal.2d 739, 81 P.2d 923. It should be mentioned that one of the briefs in that case contended the section violated the tender clause, but apparently the Supreme Court did not consider the point even worthy of mention.

[5, 6] It is thus seen that, had the appellant herein pursued the alternative remedy of foreclosure, he would have been subjected to exactly the same restrictions as to the amount of the deficiency judgment as are provided by section 580a of the Code of Civil Procedure. This is of considerable importance. Section 726 of the Code of Civil Procedure is clearly valid. What this state has done, by the adoption of sections 580a and 726, is to declare that property sold for a debt secured by a mortgage or deed of trust, whether sold in a foreclosure proceeding or under a power of sale, must be sold for the fair market value. The state has also declared that if the creditor either buys in the property himself or sells to a third person at a figure less than the fair market value, he has participated in a sale, to the detriment of the debtor, that is unfair and unconscionable, and he must bear the consequences. It may be assumed that the legislature in passing such statutes had certain abuses in mind that the statutes were intended to remedy. In fact we are permitted to take judicial notice of the fact that in 1933, when these statutes were enacted, and prior and subsequent thereto, the market for real estate had almost entirely disappeared. Under such circumstances we are clearly of the opinion that, since under a contract of mortgage or deed of trust, the creditor agrees to look to the land as his principal debtor, and to the borrower merely as surety, that the state has the power to declare that the land can only be sold for the fair market value, and that the surety can only be held for the difference between the fair market value and the amount of the indebtedness. If sections 580a and 726 were to be given retroactive effect so as to apply to mortgages and deeds of trust executed prior to their passage in 1933, there might be some merit in appellant's contentions, but here the appellant knew when the loan was made that in case of default, if he desired to secure a personal judgment against the creditor, he must sell at the fair market value.

Equity courts have gone far, in the exercise of their inherent and broad powers, and independently of statute, to protect the rights of all concerned in foreclosure proceedings. In Suring State Bank v. Giese, 210 Wis. 489, 246 N.W. 556, 85 A.L.R. 1477, the supreme court of Wisconsin affirmed a lower court decree confirming a sale of the property on the express condition that plaintiff be not entitled to a deficiency judgment at all—a decree which goes far beyond section 580a of the Code of Civil Procedure. In so doing the Wisconsin supreme court pointed out that the economic depression had practically wiped out the real estate market; that because of that fact the device of a judicial sale had failed of its intended purpose of securing the fair value of the property at such sale, and stated 246 N.W. at page 557: "* * * and the question arises whether a court of equity is wholly impotent to rise to the needs of justice and see that the parties are fairly and properly protected". The court pointed out that equity courts possess the inherent power to adopt any one of three measures to protect all concerned:

1. The court may decline to confirm the sale where the bid is substantially inadequate.

2. The court, in ordering a sale, may, in its discretion, take notice of the present emergency, and, after a proper hearing, fix a minimum or upset price at which the premises must be bid if the sale is to be approved.

3. The court may conduct a hearing, after sale, if it has not theretofore fixed an upset price, and establish the value of the property, and, 246 N.W. at page 558: "* * * as a condition to confirmation, require that the fair value of the property be credited upon the foreclosure judgment. If an upset price has been established, the plaintiff may be required to credit this amount upon the judgment as a condition to confirmation". There is an exhaustive annotation on this case in 85 A.L.R. 1480, supplemented by an annotation in 89 A.L.R. 1087; related points are discussed in 90 A.L.R. 1330; 94 A.L.R. 1352; 108 A.L.R. 891; 115 A.L.R. 435. Under the Wisconsin case, and the authorities discussed in the various annotations referred to, supra, section 726 of the Code of Civil Procedure merely puts into statutory form a power the court inherently possessed. By section 580a of the Code of Civil Procedure the legislature has merely carried over to sales under a power contained in a deed of trust or mortgage the same restrictions that are provided in the case of foreclosure actions.

It should also be mentioned that the United States Supreme Court has upheld, even as to its retroactive operation, a statute, in many respects, similar to section 580a of the Code of Civil Procedure. In Richmond Mtg. & L. Corp. v. Wachovia B. & T. Co., 300 U.S. 124, 57 S.Ct. 338, 81 L.Ed. 552, 108 A.L.R. 886, the court had under consideration a North Carolina statute which provided that whenever a sale is had of mortgaged property, and the mortgagee becomes the purchaser, and thereafter the mortgagee seeks to secure a deficiency judgment, the mortgagor may show as a matter of defense that the property sold was fairly worth the amount of the debt, or that the amount bid was substantially less than the true value, and, upon such showing, may defeat any deficiency judgment against him, in whole or in part. The United States Supreme Court, in upholding the statute retroactively as against the contention that the statute impaired the obligation of contracts, stated in part, 300 U.S. at page 130, 57 S.Ct. at page 340, 81 L.Ed. 552, 108 A.L.R. 886: "The act alters and modifies one of the existing remedies for realization of the value of the security, but cannot fairly be said to do more than restrict the mortgagee to that for which he contracted, namely, payment in full. It recognizes the obligation of his contract and his right to its full enforcement but limits that right so as to prevent his obtaining more than his due. By the old and well-known remedy of foreclosure a mortgagee was so limited because of the chancellor's control of the proceeding." The court goes on to point out that foreclosure has been the classical method of realizing upon the mortgage security, and then continues, 300 U.S. at page 131, 57 S.Ct. at page 340, 81 L.Ed. 552, 108 A.L.R. 886: "If, therefore, *the Legislature of the state had elected altogether to abolish the remedy by trustee's sale,* we could not say that it had not left the mortgagee an adequate remedy for the enforcement of his contract. But the Legislature has by no means gone so far. The law has merely restricted the exercise of the contractual remedy to provide a procedure which, to some extent, renders the remedy by a trustee's sale consistent with that in equity. This does not impair the obligation of the contract." (Italics ours.)

In Honeyman v. Jacobs, 306 U.S. 539, 59 S.Ct. 702, 83 L.Ed. 972, decided in April of 1939, the United States Supreme Court reaffirmed the Richmond Mortgage Corporation case, supra. In the Honeyman case the court had under consideration the validity, retroactively, of section 1083-a of the New York Practice Act. That statute is substantially similar to section 580a of the California Code of Civil Procedure, and, apparently, is not limited, as was the North Carolina statute to cases where the mortgagee becomes the purchaser at the sale. The court held the statute was valid retroactively as against the argument that it violated the contract clause. In so holding the court pointed out that the mortgage debt was $15,000; that the property was sold for

$7,500; that with interest and expenses the mortgagee was attempting to collect a deficiency of over $9,500; that the trial court found that the property was actually worth more than $25,000. The court stated, 59 S. Ct. at page 703: "The contract contemplated that the mortgagee should make himself whole, if necessary, out of the security but not that he should be enriched at the expense of the debtor or realize more than what would repay the debt with the costs and expenses of the suit. Having a total debt of $15,771.17, with expenses, etc., of $1,319.03, appellant has obtained through his foreclosure suit the property of the debtor found without question to be worth over $25,000. He has that in hand. We know of no principle which entitles him to receive anything more. Assuming that the statute before its amendment permitted a recovery of an additional amount through a so-called deficiency judgment, we cannot say that there *was any constitutional sanction for such a provision which precluded the legislature from changing it so as to confine the creditor to securing the satisfaction of his entire debt.*" (Italics ours.)

These cases, in our opinion, are conclusive in the present case. It is true that they involved the contract clause and not the tender clause of the Constitution, but it is also true that the reasoning therein contained is equally applicable to the tender clause. If the tender clause is applicable both cases were decided incorrectly. If the tender clause was applicable we do not think the United States Supreme Court would have overlooked that fact.

[7] On the authority of the above cases, and upon the reasoning above set forth, we hold that section 580a of the Code of Civil Procedure is not violative of the tender clause of the United States Constitution; that that clause merely compels the creditor to sell at the fair market value, and if he does not, limits his recovery accordingly; that such provision is in accord with the principles of equity governing foreclosure sales; that the statute is not a tender statute at all.

[8] Appellant emphasizes that some, but not all, of the cases referred to in the above annotations are justified on the theory that they dealt with emergency legislation, and that section 580a as enacted in 1933 and reenacted in 1935 does not purport to be emergency legislation. The exact theory of appellant on this point is not clear. Emergencies do not create power, although they may offer the excuse for its exercise. Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413, 88 A.L.R. 1481. Appellant's major argument is that the section violates the tender clause of the federal Constitution. If that section prohibits legislation of the type of section 580a (which, as we have seen, it does not) it would prohibit it whether or not an emergency existed. There is no express or implied exception in this constitutional provision.

Appellant contends that no state from 1789 to the start of the last depression attempted to pass legislation of the type exemplified by section 580a, and contends that this indicates that the prohibition is so clear that no state, until recently, dared to pass such legislation. Whether it is true that no state has passed such legislation in the period in question we do not know. To search all the statutes of all the states for that period of nearly a hundred and fifty years would be an intolerable, if not an impossible, task. It is true that we have been referred to no case in a state or federal court, and independent research has disclosed none, that directly passes on the question as to whether such legislation violates the tender clause. So far as mortgage legislation comparable to section 580a is concerned, it could be argued that if various states have passed such legislation, that it so clearly does not violate the tender clause that no one has seen fit until now to challenge such legislation on that ground. Either inference is possible. Neither inference has any legal effect on the actual question to be decided in this opinion. Whether any state has seen fit to pass such legislation in the past is a false quantity. Whether they have or not, the above cases and annotations indicate that for many years equity courts, regardless of statute, have exercised comparable powers in foreclosure proceedings. These cases demonstrate beyond question that the principles stated in sections 580a and 726 of the Code of Civil Procedure are not something new and novel, but are the statutory statement of equitable principles that have been recognized and enforced since the adoption of the Constitution.

[9-11] Appellant, supported by amicus curiae, next urges that section 580a of the Code of Civil Procedure is unconstitutional because it unnecessarily inter-

feres with the freedom of contract guaranteed by the due process clause, arguing, in this regard, that while the state has the right to regulate the collection of loans, it has no constitutional right to prohibit the collection in full of loans. It is also urged that the section denies "equal protection of the laws" because it discriminates against creditors secured by real property, in favor of unsecured creditors or creditors secured by personal property.

These contentions require but little attention in view of the discussion herein contained concerning the first point. As already pointed out, all section 580a of the Code of Civil Procedure, and the related section 726, do, is to tell the prospective lender that in cases of loans on real property hereafter made by you, in case of default by the borrower, you can sell the security, but you must sell at a fair sale—you must see to it, as a matter of fair play, in order to protect the borrower, that you receive or pay the fair market value of the property, and if you do not, your recovery will be limited accordingly. So understood, the section in question does not prohibit the "full" collections of loans or in any other way interfere with the freedom of contract guaranteed by the due process clause. As already held, all section 580a does is to carry over to sales of property under a power of sale in a deed of trust or mortgage those equitable principles that many courts have held have always existed in foreclosure proceedings.

The contention that the section discriminates against creditors whose debts are secured by real property is obviously without merit. Real property mortgages and deeds of trust have always been considered, and properly so, as a proper subject of classification. That such classification is reasonable is too obvious to require discussion.

[12] In a supplemental brief filed by appellant it is urged that when section 580a of the Code of Civil Procedure was enacted in 1933, it was made self-limiting for a period of a little over three years; that the note and deed of trust here involved were executed on July 7, 1934; that the 1933 statute, including its self-limiting provision, became part of the note and deed of trust; that the statute expired in September, 1936; that the sale took place in January, 1938; that at that time, but for its re-enactment in 1935, section 580a as enacted in 1933 would have been nonexistent and appellant would have had all the rights and remedies that existed prior to its adoption. Based on these premises, it is urged that the 1933 statute cannot be applied to this transaction because it had expired; and that the 1935 reenactment cannot be applied to notes and deeds of trust executed in 1934, because to do so would be to give the 1935 statute a retroactive effect, which, it has been held, in the many cases cited earlier in this opinion, cannot be done.

To this argument there are at least two complete answers. In the first place, section 580a of the Code of Civil Procedure as enacted in 1933, in our opinion, was not limited as to time. That section was part of a statute adding several new sections to and amending various other sections of the Civil Code and Code of Civil Procedure. (Stats.1933, p. 1669, chap. 642.) The statute has nine separate distinct and wholly self-sufficient sections. Each section of the act, with the exception of section 9, either amends some section of the codes, or adds a new section thereto. Section 9 is the severability section. Section 4 is the section that provides for the addition of section 580a to the Code of Civil Procedure. In that section nothing is said as to any limitation of time—as there added to the Code of Civil Procedure the section is not limited as to time. Section 8 adds section 2924½ to the Civil Code. At the end of that section, without a new paragraph, and with nothing to indicate that the sentence applies to any other section but section 8, appears this sentence: "This act and the provisions of this section shall be effective to and until September 1, 1936." In spite of the use of the word "act" in this sentence, the only reasonable conclusion is that the time limitation was intended to apply only to section 2924½ of the Civil Code. This is the normal interpretation of section 8. If the legislature had intended the time limitation contained in the last sentence of that section to be applicable to all of the preceding seven sections, it would normally have added a separate section of the statute so declaring. At least it would have set the sentence forth in a separate paragraph.

Apparently the legislature of 1935 had some doubts on the matter. Accordingly, they caused to be reenacted the seven sections that had been amended or added in 1933 (Stats.1935, p. 1802, chap. 650), but they did not reenact section 2924½ of the Civil Code that contained the time-limitation clause thus clearly indicating that in 1933 they had intended only section 2924½ of the Civil Code to be limited as to time, and that as to the other seven sections, including section 580a of the Code of Civil Procedure, no limitation was intended. Section 580a of the Code of Civil Procedure was expressly "reenacted" in 1935. Sec. 4, Stats.1935, p. 1805, chap. 650. By section 9 of the 1935 act the legislature declared: "It is the intent of this act to reenact sections 2924, 2924b and 2924c of the Civil Code and sections 580a, 580b, 580c and 725a of the Code of Civil Procedure in order to continue the same in effect subsequent to September 1, 1936, *and remove any ambiguity created by the language of section 2924½ of the Civil Code as added by an act approved June 2, 1933, as to the time said sections shall be effective.* It is intended that sections * * * 580a * * * of the Code of Civil Procedure shall be effective without any time limitation thereon." (Italics ours.) From this review of the situation it seems clear that the legislature of 1935 "reenacted" section 580a simply out of an abundance of caution. Such reenactment, in our opinion, was unnecessary. The 1933 statute, in so far as it enacted section 580a, was not limited as to time.

[13] There is another answer to appellant's contention even though it be admitted that section 580a as passed in 1933 was operative only until September 1, 1936. Although the provisions of section 580a appertain to the remedy, in the many cases holding the section not retroactive already cited in this opinion, it was held that its provisions affected the substantial rights of the contracting parties to such a degree that to apply the statute to mortgages and deeds of trust executed prior to its passage would impair the obligation of contracts. This holding is fatal to appellant's present contention. When this deed of trust and note were executed in 1934, the provisions of section 580a became an integral part of the contract the same as if written therein. By that section appellant's rights were limited. The fact the statute was to become inoperative in 1936 could in no way affect the contractual rights of respondent. If section 8 of the 1933 statute above quoted is given its broadest possible meaning, the legal effect would simply be that as to all mortgages and deeds of trust executed between the effective date of section 580a in 1933, and September 1, 1936, regardless of when the sale was held, the rights of the parties were to be measured by the statute as it existed at the time the mortgage or deed of trust and note were executed. There is no warrant for the interpretation that, if the sale were to be held after September 1, 1936, the old law should be applicable. Such an interpretation would make the substantial rights of the respondent dependent on the mere whim or caprice of appellant. Here the note was executed and fell due prior to 1936. The rights of the parties must, therefore, be governed by the 1933 statute.

For the foregoing reasons the judgment appealed from is affirmed.

We concur: WARD, J.; GOODELL, Justice pro tem.

BECHTOLD et al. v. BISHOP & CO., Inc., et al.*

McKINLEY et ux. v. SAME.

Civ. 2406.

District Court of Appeal, Fourth District, California.

Jan. 19, 1940.

Hearing Granted March 14, 1940.

1. Action 🔑59

Where cases of law present similar issues and are consolidated and are tried together, all issues should be settled by a single set of findings of fact and conclusions of law and by one judgment.

2. Appeal and error 🔑845(1)

On appeal from judgments in consolidated actions which were tried together, appellate court must consider separate findings of fact and conclusions of law together as though they were incorporated in single document.

3. Appeal and error 🔑839(1)

As respects sufficiency of evidence to sustain finding of negligence of driver of truck which struck automobile injuring automobile guests, unappealed from portion of judgment which found that automobile driver was guilty of willful misconduct which contributed to collision and injury became the "final judgment" and could not be questioned. Vehicle Code, §§ 86, 465, 511(a)(4), St. 1935, pp. 99, 165, 176.

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*For subsequent opinion see 105 P.2d 984.

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words & Phrases.]

4. Appeal and error 🔑882(3)

Where entire case against automobile host for injuries sustained by guests, as disclosed by evidence, findings and pleadings was based on fact that host failed to observe stop signs legally placed at intersection, and cases were tried and judgments rendered on that theory, plaintiffs could not change such theory on appeal for the first time to argue question of prima facie speed limit at intersection. Vehicle Code, §§ 86, 465, 511(a)(4), St.1935, pp. 99, 165, 176.

5. Automobiles 🔑206

If driver of truck on through highway was not negligent, he had right to presume that driver of automobile on unfavored street would obey law and would stop before entering intersection and would yield right of way. Vehicle Code, §§ 86, 552, St.1935, pp. 99, 187.

6. Negligence 🔑12

A person free from negligence who is placed in position of sudden and imminent peril may be excused if he errs in judgment or omits a warning to another.

7. Automobiles 🔑159

The driver of truck which struck automobile at obstructed street intersection was not negligent in failing to sound a warning so as to create liability for injuries to automobile guests, where automobile driver failed to stop at stop sign and failed to yield right of way as required by statute, thus creating condition of imminent peril. Vehicle Code, §§ 86, 552, 671, St.1935, pp. 99, 187, 223.

8. Automobiles 🔑168(12)

Negligence of driver of truck which struck automobile at obstructed street intersection was not shown because truck crossed railroad tracks near intersection at speed in excess of 15 miles per hour in violation of statute, where provisions of statute were for protection of vehicles on highway and trains on intersecting tracks from danger of colliding with each other. Vehicle Code, § 511(a), St.1935, p. 176.

9. Automobiles 🔑201(2)

The alleged negligence of truck driver in crossing railroad tracks near street intersection at speed of more than 15 miles per hour did not create liability for injuries to guests of automobile which was struck by truck, where alleged negligence was not proximate cause of collision. Vehicle Code, § 511(a), St.1935, p. 176.

10. Automobiles 🔑168(6)

A truck driver was not negligent in traversing obstructed street intersection at speed of more than 15 miles per hour so as to create liability for injuries to guests of automobile which was struck by truck at intersection, where intersection was traffic controlled and was outside of business or residence district, which under statute was excepted from 15 miles per hour rule. Vehicle Code, § 511(a)(4), St.1935, p. 176.

11. Evidence 🔑14

As respects negligence of truck owner predicated on theory that truck was not equipped with brakes capable of stopping truck within 20.8 feet when traveling at speed of 15 miles per hour, it is well known that human reactions are not instantaneous, and that it takes an appreciable space of time after seeing a danger before a person can act to avoid it. Vehicle Code, § 670, St.1935, p. 222.

12. Evidence 🔑5(2)

As respects negligence of truck owner predicated on theory that truck was not equipped with brakes capable of stopping truck within 20.8 feet when traveling at speed of 15 miles per hour, it is recognized that operation of brakes is not instantaneous, and that it takes a little time for brakes to take hold after they are applied. Vehicle Code, § 670, St.1935, p. 222.

13. Negligence 🔑134(1)

A finding of negligence must be supported by some substantial evidence and cannot be based on speculation or surmise.

14. Automobiles 🔑244(11)

Negligence of truck owner could not be predicated on theory that truck was not equipped with lawful brakes since it was not stopped within 20.8 feet when traveling at speed of 15 miles per hour, where only testimony on point showed that when truck was about same distance from center of intersection as the automobile which was struck by truck, truck driver applied foot brakes as hard as he could and truck was stopped within distance of between 23 and 30 feet. Vehicle Code, § 670, St.1935, p. 222.

15. Appeal and error ⚷994(3), 1008(1)

The trier of fact is the sole judge of weight and sufficiency of evidence and the credibility of witnesses.

16. Appeal and error ⚷1011(1)

Where there is substantial conflict in evidence, conflict is addressed to trier of fact and is no concern of an appellate court.

17. Evidence ⚷588

The trier of fact may accept part of testimony of a witness as true and reject other parts as false.

18. Appeal and error ⚷1011(1)

Under rule that conflict in evidence is no concern of appellate court, the "conflict" must be real and substantial so that reasonable minds might differ upon its effect and find either way upon it.

19. Witnesses ⚷317(2)

The testimony of a witness who has deliberately sworn falsely to some material facts is to be distrusted.

20. Appeal and error ⚷1011(1)

Where testimony of witness who had sworn falsely to some material facts as to speed of truck during last 20 feet of its progress was contradicted, witness's opportunity and time for observation and estimation of speed was so poor as to almost constitute no opportunity at all, and his testimony was disputed by physical facts, such testimony was too unsubstantial to create any real "conflict in evidence" within rule that conflict is addressed to trier of fact.

21. Automobiles ⚷244(11)

In action for injuries to guests when automobile in which they were riding was struck by truck at obstructed street intersection which was traffic controlled and outside of business or residence district, wherein it was found that host was guilty of willful misconduct which contributed to collision, evidence failed to show negligence on part of truck driver. Vehicle Code, §§ 86, 465, 511 (a)(4), 552, St.1935, pp. 99, 165, 176, 187.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Action by John B. Bechtold and others against Bishop & Co., Inc., and others to recover for the death of Rachel A. Bechtold occurring in an automobile collision, wherein John G. Baker filed a cross-complaint, and action by Harry T. McKinley and Ethel Gladys McKinley, his wife, against Bishop & Co., Inc., and others for injuries sustained by the wife in the same automobile collision. From judgments for plaintiffs, defendants appeal.

Reversed.

Sarau & Thompson and Roy W. Colegate, all of Palm Springs, for appellants.

Kenneth Evan Schwinn, of Riverside, for respondents.

MARKS, Justice.

This is an appeal from those portions of the judgments which were against appellants. Judgments were also rendered against defendant Baker. He has not appealed and the judgments against him have become final.

On the morning of March 2, 1937, defendant Baker, with Ethel Gladys McKinley and Rachel A. Bechtold as his guests, was driving his 1927 model T Ford coupe easterly on Jurupa avenue in Riverside county. At the same time Edward West, as an employee of Bishop & Company, Inc., was driving a White delivery truck north on Garnet street. The two vehicles came into collision a few feet south of the center line of Jurupa avenue and east of the center line of Garnet street. Mrs. McKinley was seriously injured and Mrs. Bechtold died as a result of her injuries.

John B. Bechtold, the surviving husband, and George B. and John D. Bechtold, sons of John and Rachel, brought an action under the provisions of section 377 of the Code of Civil Procedure to recover damages suffered by them as a result of the death of Rachel. Both sons were over the age of thirty years and residents of the state of Washington. Judgment was rendered in their favor for $12,418.16 against all defendants, except the National Biscuit Company. The judgment against this defendant was limited to $5,000. We will hereafter refer to this as the Bechtold case.

Harry T. McKinley and Ethel Gladys McKinley, husband and wife, instituted an action against all defendants to recover damages resulting from the injuries suffered by Mrs. McKinley. These plaintiffs were given judgment against all defendants in the sum of $17,250. We will hereafter refer to this as the McKinley case.

Defendant John G. Baker filed a cross-complaint in the Bechtold case seeking to recover the damages suffered by him from appellants. Judgment went against him on his cross-complaint.

[1, 2] The cases were consolidated and tried together and are here on a single record. There are three separate sets of findings and conclusions of law and three separate judgments in the record,—one set of findings and a judgment in the Bechtold case; a second set of findings and a judgment on the Baker cross-complaint in that case; a third set of findings and a judgment in the McKinley case. This procedure is irregular. Where cases at law present similar issues and are consolidated, and are tried together, all issues should be settled by a single set of findings of fact and conclusions of law and by one judgment. Union Lumber Co. v. Simon, 150 Cal. 751, 89 P. 1077, 1081; Willamette, etc., Co. v. Los Angeles College Co., 94 Cal. 229, 29 P. 629. We must consider the separate findings of fact and conclusions of law together as though they were incorporated in a single document. They are in reality but one set of findings. Stanton v. Superior Court, 202 Cal. 478, 261 P. 1001.

Jurupa avenue and Garnet street are public streets in the county of Riverside. Garnet street runs north and south and Jurupa avenue slightly north of east and south of west. Thus they intersect each other at something more than a right angle. At the time of the accident Jurupa avenue had a pavement sixteen and one-half feet in width along its center and Garnet street had a pavement eighteen feet in width along its center. During the trial the term "intersection" was used to describe the intersection of the exterior lines of these pavements. We will continue the use of the word in that sense instead of giving it its legal meaning. Sec. 86, Vehicle Code, St.1935, p. 99. There were no curbs on either highway.

There were stop signs on Jurupa avenue on both sides of Garnet street which required all traffic on Jurupa avenue to stop before entering Garnet street. The word "Stop" was painted on the pavement on Jurupa avenue opposite the westerly stop sign. Tracks of the Union Pacific Railroad paralleled Jurupa avenue on the south, with the southerly rail twenty-two and one-half feet south of the southerly line of the pavement on Jurupa. A double row of eucalyptus trees paralleled the Union Pacific Railroad along the south side of the tracks, to the west of Garnet street, and were about thirteen feet from the south rail. Another row of eucalyptus trees paralleled Garnet street about fifteen feet to its west and ended at the double row just referred to. It is clear that at least as far as traffic proceeding north on Garnet street, and easterly on Jurupa avenue, was concerned, the intersection was an obstructed one. It is equally clear that the traffic was controlled at the intersection by the stop signs, sec. 465, Vehicle Code, and that the prima facie speed of vehicles traversing the intersection on Garnet street was thirty miles an hour, subd. 4, sec. 511(a), Vehicle Code, as the intersection was outside a business or a residential district. (All references in this opinion are to the Vehicle Code of 1935.)

In the Bechtold case it was alleged that Baker was guilty of wilful misconduct by deliberately, intentionally and wantonly failing to stop his automobile at the westerly stop sign and by driving his automobile into the intersection without any regard to oncoming traffic on Garnet street. Negligence on the part of Edward West was alleged in general terms. It was also alleged that he was driving the truck belonging to the National Biscuit Company as the agent and servant of Bishop & Company. This allegation was not denied.

Generally speaking, these allegations were repeated in the McKinley case with the added allegation that West was driving the truck as the agent and servant of the National Biscuit Company. This was not denied. It explains why, in the two cases, judgments in different amounts were rendered against the National Biscuit Company.

In both cases the trial court found Baker guilty of wilful misconduct, and West guilty of negligence, in almost the exact language of the pleadings. It was also found in both cases that the two women were injured as a direct and proximate result of the wilful misconduct of Baker and the negligence of West.

In the separate findings made on the cross-complaint of Baker we find the following: "It is true that the said Edward West while acting within the scope and course of his employment did so carelessly and recklessly and negligently drive, operate and control the said White truck automobile in that he failed and neglected to immediately stop said White truck automobile at the intersection of Jurupa Avenue and Garnet Street and thereby caused said White truck to run into and collide with the Ford automobile referred to in said cross-complaint."

[3] The first ground presented for a reversal of the judgment is that there is no evidence in the record to support the finding of the trial court that West was negligent in his operation of the White truck at the time of the accident. The determination of this question requires a somewhat detailed summary of the evidence. In doing this we must bear in mind that the trial court found Baker was guilty of wilful misconduct in the operation of his automobile and that this wilful misconduct contributed to the collision and to the injury of the two women; that no appeal was taken from this portion of the judgment; that consequently these findings of wilful misconduct and the portion of the judgment based upon them have become final and cannot now be questioned.

Baker and the two women were neighbors and lived westerly from the city of Riverside. Baker, with the two women as his guests, started the journey to Riverside to attend a funeral on the morning of March 2, 1937, traveling over Jurupa avenue. The day was clear and all the roadways were dry. Baker had traveled this route many times and was familiar with the intersection of Jurupa avenue with Garnet street and with the stop signs on the former. Baker testified that when he was forty-three feet westerly from the intersection he stopped and looked north and south on Garnet street four or five hundred feet and saw no vehicles. From this point on, Baker's testimony is confused and somewhat conflicting. We believe the following is a fair summary of his evidence most favorable to respondents: That he stopped again, opposite the stop sign and at the line marked "Stop", and again looked the same distance north and south on Garnet street and saw no vehicles; that he proceeded into the intersection at a speed of between five and eight miles an hour; that when the front of his car had crossed, by several feet, the west line of the pavement on Garnet street produced across Jurupa avenue, he again looked to his right (the south) and saw the White truck four or five hundred feet away proceeding north on Jurupa avenue at a speed of between forty-five and fifty-five miles an hour; that he proceeded across the intersection at about the same speed and when his Ford was from four to five feet past the center of the intersection he again saw the truck five or ten, or maybe twenty, feet to his right coming towards him at about the same speed; that he tried to increase the speed of the Ford and turned slightly to his left; that the truck crashed into the right rear of his Ford driving it northeasterly off the pavement and causing it to turn over; that in traversing the intersection before the collision the left side of his Ford was about three feet southerly of the center line of Jurupa avenue.

Mrs. McKinley testified that when the Ford stopped before entering the intersection she looked both ways on Garnet street for a distance of four hundred fifty or five hundred feet and saw no vehicles; that she then looked down into her lap and sorted some letters; that she did not look up again until she heard Mrs. Bechtold scream; that she then looked to her right and saw the truck two feet distant from the Ford; that the truck was traveling forty-five miles an hour "easy"; that before she could turn her head away the collision occurred.

It is evident that no weight can be given the estimate by Mrs. McKinley as to the speed of the truck at the time of the impact. If it had been traveling forty-five miles an hour, as she estimated, she could have had it under observation for but an infinitesimal fraction of a second, too short a time for anyone to have estimated the speed of its approach. If it had been traveling but five miles an hour, as estimated by West, she still would have had neither the time nor the distance within which to form any credible estimate of its speed. This leaves the testimony of Baker as the only evidence in the record to support the finding of negligence on the part of West. Generally speaking, were this an ordinary case in which both drivers were found guilty of negligence, such findings of negligence might not be disturbed because of the conflict-in-the-evidence rule.

West testified that he was familiar with the intersection of Jurupa avenue and Garnet street, having crossed it a number of times on both roads; that on the day of the accident he was driving the White truck north on Garnet street; that when he was five hundred feet south of the intersection he was traveling between forty and forty-five miles an hour; that at that point he reduced the speed of the truck so that when he was about one hundred feet south of the intersection he was traveling between twenty and twenty-five miles an hour and continued to reduce his speed; that he saw the Ford traveling easterly on Jurupa avenue at a speed of between fifteen and twenty miles an hour; that he presumed the Ford would stop at the stop sign west of the intersection; that when the Ford reached the stop sign the truck was close to the south rail of the Union Pacific Railroad tracks; that the Ford did not stop, either before or at the stop sign, but proceeded into and across the intersection at about the same speed; that the two vehicles approached the intersection at about equal distances from its center; that he watched the Ford continuously after the two vehicles were about forty-five feet from the intersection; that the truck was then traveling between fifteen and twenty miles an hour; that when he reached the railroad tracks he realized for the first time that the Ford was not going to stop; that he then "got up" on his brakes, that is, he applied his foot brakes as hard as he could; that he attempted to turn the truck to his right but could not do so because of lack of space; that he got up on the brakes until the impact; that he was not going over five miles an hour when he entered the intersection; that the left front of the truck hit the right rear of the Ford; that the point of impact was about three feet east of the center line of Garnet street and about five feet south of the center line of Jurupa avenue; that when the truck stopped its front was slightly north of the center line of Jurupa avenue; that when the collision occurred the truck was headed north; that he did not sound his horn prior to the collision.

Clarence West, a traffic officer, arrived at the scene of the accident about ten minutes after it had happened. He found tire marks on the pavement apparently made by the Ford when it was struck by the truck. Baker, Clarence West and defendant Edward West fixed the point of impact at about the same distance south of the center line of Jurupa avenue, but Baker located it two or three feet further east than did defendant West. Traffic officer West examined the truck after the accident and found no damage to the braking system. He also drove the truck and found "what I would call fair brakes".

Mrs. Nellie Cheney resided on Garnet street about two hundred feet south of the intersection. She was standing in her driveway in front of her house when the White truck passed going north. She observed its progress for forty or fifty feet and estimated its speed at about thirty miles an hour and testified that it was slowing down. She heard but did not see the crash. She immediately went to the scene of the accident and saw the truck at rest on the east half of Garnet street with its front about three feet north of the center line of Jurupa avenue.

Mrs. Beatrice Osborne also lived on Garnet street south of the intersection. She was standing with Mrs. Cheney when the White truck passed. She estimated its speed at about thirty miles an hour. She also went to the scene of the accident and thought that the truck had stopped with its front wheels three or four feet north of the center line of Jurupa avenue.

Charles Bartlett, a nine-year-old schoolboy, was standing in the driveway of his home situated near the northwest corner of the intersection. He saw the Ford on Jurupa avenue seventy-six and one-half feet west of the intersection (according to measurements made during the trial). He observed it traveling easterly up to the time of the collision. It made no stop. He did not see the truck until about the time of the impact.

The complaints alleged and the trial court found Baker guilty of wilful misconduct. In the pleadings it was alleged and in the findings it was found that to constitute this wilful misconduct "he wantonly drove said automobile into the said intersection of Jurupa Avenue and Garnet Street without regard to oncoming traffic passing over and along Garnet Street and failed, neglected, and omitted to stop said Ford coupe automobile at the stop sign on the westerly edge of said intersection on Jurupa Avenue and thereby proximately caused said Ford automobile to collide with that certain White truck automobile. * * *"

Thus we have a direct finding that the testimony of both Baker and Mrs. McKinley, that the Ford made the required boulevard stop, was false and was not worthy of belief. By necessary inference the trial court also found false and unworthy of belief Baker's testimony that when his Ford was partly across the west line of the pavement on Garnet street he looked to the south and saw the White truck between four and five hundred feet away approaching at a speed of between forty-five and fifty-five miles an hour. "'Willful misconduct,' within the meaning of this statute, may then be defined as intentionally doing something in the operation of a motor vehicle which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result." Meek v. Fowler, 3 Cal.2d 420, 45 P.2d 194, 197. No one could conclude, if this testimony by Baker were true, that he made injury to his guests a probable result by proceeding across the intersection even at five miles an hour under those circumstances, because Baker would have cleared the paved portion of Garnet street and would have reached a place of safety while the truck was about one hundred feet from him. Wilful misconduct cannot be predicated on such circumstances because an injury to a guest would not have been a probable result of such conduct.

Thus we find that Baker is a most discredited witness not only from contradictions in his own testimony and by the evidence of three disinterested and seemingly credible witnesses, but by the findings of the trial court who refused to believe, and found to be false, important portions of his testimony.

The only evidence in the record supporting the finding of negligence on the part of defendant West because of excessive speed is found in the testimony of Baker to the following effect: That when the rear of the Ford had crossed the center line of Garnet street he looked to his right and saw the truck about twenty feet or less away approaching at a speed of not less than forty-five miles an hour. This statement is in direct conflict with Baker's other testimony, to which we have just alluded, to the effect that but a few moments before he had seen the truck between four and five hundred feet distant from him. It is also contradicted by the evidence of other witnesses. It is strongly disputed by the admitted physical fact of the slight damage in the collision to the front of the truck. It is also strongly contradicted by the undisputed fact that the truck came to rest with its front just over the center line of Jurupa avenue. None of these facts could have been true had the truck been traveling that last twenty feet at anywhere near the speed described by Baker.

As we have seen, the only portion of Baker's evidence concerning the operations of the two vehicles, which the trial court seemed to believe, was that small part of it concerning the course and speed of the truck during its progress for twenty feet before the impact. Its progress was directly toward Baker. According to this testimony he had but twenty feet within which to observe its approach. At forty-five miles an hour this distance would have been covered in a fraction of a second. Even at the speed given by West the distance would have been traversed in slightly more than a second. At best Baker had but little time and but slight opportunity to observe and estimate the speed of the approaching truck even though he had devoted his entire time and attention to so doing.

[4] Respondents in their brief argue the question of the prima facie speed limit of vehicles on Garnet street while traversing the intersection. Their complaints alleged the existence of the stop signs we have mentioned, and that defendant Baker failed to make a stop before entering Garnet street. Their entire case against Baker, as disclosed by the pleadings, the evidence and the findings, is based on the fact that the stop signs were legally placed and that Baker failed to observe them. Their cases were tried and the judgments rendered on that theory and they cannot desert and change that theory here for the first time. Lindenbaum v. Barbour, 213 Cal. 277, 2 P.2d 161.

Besides urging the speed of forty-five miles an hour by defendant West as negligence, supporting the judgments, respondents urge six other acts and conditions as additional negligence supporting the judgments.

They maintain that Baker entered the intersection first and from the left of defendant West and that it was negligence for West to fail to yield the right of way as required by section 550 of the Vehicle Code. The provisions of this section govern the respective rights of way at uncontrolled intersections. The right of way on a through highway at a controlled intersection is established by section 552 of the Vehicle Code. By that section Baker was required to stop at the stop sign and to "yield the right of way to other vehicles * * * which are approaching so closely on the through highway as to constitute an immediate hazard, * * *." It is clear that under this section the White truck had the right of way over the Ford driven by Baker and that Baker was required to yield that right of way to West.

Respondents urge that West was negligent in failing to sound his horn as required by section 671 of the Vehicle Code and thus warn Baker of impending danger.

[5-7] It is well settled that if West were not negligent, he had the right to presume that Baker would obey the law and would stop before entering the intersection and would yield the right of way. This Baker did not do. He failed to stop at the stop sign and failed to yield the right of way, thus creating a condition of sudden and imminent peril for both drivers. It is well settled that where one who is himself free from negligence, is placed in a position of sudden and imminent peril, he may be excused if he errs in judgment or omits a warning to another. Neff v. United Railroads of San Francisco, 188 Cal. 722, 207 P. 243; Lindley v. Southern Pac. Co., 18 Cal.App.2d 550, 64 P.2d 490; 19 Cal.Jur., p. 598, § 36, and cases cited. Thus, unless we find other evidence in the record supporting the finding of negligence on the part of West we cannot hold him negligent because he failed to sound a warning.

Respondents urge that West was negligent in exceeding the basic speed provided for vehicles traveling on Garnet street. This argument rests on the evidence of Baker that the truck was traveling at a speed of from forty-five to fifty-five miles an hour. We will return to the question of the weight to be given to this evidence when we dispose of the other specific charges of negligence made against West.

[8, 9] Respondents next urge that West was guilty of negligence per se in crossing the tracks of the Union Pacific Railroad, view of which was not clear and unobstructed, at a speed in excess of fifteen miles an hour in violation of the provisions of paragraph two of subdivision "a" of section 511 of the Vehicle Code.

The provisions of this paragraph are clearly for the protection of vehicles on a highway and trains on the intersecting tracks from the danger of colliding with each other. Other provisions of the same section govern the speed of vehicles traversing obstructed intersections of highways and are intended to protect such vehicles from the dangers of collision with each other. Here we are concerned with a collision between two motor vehicles traversing an obstructed intersection and not with a collision between a train and a motor vehicle. Further, if we assume that West was negligent in crossing the railroad tracks at a speed of more than fifteen miles an hour we cannot see how that in itself could have been a proximate cause of the collision.

[10] Respondents further urge that West violated the provisions of paragraph four of subdivision "a" of section 511 of the Vehicle Code in traversing the intersection at a speed of more than fifteen miles an hour. This paragraph contains this exception to the fifteen miles an hour prima facie speed limit: "Except upon a through highway or at traffic-controlled intersections, in which event in a business or residence district the district speed shall apply and elsewhere the speed shall be thirty miles per hour." As the intersection involved here was traffic-controlled and was outside of a business or residence district, the fifteen miles an hour prima facie speed limit would not apply.

[11-14] Lastly, it is urged that the White truck was not equipped with lawful brakes as it was not stopped within a distance of 20.8 feet when traveling at a speed of fifteen miles an hour as required by section 670 of the Vehicle Code.

If we assume, without holding, that under the circumstances here disclosed the brakes on the truck were required to stop within a distance of 20.8 feet when proceeding at such speed, there is no evidence that they did not do so. The only evidence on that question was given by defendant West and it is not disputed. West testified that when the truck was about the same distance from the center of the intersection as the Ford, he realized the Ford was not going to stop and "got up on my brakes", that is applied his foot brakes as hard as he could. The truck was stopped within a distance of between twenty-three and thirty feet.

It is well known that human reactions are not instantaneous; that it takes an appreciable space of time after seeing a danger before a person can act to avoid it. This is recognized in our law. Poncino v. Reid-Murdock & Co., 136 Cal.App. 223, 28 P.2d 932. It is also recognized here that the operation of brakes are not instantaneous; that it would take a little time for brakes to take hold after they are applied. Bagwill v. Pacific Electric R. Co., 90 Cal.App. 114, 265 P. 517. During the period elapsing between the time that West first realized that the Ford was not going to make the boulevard stop and the time the brakes took hold, the truck was moving towards the place where it came to rest and passed over a part of the thirty or less feet intervening. To conclude that the truck was not stopped within 20.8 feet after West applied the brakes would be based on mere speculation. An opposite conclusion would be more reasonable and more in accord with the evidence. A finding of negligence must be supported by some substantial evidence and cannot be based on speculation or surmise. Furthermore, officer West testified that the brakes on the truck were "fair brakes". Fair brakes are not defective brakes.

We have already observed that in finding West guilty of negligence the trial court specifically found that such negligence consisted of failing "to immediately stop said White truck automobile at the intersection of Jurupa Avenue and Garnet Street and thereby caused said White truck to run into and collide with the Ford automobile. * * *" While it is factually true that West did not stop the truck, his negligence cannot be predicated on any such omission. There was no duty founded in any statute, nor arising from the facts, which required him to so stop.

We have now reached the point where it is obvious that the only evidence in the case which tends to support the finding of negligence on the part of West is that fragment of the testimony of Baker, that just before the impact he saw the truck twenty feet away from him and coming directly towards him at a speed of not less than forty-five miles an hour, the trial court having found, either expressly or by necessary inference, that all of Baker's testimony as to the other events immediately preceding the impact was false and untrue.

[15-17] We are mindful of the firmly established rules that the trier of fact is the sole judge of the weight and sufficiency of the evidence and the credibility of the witness; that where there is a substantial conflict in the evidence, that conflict is addressed to the trier of fact and is no concern of an appellate court; that the trier of fact may accept part of the testimony of a witness as true and reject other parts as false. These rules are too well founded in the jurisprudence of our state to need citation of authority.

[18] It is equally well settled that the conflict in the evidence must be real and substantial so that reasonable minds might differ upon its effect and find either way upon it. Houghton v. Loma Prieta Lumber Co., 152 Cal. 574, 93 P. 377; Wenban Estate, Inc., v. Hewlett, 193 Cal. 675, 227 P. 723; Gardiner v. Holcomb, 82 Cal.App. 342, 255 P. 523; Thoreau v. Industrial Acc. Comm., 120 Cal.App. 67, 7 P.2d 767; Humphry v. Safeway Stores Inc., 4 Cal.App. 2d 589, 41 P.2d 208.

Speaking on this question, the Supreme Court in Field v. Shorb, 99 Cal. 661, at page 666, 34 P. 504, at page 505, said: "We are adverse to holding that a finding by a jury or trial court on an issue of fact is not warranted by the evidence, whatever we might think as to its preponderance, where there is presented a fair, reasonable ground for a difference of opinion, and where a conclusion either way could not be considered as the necessary result of the exercise of an unsound judgment. But where the great current of the evidence is against the verdict, and we cannot escape the conviction that it is wrong, we should not be deterred from setting it aside by the contention that one or two general statements or assertions of one or two witnesses bring the case within the rule which governs in cases where there is a material 'conflict of evidence.'"

In Barton v. McDermott, 108 Cal.App. 372, 291 P. 591, 594, it was said:

"It was said in Gardiner v. Holcomb, 82 Cal.App. 342, 350, 255 P. 523, 526:

"'On the question of the conclusiveness of the findings of the trial court we may concede that the rule of law governing appellate procedure precludes this court from making further inquiry than to ascertain if there is any evidence of a substantial character, and not inherently weak or improbable, which supports the finding, and, if such be disclosed, the finding should stand irrespective of what evidence there might be opposed to the finding.

"'However, without regard to the qualifications of the rule, but accepting it in all its strength, there is still the necessity that there be some support for the finding, and that, as against the positive and direct evidence of a fact, a mere conclusion or general statement will not serve to meet the definition of substantial or any evidence.' * * *

"We do not hesitate, in these circumstances, to say that the supposed admissions are too insubstantial as evidence to support the finding."

[19, 20] As we have observed a number of times, the trial court found the testimony of Baker false in several of its most important particulars. It is a truism that the testimony of a witness who has deliberately sworn falsely to some material facts is to be distrusted. The testimony of Baker as to the speed of the truck during the last twenty feet of its progress was flatly contradicted. His opportunity and time for observation and estimation of such speed was so poor as to almost constitute no opportunity at all. This portion of his testimony was disputed by the physical facts which demonstrated that he was at least badly mistaken if not deliberately false in this portion of his testimony. Under these circumstances we feel justified in concluding that this testimony by Baker was a mere assertion of facts and was too unsubstantial to create any real conflict in the evidence.

[21] As defendant West was himself free from negligence it follows that he had the right to presume that Baker would stop at the stop sign, would yield the right of way and would not proceed into the intersection until he could do so without creating a traffic hazard. Sec. 552, Vehicle Code; Billig v. Southern Pac. Co., 192 Cal. 357, 219 P. 992; Harris v. Johnson, 174 Cal. 55, 161 P. 1155, L.R.A.1917C, 477, Ann.Cas.1918E, 560; Gornstein v. Priver, 64 Cal.App. 249, 221 P. 396; Hanson v. Cordoza, 106 Cal.App. 500, 290 P. 62. Thus, we are satisfied from a careful consideration of all of the record that there is no substantial evidence in the record to support the judgment against appellants, based as it is on the supposed negligence of West. The actions of defendant West, prior to the collision, were those which might be expected of a reasonably prudent person under similar circumstances. He had the right to expect that Baker would obey the law and yield the right of way to which he (West) was entitled. As soon as he realized that Baker intended to attempt to beat him across the intersection he was confronted with a situation of sudden and imminent peril. He did all that a prudent and careful person, when confronted with such peril, might have been expected to do under the circumstances. That he lacked sufficient space in which to stop his truck was not his fault, but Baker's. The proximate cause of the accident was the wilful misconduct of Baker without any concurring negligence on the part of West. See Sanford v. Grady, 1 Cal.App.2d 365, 36 P.2d 652, 37 P.2d 475.

As the finding of negligence on the part of West lacks necessary evidentiary support and the judgment against appellants must be reversed it is unnecessary to consider the other grounds urged by them for reversal of the judgment.

Those portions of the judgments which are against appellants are reversed.

We concur: BARNARD, P. J.; GRIFFIN, J.

36 Cal.App.2d 690

BLANKENFELD v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 12319.

District Court of Appeal, Second District, Division 1, California.

Jan. 24, 1940.

Hearing Denied March 21, 1940.

1. Evidence 🔑570

Expert testimony is no stronger than the facts upon which it is predicated.

2. Workmen's compensation 🔑562

If an employee afflicted with a weak heart subjects himself to extraordinary strain in the course of his employment, which causes his death sooner than he otherwise might have suffered, his dependents are entitled to compensation.

3. Workmen's compensation 🔑1546

Under evidence that employee suffering from a heart disease, and another, lifted a parallel weighing over 500 pounds, that soon thereafter employee complained of pains, that he continued to work for the next three days, during which time he complained of pain near his heart, and that he died a week after receiving strain from acute dilatation of the heart, denial of compensation was error.

Proceeding under the Workmen's Compensation Act by Myrtle V. Blankenfeld, widow of a deceased employee, opposed by the Industrial Accident Commission of the State of California, R. K. O. Studios, a corporation, employer, and the Lumbermen's Mutual Casualty Company, insurance carrier, to review and annul findings and award of the Industrial Accident Commission denying compensation.

Award annulled and cause remanded.

Walter Gould Lincoln, of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco, for respondent Commission.

YORK, Presiding Justice.

Petitioner, the widow of William Blankenfeld, seeks to review and annul the findings and award of respondent commission wherein it was found that said William Blankenfeld, the deceased employee, came to his death on October 25, 1938, but that said employee's death was not proximately caused by injury arising out of and occurring in the course of his employment.

It is here contended that the decision of the respondent commission lacks support in the record and in authority for the reasons (1) that there was no true conflict of evidence and therefore the so-called findings were error; (2) that the respondent commission did not show there was no causal connection between the overexertion and strain of October 18, 1938, and the thrombosis and hemorrhagic condition of the heart discovered on October 27, 1938.

In order to pass upon the questions presented, it is necessary to analyze the testimony adduced at the hearing: It is revealed by the record herein that William Blankenfeld was 65 years of age at the time of his death, and that for a period of approximately 15 years theretofore he had been employed by various moving picture companies as a grip, and was accustomed to doing heavy work including the lifting and moving of heavy objects. The grip department of a moving picture studio has charge of the diffusing and shading of sunlight and artificial light on the sets; the erection and moving of all camera and light parallels, which are platforms on rollers, and the building and maintenance of all equipment necessary to the production of a moving picture.

At 6:45 o'clock on the evening of October 18, 1938, when decedent was employed on a work-shift from 1 until 7 o'clock in the afternoon, he was directed to move a parallel weighing between 500 and 600 pounds assisted by a fellow-workman named Kashuk. The men found the parallel in such a position between a wall and a ramp that it became necessary to lift it over the end of the ramp in order to place it in the desired location. This ramp was eight or ten feet wide and tapered from eight or nine feet to nothing. The ramp and the wall were far enough apart to allow the parallel to be placed within eighteen inches of the bottom of the ramp, and at the time the two men started to lift the parallel, Kashuk testified that he was at the lower end of the ramp where it was about six inches from the floor, and decedent was "at a point where it (the ramp) was about eighteen inches from the floor, and the parallel more or less had to be lifted at one time", and he guessed decedent lifted higher than he did; that after they had finished this piece of work and started back to the grip room preparatory to leaving the studio for the day, decedent complained that "he ached all over and I drew the conclusion it was from the parallel, because of the fact that my back ached too".

Petitioner testified that her husband had been regularly employed as a grip for at least ten years; was in good health and never complained; that he was five feet six inches in height, and weighed one hundred thirty-two pounds and was very strong for a man of his size; that on the evening of October 18, 1938, he returned home from his day's work and said he did not feel well; that he ate very little dinner and retired early but did not sleep; that he told her in lifting a parallel that day the weight had shifted a little more to him and he felt something break in his chest, and that he hurt his knees; that he ached all over and complained of a pain in his chest through the heart region. The next day, October 19th, he returned home after working about three hours and said he "felt awfully bad and seemed to be in considerable pain * * * through the heart region, and across his back and his knees. * * * He couldn't eat anything." He worked on the 20th and during that day was sent to the first aid department and in turn was sent to Drs. Dickey and Cass, doctors for the insurance carrier, who put him under a light, but did not examine him; that he still complained to her of the pain in his back and chest.

On the 21st he again returned to work but in the evening he said he felt awfully bad and stated to his wife, "I think I would be pretty well if I hadn't gone over and helped the fellow lift those planks. * * * We had to lift them up and it seemed to hurt me." That night petitioner called the family physician, Dr. Ringnell, and for the next two days decedent remained in bed most of the time, complained of pain in his chest and seemed exhausted. On the morning of the 24th "he got up in the morning and set out in the sun for about two hours that day, and then he went back, he said he guessed he felt better in bed; so he went back to bed again until evening, he got up and went to the bathroom and that was where I found him. He had fainted and fallen on the floor * * * he had fallen against the glass knobs on the doors and cut his head in two places." Petitioner then called Dr. Reinhart, the neighborhood doctor, who dressed the wounds and gave him some shots, which produced a coma from that time until he passed away at 5:10 o'clock the next morning, October 25th. Petitioner further testified that so far as she knew, when her husband fainted and fell on the night of the 24th, it was the first time he had fainted in his life, and that he never had any spells of unconsciousness prior to that time.

Harland West, foreman of the grip department at R. K. O. Studios for eight years, testified that decedent was a "very good workman, very trustworthy and dependable", and performed his duties properly and satisfactorily; that decedent on October 19th complained to him of feeling nauseated and ill, and told him that he had strained himself when he lifted a parallel the day before.

Dr. Reinhart testified that he attended decedent on the night before he died and was also present at a post mortem examination made by the coroner's physician which showed a hemorrhage into the heart muscle, coronary thrombosis and pleurisy and that an acute myocarditis must have formed; that taking into consideration the fact that there was no history of any prior heart trouble, it was his opinion that the condition found to exist was attributable to the strain of lifting of which decedent had told him when he called to see him; that he also discovered at the post mortem examination that the muscles of the heart had ruptured and separated. When asked with reference to chronic myocarditis being present at the time of the examination, he replied: "If there had been a chronic enlargement of the heart, unless it was some time prior to the accident, it would not cause a rupture of the heart." This doctor defined chronic myocarditis as enlargement of the heart which is to be expected in people of decedent's age, but not a cause of death by itself, "especially when there are no complaints any other way".

A written statement of Dr. F. O. Ringnell was introduced in evidence to the effect that he had been decedent's family physician for twenty-five years but had not attended decedent for any illness during that period nor had he ever observed in decedent any indications or symptoms of heart disease; that he was called to see decedent on October 21, 1938, and was told that on October 18th decedent in lifting a heavy standard of some sort in the studio felt something give way in his chest or in the heart causing him severe pain; that the standard got out of balance and its entire weight was thrown against decedent causing it to strike his knees; that decedent was taken to a dressing station and later was taken to a clinic (evidently referring to Drs. Cass and Dickey). When he attended decedent on October 21st, Dr. Ringnell found decedent weak and in shock, pain in both knees and a bruise upon the left knee; he prescribed a heart stimulant and ordered rest; he saw decedent again on the 23d and also on the 24th when he was called at 7 o'clock in the evening and found decedent unconscious and in a dying condition. He stated that, in his opinion, decedent could not have done the work which he had been doing for years if there had been any heart injury previous to October 18th, and he was of the belief that decedent died as the result of the injury to his heart occasioned by his overlifting on October 18th, which in turn caused acute dilatation.

One T. J. Connolly, employed as a grip at the R. K. O. Studios, testified that he was on a scaffold above decedent and Kashuk when they were moving the parallel on October 18th, and when they came to the ramp which was built in such a way that they could not get over it "without lifting one roller of the parallel and rolling it over", because it was tight in between the wall and the ramp, they had to lift the parallel up over one side of the ramp. Said witness testified that "Kashuk was on the front end here and Mr. Blankenfeld was over on this corner (indicating opposite sides of the parallel), and when they started to lift it Kashuk got it part way up and just as he started to get it up over there, instead of letting it where it rests solid, he left go and as he let go, he said 'Let's get some help', and the whole weight of the parallel was thrown on Mr. Blankenfeld * * * as the whole weight came on him he caught it on his arms," and some electricians who heard Kashuk ask for help went over there. Connolly also testified that the cross-brace of the parallel "would just about get him (decedent) above the knees", and that decedent staggered back a little bit, but did not go down with the weight; that shortly thereafter the witness talked to decedent and the latter told him he felt sick and felt a strain across his chest.

The testimony of Wm. Croff, the electrician who helped to lift the parallel in question, was as follows: "The ramp came in at a slant to the wall and left a wedge-shaped clearance with the wall and the ramp. And I would say that the width of the parallel which is about eight feet would leave the ramp about two feet high. * * * And they had the parallel jammed against the wall and against this ramp where they couldn't lift it. They needed more help to get it away from the wall in order to get it freed and over the ramp." The two men were standing there holding the parallel with two wheels on the floor and one wheel on the ramp with the parallel so tilted that its handrail was thrown against the wire mesh and against the wall so it had to be pulled away from the wall in order to move it.

At the conclusion of petitioner's case, there were introduced in evidence and marked defendant's exhibits 3, 4 and 5, respectively, the report of Dr. Cass, the report of Dr. Gaulden and the autopsy report of Dr. Maner.

The report of Dr. Cass dated October 26, 1938, was as follows:

"This patient came to us on October 20, 1938, and gave the following history: Aged, fifty-six. Married. Occupation, grip. On October 18, 1938, he was lifting a ten foot parallel and felt a sprain and pain in his chest and both arms.

"There was no physical evidence of injury. No deformity. His pains were not localized or associated with any changes indicating an injury.

"The tentative diagnosis was sprain of the pectoral muscles and arm muscles, both sides.

"He was not considered disabled. He did not return for further treatment."

Dr. Gaulden's report to the insurance carrier contains the following:

"As per your request I attended the autopsy done on the body of Mr. Blankenfeld on Oct. 27th, the autopsy being done by Dr. George Maner. A previous autopsy had been done by Dr. Newbarr, the County autopsy surgeon.

"Examination of this body showed a wound on the left scalp, showed a coronary thrombosis, coronary arteriosclerosis and infarction of the heart muscles. * * *

"From the history which was given me, this patient reported to Drs. Dickey and Cass several days before his death complaining of pain in his chest and both arms, claiming he thought he had strained his chest in a lifting effort. It is my understanding from Dr. Cass that there were no objective findings of any injury. I am told also that patient returned to work and worked for several days before his death and he died very suddenly, and naturally when he fell shortly before his death, he struck his scalp on some object as he fell, causing the scalp wound.

"From the findings it would indicate this man died from a coronary thrombosis and the condition was not related or exacerbated by his employment or his alleged injury."

Upon cross-examination, Dr. Gaulden admitted that he never examined decedent's heart and that he "only saw the autopsy"; that he did not receive any history of the case before he examined the heart at the time of the autopsy.

"I received history from Dr. Cass, who saw the man, the man reported to his office and complained of pain in his chest muscles as a result of a lifting effort.

"Q. At that time Dr. Cass did not examine his heart at all, did he? A. I don't know.

"Q. That is, so far as he told you? A. No, he didn't tell me anything about examining him then.

"Q. And so far as there is any evidence here there was no statement by Dr. Cass or Dr. Dickey that the heart was examined at that time? A. No. I might say they might not have found anything on examination anyway. This type of heart oftentimes you can't find it.

"Q. That is problematic. All I am able to go on is what they did or did not do. A. I do not know what they did.

"Q. That is all the history of the case you received at the time you saw this heart? A. That is right. * * *

"Q. Do I understand you to say that from your examination of the patient's heart, or what you saw of the patient's heart at this particular time when it was shown to you, and from the history of the case which was given you at that time and which you have just given to us, you made up your mind and your opinion that there was nothing abnormal about the gentleman's death? A. I decided that there was nothing that he had that would have been caused by any lifting effort; that he died from natural causes which were coronary sclerosis and coronary thrombosis."

The report of Dr. George D. Maner shows that he performed an autopsy on October 27th at the request of Drs. Donald Cass and C. L. Gaulden of the Lumbermen's Mutual Casualty Company. The findings of this surgeon reveal, among other things, the following:

"Body is that of a white male, age approximated at 50 years and height at 5 feet 8 inches. * * * The heart has been removed and the chambers of the left side have been opened. On the posterior aspect of the left ventricle there is a hemorrhagic blotch covering an area about 6 x 4 cm. This is indefinitely outlined and there is a superficial incision extending transversely across it. The left ventricle is moderately hypertrophied and multiple sections from the apex to the base reveal an area of infarction involving the discolored area. * * *

"Microscopic: Sections of coronary arteries show a marked degree of sclerosis * * * In the circumflex branch there is a thrombus which shows slight early organization. * * *

"I am of the opinion that the cause of death is a natural one, namely, coronary sclerosis with thrombosis and infarction of the heart muscle. The coronary sclerosis is of long standing but the thrombosis is relatively recent. The infarction or sclerosis of the heart muscle, of course, results from the blocking off of the circulation in the coronary artery by the thrombus. * * *

"Cause of death: Coronary arteriosclerosis with thrombosis and infarction of heart muscle."

Dr. Newbarr, the coroner's surgeon, performed the first autopsy upon the body of decedent and signed the certificate of death, in which he gives the principal cause of death as "Acute dilatation of the heart," and gives as other contributory causes of importance, "Chronic Myocarditis; Hemorrhage into heart muscle."

From the foregoing resume, it becomes at once apparent that both the doctors and the laymen, who observed the decedent shortly after the lifting incident, with the exception of Dr. Cass, were of the opinion that death was directly attributable thereto, while the medical experts representing the insurance carrier, as well as the surgeon, who performed the second autopsy at the request of such carrier, were of the opinion that death was caused by a preexisting pathological condition of the heart without reference to the strain of lifting the parallel which weighed between 500 and 700 pounds.

With respect to the evidence adduced on behalf of respondents and which it is claimed presents a conflict, it should be pointed out that Dr. Cass was not called as a witness and from all that appears in the record he made no examination of decedent's heart when the latter called to see him on October 20th. Dr. Gaulden never saw or examined decedent in his lifetime, and his opinion as to the cause of death was based upon the condition of the heart as observed by him at the autopsy performed by Dr. Maner at the request of the insurance carrier, and upon an incomplete and inaccurate history of the case obtained by him from Dr. Cass and from two witnesses whose testimony he heard while waiting to be called to the stand at the hearing before the commission. The opinion of the autopsy surgeon Maner is based solely upon the condition of the heart which he found to exist after death.

It is interesting to note that the cause of death shown in the certificate signed by Dr. F. D. Newbarr, the coroner's surgeon, who performed the first autopsy upon decedent's body, is in complete agreement with the evidence adduced at the hearing on behalf of petitioner.

[1-3] In the case of Mark v. Industrial Acc. Comm., 29 Cal.App.2d 495, 500, 84 P.

2d 1071, the court held that expert testimony is no stronger than the facts upon which it is predicated, citing in support of such theory Winthrop v. Industrial Acc. Comm., 213 Cal. 351, at page 354, 2 P.2d 142, at page 144, in which latter case the Supreme Court said: "The case does not present a true conflict of evidence. The opinions of the doctors who were of the view that the fall did not produce the twisting of the pedicle, as stated in their letter reports, were based on the theory that severe symptoms did not appear until some time after the fall. The evidence, on the other hand, shows that petitioner suffered severe abdominal pains almost immediately thereafter, although her condition naturally became aggravated as time elapsed. Said opinions, being based on a state of facts not shown by the record to exist, are not in conflict with the opinions of the doctors whose statements were based on the facts actually shown to exist by the evidence of petitioner and the doctors who attended her."

It was further stated in the Mark case, supra, 29 Cal.App.2d at page 500, 84 P.2d at page 1074: "Assuming, if necessary, that decedent was afflicted with a weak and somewhat devitalized heart, that in itself is not determinative of the question here. If deceased was afflicted with such a condition and thereafter subjected himself to violent exertion and extraordinary strain in the course of his employment which caused his death sooner than he otherwise might have suffered, his dependents are entitled to compensation. Eastman Co. v. Industrial Acc. Comm., 186 Cal. 587, 200 P. 17. We have the undisputed testimony that the work of cranking the engine was both unusual and exhausting. Whether or not the decedent was so engaged in work that required an unusual physical exertion is a matter which should have been determined by the commission. Knock v. Industrial Acc. Comm., 200 Cal. 456, 253 P. 712."

The contention of petitioner that the award of the commission denying compensation for the death of her husband lacks support in the record must be sustained. The award is therefore annulled and the cause remanded.

I concur: DORAN, J.

WHITE, Justice (concurring).

I concur. The cause of the death being coronary arteriosclerosis with thrombosis and infarction of heart muscle, or acute dilatation of the heart, it is at once apparent that the only reasonable conclusion to be derived therefrom in accordance with the evidence introduced at the hearing before the commission is that there was a causal connection between the severe exertion attendant upon lifting the parallel and the death of the employee. It does not require a medical education to realize that in the commonly accepted and generally recognized version a coronary thrombosis is simply a blood clot in an artery which shuts off the supply of blood to the heart. It is also common knowledge that excessive exertion or exercise is intimately connected in tne production of coronary artery thrombosis. In fact, medical science seems to teach that excessive exercise or exertion are directly concerned in the primary causes of the condition leading up to the attack. This employee, the evidence indicates, suffered from a myocardial disease due to coronary sclerosis, and by reason of his exertion in the course of his employment the coronary thrombosis ensued. The latter ailment is generally recognized as an obstruction, ordinarily acute, of a branch of one of the coronary arteries, resulting in infarction and death of the area supplied by the occluded vessel. The shock, exertion or exercise is medically recognized as producing the coronary artery thrombosis, although it may have little relationship with the fatal attack, which, as in the case before us, may take place several days later. In other words, had this patient not received the shock occasioned by overlifting and later by overexertion in handling the planks, he would probably have gone on living as he had been with the chronic myocarditis and arteriosclerosis condition, which is common to men of his age; but it was the overexertion occasioned by his employment which started in motion the coronary thrombosis that took his life. True, he might have died from any other type of overexertion, such as cranking his automobile or running for a streetcar, but the facts here present point unerringly to an association between the decedent's overexertion while performing services for his employer and the fatal thrombosis attack.

15 Cal.2d 89

PRAGER v. ISREAL.

S. F. 16235.

Supreme Court of California.
Jan. 31, 1940.

1. Automobiles 🔑181(2)

An occupant of automobile is not a "guest" within automobile guest statute, although he accepts ride without giving compensation therefor, unless all conditions set forth in statute under which "guest," so defined, will be denied recovery for injuries, are satisfied. St.1923, p. 417, as added by St.1929, p. 1580, as amended by St.1931, p. 1693.

[Ed. Note.—For other definitions of "Guest," see Words & Phrases.]

2. Automobiles 🔑181(1)

The so-called "guest laws" are in derogation of the common law and must be construed strictly. St.1923, p. 417, as added by St.1929, p. 1580, as amended by St.1931, p. 1693.

3. Statutes 🔑212

It is presumed that every word, phrase and provision employed in a statute were intended to have some meaning and to perform some useful office.

4. Statutes 🔑212

Any construction of statute which implies that Legislature was ignorant of meaning of language so employed, or that it used words in vain, should be avoided, the legal intendment being that each and every clause was inserted for some useful and sensible purpose.

5. Statutes 🔑212

Where phrase "while so riding" was used five times in automobile guest statute, it would not be presumed that its presence therein was due to happenstance or mere legislative inadvertence. St.1923, p. 417, as added by St.1929, p. 1580, as amended by St.1931, p. 1693.

6. Statutes 🔑147

The elimination of a statutory clause after rendition of a decision affecting law is to be regarded as an indication of legislative intent to change meaning of law or to obviate objections to it.

7. Statutes 🔑147

It may be inferred from legislature's eliminating from automobile guest statute phrase "in any vehicle, moving upon any of of the public highways," and inserting instead words "in any vehicle upon a highway," and further eliminating entirely use of phrase "while so riding," after decision of appellate court holding that invitee who broke arm while cranking automobile was not "guest" within statute, that legislature recognized the correctness of decision in light of wording of statute, and made changes in order to obviate necessity of such interpretation. St.1923, p. 417, as added by St.1929, p. 1580, as amended by St.1931, p. 1693; Vehicle Code, § 403, St.1935, p. 154.

8. Automobiles 🔑181(2)

A person who accepts ride in automobile of another and who is in a position with one foot on the ground and the other on running board when automobile moves is not "riding" in automobile within meaning of statute providing that person, who, as guest, accepts ride in any vehicle, moving on public highways, and while so riding receives injuries, can recover only if owner was willfully negligent. St.1923, p. 417, as added by St.1929, p. 1580, as amended by St.1931, p. 1693.

9. Automobiles 🔑181(2)

Where automobile driver and companion parked automobile on public highway, and moved from front to rear seat where they lunched, and after which they started to alight for purpose of returning to front seat, but automobile moved forward, causing companion to fall to ground, companion was not a "guest" within statute providing that person, who, as guest, accepts ride in any vehicle, moving on public highways, and while so riding receives injuries, can recover only if owner was willfully negligent. St. 1923, p. 417, as added by St.1929, p. 1580, as amended by St.1931, p. 1693; Code Civ. Proc. § 1858.

10. Automobiles 🔑244(20)

Where motorist testified that his brakes were in repair but that his emergency brake would slip unless he forced it in, it was permissible inference that automobile rolled down incline injuring companion, because motorist failed either totally or partially to apply brakes.

11. Automobiles 🔑244(20)

Evidence that motorist failed to park his automobile in such a manner that it was safe for companion to alight therefrom, or that automobile was in such condition that it could not have been so parked, and that

companion suffered injury in attempting to alight therefrom as result of sudden movement of automobile due to failure of motorist to properly set or apply brakes, was sufficient to establish negligence of motorist.

12. Trial ⚷296(3)

Instructions which included statement that it was duty of motorist to exercise ordinary care to maintain braking system in good working order did not constitute prejudicial error on ground that only negligence pleaded by plaintiff was motorist's failure to set and apply brakes, where instructions clearly stated that it was for jury to determine as to whether motorist was guilty of negligence in failing to properly set or apply brakes, and not in failing to have automobile equipped with brakes in good working order.

13. Trial ⚷339(2)

Where jury returned verdict for plaintiff for "$5,000, plus reasonable attorney's fees and costs," which fees could not be allowed, trial court properly sent jury out with direction to correct its verdict, and when jury returned verdict with the quoted portion struck out and an increased amount written in, new verdict was valid.

◆

In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action for personal injuries by Violet Prager against E. M. Isreal. From judgment for plaintiff, the defendant appeals.

Affirmed.

Prior opinion, 87 P.2d 870.

Theodore Hale and Carroll B. Crawford, both of San Francisco, for appellant.

Parker & Stanbury, Harry D. Parker, and Vernon W. Hunt, all of Los Angeles, amici curiæ.

Jerome L. Schiller, of San Francisco, for respondent.

CARTER, Justice.

This is an appeal by the defendant from a judgment in favor of plaintiff entered on the verdict of a jury in an action for personal injuries.

Plaintiff and defendant had met on several occasions prior to the accident which is the subject of this action. On Sunday, June 9, 1935, defendant called at plaintiff's home in San Francisco to take her for a ride in his automobile. They drove about the city for an hour or more, then parked on a widened portion of the public highway overlooking the beach. They moved to the back seat to eat a lunch prepared by the plaintiff. Around 5 o'clock they decided to attend the theater. Plaintiff, who was seated on the right side of the rear seat, started to leave the car on that side, intending to resume her former position in the front seat. At the same time the defendant alighted on the left side to resume his position as driver. As the plaintiff had one foot on the ground and the other on the running board, the car moved forward, throwing her to the ground. She sustained injuries resulting principally in a fracture of the neck of the left femur.

The case was tried on issues raised by the third amended complaint which alleged that the injuries were caused by defendant's negligence in "failing to set and apply the brakes on said automobile". The answer pleaded specially the guest relationship between the parties and denied that there was any wilful misconduct on the part of the defendant. In the trial court plaintiff had a verdict for $7,500.

As his main ground for reversal of the judgment, defendant urges that a guest relationship existed between the plaintiff and defendant and that she has no cause of action against him unless her injuries resulted from his wilful misconduct or intoxication, neither of which was proved.

In the trial court, the judge who presided took the position that the guest statute was not applicable. For this reason he refused to permit counsel for defendant to present the issue of the guest relationship to the jury and refused to instruct the jury on the application of the guest statute. The ruling was based upon said trial court's interpretation of section 141¾ of the California Vehicle Act, St.1923, p. 417, as added by St.1929, p. 1580, as amended by St.1931, p. 1693, the statute applicable at the time of the accident. The pertinent portion of the section reads: "Any person who as a guest accepts *a ride* in any vehicle, moving upon any of the public highways of the State of California, and while so riding as such guest receives or sustains an injury, shall have no right of recovery against the owner or driver or person responsible for the operation of such vehicle." (Emphasis ours.)

In so holding the trial court relied upon the case of Moreas v. Ferry, 135 Cal.App. 202, 26 P.2d 886. The plaintiff in that case rode with the defendant to a theater. Finding the showhouse crowded they decided to seek another place of entertainment. Defendant seated behind the steering wheel, requested plaintiff to crank the car. Upon so doing the crank "kicked back", breaking plaintiff's arm. The court stated therein: "From an analysis of section 141¾ of the California Vehicle Act, it is apparent that under the facts here alleged its provisions are not applicable. It is therein provided, 'any person who as a guest accepts a ride in any vehicle, moving upon any of the public highways * * * and while so riding * * * receives or sustains an injury. * * *' The injury here received was not inflicted *in any vehicle moving upon any highway and was not inflicted while so riding.*"

[1] The third paragraph of section 141¾ defines a guest as "a person who *accepts a ride* in any vehicle without giving compensation therefor". The defendant argues that anyone who comes within said definition of the term guest is, under section 141¾, precluded from recovery for injuries sustained unless wilful misconduct or intoxication of the driver of such vehicle is established.

In this contention, we cannot agree with the defendant. The definition of the term "guest" must be construed with the rest of the section in which it appears. The first paragraph thereof sets forth the conditions under which a guest, so defined, will be denied recovery for injuries. Those conditions are when a guest accepts a ride in any vehicle *"moving upon any of the public highways"*, and receives or sustains an injury "while *so riding* as such guest". It is clear that unless all of those conditions are satisfied, the plaintiff is not such a guest as is denied recovery for her injuries by the terms of the guest statute.

[2] It is well settled in this and other states that the so-called "guest laws" are in derogation of the common law and must be construed strictly. See McCann v. Hoffman, 9 Cal.2d 279, 282, 70 P.2d 909; Callet v. Alioto, 210 Cal. 65, 290 P. 438; Rocha v. Hulen, 6 Cal.App.2d 245, 254, 44 P.2d 478; Hunter v. Baldwin, 268 Mich. 106, 255 N.W. 431. Furthermore, as stated in Rocha v. Hulen, supra [6 Cal.App.2d 245, 44 P.2d 483], "The common-law right of having redress for injuries wrongfully inflicted, being lessened by such statutes, necessitates strict construction, and also *that cases be not held within the provisions of such statutes unless it clearly appears that it should be so determined.*" (Emphasis ours.)

[3, 4] It cannot be said that the legislature did not intend the language of the statute to be so interpreted, for it is presumed that every word, phrase and provision employed in a statute was intended to have some meaning and to perform some useful office, 23 Cal.Jur. 781; Appeal of Houghton, 42 Cal. 35, 52; Drew v. Smith, 38 Cal. 325, 333; Bourland v. Hildreth, 26 Cal. 161, 231; Robinson v. Bidwell, 22 Cal. 379, 393. And any construction should be avoided which implies that the legislature was ignorant of the meaning of the language so employed, or that it used words in vain, the legal intendment being that each and every clause was inserted for some useful and sensible purpose. Mono Power Co. v. City of Los Angeles, 9 Cir., 284 F. 784, 795; Hannon v. Southern Pac. R. Co., 12 Cal.App. 350, 107 P. 335; Attorney General v. State Board of Judges, 38 Cal. 291, 296.

[5] In this connection it is significant that the phrase "while so riding" was used not once, but five times in section 141¾. It is therefore not to be presumed that its presence therein was due to happenstance or a mere legislative inadvertence.

[6, 7] In addition, it is to be observed that following the decision in Moreas v. Ferry, supra, the legislature eliminated from the statute, the phrase "in any vehicle, *moving* upon any of the public highways" and inserted in its stead the words "in any vehicle upon a highway", and further eliminated entirely the use of the phrase "while so riding". Vehicle Code § 403, St.1935, p. 154.

It was held in Oakland Paving Co. v. Whittell Realty Co., 185 Cal. 113, 195 P. 1058, that the elimination of a statutory clause after the rendition of a decision affecting the law is to be regarded as an indication of legislative intent to change the meaning of the law or to obviate objections to it. It may therefore be inferred that the legislature recognized the correctness of the decision in Moreas v. Ferry, supra, in the light of the wording of the statute at that time, and made the above-mentioned changes in order to obviate the necessity of such an interpretation. See McColgan v. Jones, Hubbard & Donnell, Inc., 11 Cal.2d 243, 78 P.2d 1010.

[8, 9] Defendant states that "it would be absurd in the extreme to hold that one who has accepted a ride with another and had thus become his guest, immediately changed to a paying passenger or a mere trespasser a soon as the wheels of the car stopped turning at a highway intersection, or when the parties have voluntarily stopped for gas or lunch or similar conveniences".

Be that as it may, it would be equally illogical to say that a car which had been parked for several hours on a widened space in a public highway provided for that purpose, and which thereafter moved a few inches due to defective brakes or their lack of application—without a driver behind the steering wheel and without the motor having been started—is "moving on" a public highway within the meaning of the statute.

We are likewise of the opinion that a person alighting from an automobile, who is in a position with one foot on the ground and the other on the running board when it so moves cannot be said to be "riding" in said automobile within the meaning of said statute.

It is obvious that in order to bring the plaintiff within the guest statute it would be necessary to so construe said statute as to omit therefrom the words "moving upon" and "While so riding". Such construction would be a direct violation of the provisions of section 1858 of the Code of Civil Procedure which provides: "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained thereon, *not to insert what has been omitted, or to omit what has been inserted;* and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."

Defendant cites Hunter v. Baldwin, 268 Mich. 106, 255 N.W. 431, to the effect that a person cranking a car is not a gratuitous passenger because he renders a service at the owner's request, and points out that the facts of said case are similar to those in Moreas v. Ferry, supra. The decision in the latter case, however, was not rendered because the plaintiff was not a gratuitous passenger and therefore not a guest, but because he was not injured under the conditions which, according to statute, would preclude a guest from recovery.

The case of Nemoitin v. Berger, 111 Conn. 88, 149 A. 233, was decided under a statute which did not use the phrase "in a vehicle moving on a public highway". The Connecticut statute, Pub.Acts Conn. 1927, c. 308, provided that no person "transported by the owner or operator of a motor vehicle as his guest" without payment should recover for injuries, except in accordance with its terms. The plaintiff in that case had seated himself in the car preparatory to driving off with the defendant. The defendant, who was already seated behind the steering wheel, noticed that the rear door was open, reached back and slammed it. Plaintiff's fingers were injured. It was held that when the plaintiff entered the car to take his place for the purpose of immediate transportation, he placed himself under the defendant's care and came within the purview of the statute. Suffice it to say that the difference in statutes necessitates a difference in the interpretation thereof.

[10] Defendant contends that even were the guest law not to apply, the plaintiff has failed to establish a case of actual negligence against the defendant.

At the time of trial, defendant stated that the car had been his since 1927, and that from time to time the brakes had caused trouble but were repaired. He testified that immediately before the accident the emergency brake slipped occasionally unless it was forced in. He was unable to remember whether he had applied the brake when he parked the car the afternoon of the plaintiff's injury, or not. He said, "I don't remember forcing it. I probably pulled it up, but how far, I don't know." His testimony was that he was too excited on his return trip to recall whether the brake was on or not. He thought the car had rolled forward about six inches.

Since the defendant testified that his brakes were in repair, but that his emergency brake would slip unless he forced it in, if his car moved—the inference is that he failed either totally or partially to apply that brake.

In the case of Latky v. Wolfe, 85 Cal. App. 332, 349, 259 P. 470, 477, the court said: "That the statement, to which the defendant himself testified, that after the accident and after moving his car back to the position on the incline from which he left it in the first instance, he 'put the brakes on,' and the car 'stood on the incline all the time' and 'did not roll away,' is justly susceptible to the interpretation that the reason that the car did not remain in the position on the incline in which he left it to go into the store was because the brakes had not been properly set. In other words, the jury could justly, and probably did, draw the conclusion from that statement of the defendant that the brakes were in good order, and that if defendant, as it was, in view of the peculiar situation, emphatically his duty to have done, had taken the pains to see that they were properly set when he left the car to go into the Hale store, the accident would not have happened."

[11] Furthermore, we think it is clear that if the defendant failed to park his automobile in such a manner that it was safe for plaintiff to alight therefrom, or the automobile was in such a condition that it could not have been so parked and the plaintiff suffered an injury in attempting to alight therefrom as a result of the sudden movement of the automobile due to the failure of the defendant to properly set or apply the brakes, he was guilty of negligence. If such negligence was the proximate cause of the injury suffered by plaintiff, she is entitled to recover damages against him.

[12] Defendant claims prejudicial error was committed by the trial court in the giving of the following instructions: "It was the duty of the defendant to exercise ordinary care to maintain the braking system on his automobile in good working order."

"If you find from the evidence that the automobile owned by the defendant herein was equipped with brakes which were faulty, defective or in bad repair, and that the defendant herein was aware of the faultiness, defectiveness or bad repair of said brakes, and that knowing said condition he did at the time and place of the parking of said automobile fail properly to set or apply said brakes, such failure on his part constitutes negligence and if you find that the said negligence, if any, was the sole and proximate cause of the plaintiff herein being injured, then you shall find a verdict for said plaintiff."

The error claimed by the defendant in giving the foregoing instructions is based upon the contention that because plaintiff pleaded only that the defendant was guilty of negligence in failing to set and apply the brakes on the automobile, said instructions were inapplicable to the issues in the case. The instructions contain a correct statement of the law and the latter instruction is more favorable to the defendant than to the plaintiff, as it is obvious that the defendant would have been guilty of negligence if he failed to properly set or apply the brakes on his automobile, whether they were defective or in perfect condition. Said instruction clearly states that it was for the jury to determine as to whether or not the defendant was guilty of negligence in failing to properly set or apply said brakes, and not in failing to have his car equipped with brakes in good working order.

[13] Defendant also claims that the trial court committed prejudicial error in directing the jury to correct its verdict. The record discloses that after the case was submitted to the jury, it returned into court and submitted a verdict which read as follows: "We, the jury in the above-entitled cause, find a verdict in favor of plaintiff and against defendant E. M. Isreal and we hereby fix and assess the damages of the plaintiff in the sum of five thousand dollars ($5,000) plus reasonable attorney's fees and costs." The court ordered the verdict recorded and then stated to the jury: "The part of the verdict which includes reasonable attorney's fees is not to be considered. The court gave you the rule upon the measure of damages, and said nothing to you about attorney's fees, which cannot be included in a case of this kind. * * * You will have to retire and find another verdict, gentlemen." Shortly thereafter the jury again returned into court with the same verdict, but with the following portion thereof deleted: "five thousand dollars ($5,000) plus reasonable attorney's fees and costs", but the following was added thereto: "seven thousand five hundred ($7,500)". This verdict was accepted by the court and judgment entered thereon. We find no error in the action of the court above noted. The first verdict was incorrect and the court clearly had the power to direct the jury to retire and correct it. We can see no material difference in what the court did in the case at bar than what was done in the case of Toon v. Pickwick Stages, 95 Cal.App. 370, 272 P. 797, which was approved by the District Court of Appeal in said case.

What we have said disposes of all of the contentions advanced by the defendant and the judgment is therefore affirmed.

We concur: WASTE, C. J.; GIBSON, J.; CURTIS, J.; SHENK, J.

GHIRARDELLI v. PENINSULA PROPERTIES CO.*

Civ. 10959.

District Court of Appeal, First District, Division 2, California.

Jan. 26, 1940.

Rehearing Denied Feb. 24, 1940.

Hearing Granted March 26, 1940.

1. Sales 🔑477(1)

Where plaintiff's assignor, after selling hotel equipment to defendant under conditional sales contract, entered into supplemental agreement with defendant whereby defendant assigned notes to assignor who agreed that when a sufficient sum was collected upon assigned notes to reduce balance due on equipment to $11,000, assignor would execute bill of sale and release defendant from obligation on conditional sales contract, after a sufficient amount had been collected on assigned notes to reduce defendant's indebtedness to less than $11,000, the remedy of plaintiff's assignor was on notes and not on conditional sales contract, even if bill of sale and release were not executed, since supplemental agreement was a waiver of right to proceed on contract when indebtedness was reduced below $11,000. Civ.Code, § 3529.

2. Sales 🔑477(1)

Where plaintiff's assignor sold hotel equipment to defendant under a conditional sales contract, a provision in supplemental agreement between assignor and defendant, whereby assignor agreed that when there had been collected upon notes assigned by defendant to assignor a sufficient sum so that there "remains a balance payable to it (assignor) of $11,000," assignor would execute bill of sale and release defendant from obligation on conditional sales contract, was not ambiguous and could not be construed as a release by assignor of $11,000, in view of other provisions of supplemental agreement. Civ.Code, §§ 1641, 1643; Code Civ. Proc. § 1858.

3. Sales 🔑477(1)

A supplemental agreement between seller of hotel equipment and buyer providing that a trustee should be appointed to collect notes assigned by buyer to seller, that if $11,000 was not paid through collection of notes or by buyer prior to certain date seller should be restored to rights under original conditional sales contract, and that seller, when there has been collected upon notes a sufficient sum so that there remained a balance payable to seller of $11,000, would execute bill of sale for equipment and release buyer from obligations on conditional sales contract, was not, when read in its entirety, ambiguous.

4. Sales 🔑94

Ambiguity, if any, in a supplemental agreement entered into between buyer and seller of personalty was to be resolved against seller and its assignee, where seller's attorney wrote agreement.

5. Appeal and error 🔑173(1)

On defendant's appeal from judgment for plaintiff in action to recover balance claimed for goods sold and delivered, plaintiff could not successfully contend that a supplemental agreement between plaintiff's assignor and defendant concerning property in question contained a clause which was inserted by mistake and that agreement should be reformed, where such issue was not presented by pleadings.

SPENCE, J., dissenting.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by D. Lyle Ghirardelli against Peninsula Properties Company to recover a balance claimed due for goods sold and delivered. From a judgment for plaintiff, defendant appeals.

Reversed.

Carlyle Miller, of San Francisco, for appellant.

Oliver Dibble and Samuel I. Jacobs, both of San Francisco, for respondent.

STURTEVANT, Justice.

The trial court rendered a judgment against the defendant on a common count to recover a balance due for goods sold and delivered. From that judgment the defendant has appealed.

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*For subsequent opinion see 107 P.2d 41.

It makes several different points but in view of the conclusions we have reached on its second point it will not be necessary to discuss the others. That point is that by virtue of a supplemental agreement the plaintiff waived his rights to maintain an action against the defendant in the form of the one he has pleaded.

On August 1, 1930, plaintiff's assignor, hereinafter called the seller, and the defendant, executed an ordinary conditional sales contract for the sale and delivery of the furniture and furnishing of the Hotel Rio Del Mar. Of the purchase price, $31,440.55, the sum of $780 was paid in cash and the balance was evidenced by four promissory notes (1) for $3,660.55, payable October 1, 1930; (2) $6,000, payable December 1, 1930; (3) $6,000 payable in monthly instalments of $500 each; and (4) $15,000, payable in monthly instalments of $1,000 each. The provisions of said notes are not set forth in the record. As both parties have called the document first mentioned the agreement, we will do so, and by the use of the words "conditional sales agreement" we will be understood as referring to the first document.

A controversy as to performance by the seller arose. The record shows that fact but does not show the details. On June 16, 1931, a supplemental agreement was executed by the parties. It recites that the note first mentioned had been paid. It provides for certain weekly payment of principal and interest on notes (2) and (4) above mentioned. It also contains provisions settling the controversy regarding breaches by the seller. The document contains nothing else purporting to modify the original contract. On February 26, 1932, a second supplemental agreement was executed. After reciting that on January 1, 1932, there was due $11,845 and that the parties desired to provide a method of payment, the agreement designated Harold E. Haven as a trustee. Other provisions material to the present controversy were as follows:

"Now, Therefore, the parties hereto do agree as follows:

"1. The Second Party agrees to forthwith transfer and assign to First Party all membership notes of the Rio Del Mar Country Club, upon which the makers thereof are in default in the payment of any installment for a period of thirty (30) days or more and hereafter to transfer and assign all such notes as soon as the makers thereof shall have defaulted in the payment of any instalment for a period of thirty days. * * * It is further understood and agreed that there shall be transferred by the aforesaid assignment a minimum of three hundred (300) notes.

"2. It is agreed that said Haven shall be employed to collect all of said notes and shall have supervision over the collections of said Ayer and shall receive therefor twenty-five (25%) per cent of all sums collected, which percentage, in the case of collection by Ayer, shall include the percentage paid to Ayer. Said Haven is authorized to deduct said commissions from the sums so collected and also to deduct all moneys advanced or paid for court costs, service of papers, credit reports, sheriff's fees and private investigations and costs for the purpose of locating property subject to attachment or execution or levying thereon.

"3. All moneys in the hands of said Harold E. Haven after the aforesaid deductions, shall be paid by him to First Party and said First Party agrees to look solely to the moneys so received as long as said Harold E. Haven continues to collect said notes. In this connection it is understood and agreed that if Harold E. Haven shall deliver a written opinion to the Second Party that he is unable to collect any further sums on the notes so assigned, shall fully account for all moneys collected and with the consent of First Party shall return all uncollected notes to Second Party, then First Party shall be restored to all rights it has under the original conditional sales agreement as to any moneys that may then be due to it.

"4. It is further agreed that if the sum of Eleven Thousand ($11,000.00) Dollars is not paid through the aforesaid collections or by second party prior to March 1st, 1933, then upon a full accounting and the return of all uncollected notes, the first party shall be restored to all rights it has under the original conditional sales agreement as to any moneys that may then be due to it.

"5. The First Party further agrees that if and when there has been collected upon the aforesaid assigned notes a sum sufficient so that after the aforesaid authorized deductions *there remains a balance payable to it of* Eleven Thousand ($11,000.00) Dollars, that it will execute a bill of sale of the aforesaid furniture and furnishings and release the Second Party from all obligations on the aforesaid conditional sales agreement." (Italics ours.)

No accounting was had until January 22, 1937. On that date Harold E. Haven rendered an account showing a balance due plaintiff, January 1, 1937, of $5,680.29. That account also shows that on May 30, 1932, the balance due had been reduced to $10,916.45. The seller assigned its claims to the plaintiff and he filed his complaint pleading a common count for a balance due on the sale of goods. He alleged said balance to be $5,680.29 as of date April 27, 1937, and for that sum he prayed for judgment, together with interest thereon, and for costs of suit, including an attorney fee.

[1, 2] The fifth paragraph sustains the second point made by the defendant. It is admitted that the collections made by the trustee under said agreement reduced the indebtedness below $11,000. They so reduced it May 30, 1932. After the account had been so reduced the seller should have executed "a bill of sale of the aforesaid furniture and furnishings". Furthermore, after the date last mentioned it should have released the buyer "from all obligations on the aforesaid conditional sales agreement"; that is, the seller's remedy thereafter was on the notes it held and not on the agreement. True it is that the bill of sale and the release were never executed. But that which ought to have been done is to be regarded as done, in favor of him to whom, and against him from whom, performance is due. Civ.Code, sec. 3529. However, the plaintiff contends: "The language is ambiguous on its face and must be read with paragraphs 3 and 4. See Civ.Code, sec. 1641. The only conclusion that can be reached is that in paragraph 5 the words 'has been paid' should have been used instead of the words 'remains a balance payable'. Any other construction would render the language in paragraphs 3 and 4 meaningless. Any other construction would mean that if the sum of $845.00 was paid within a year, an obligation of $11,845.00 would be discharged! The preamble of the agreement provides that the parties 'desire to provide for a method of payment of said balance' (recited to be $11,845.00) and not for a fraction of that balance." That contention may not be sustained. It gives no effect to the words, "remains a balance payable to it of". But an interpretation which gives effect should, if possible, be adopted. Civ.Code, sec. 1643. It then requires the insertion "had been paid to it", words that are not written in the agreement. To do so would be to violate another statutory rule. Code Civ. Proc., sec. 1858. The plaintiff argues that any construction other than the one for which he contends makes the contract "meaningless". We think not. Paragraph 3 mentions no date and is a general covenant authorizing the seller, under certain facts, to proceed under the conditional sales contract. Paragraph 4 provides that if $11,000 is not collected by March 1, 1933, the seller may return "all uncollected notes", make a complete accounting, and be restored to all rights under the conditional sales agreement. As the debt was reduced to $10,916.45 on May 30, 1932, the contingency therein expressed never arose. Paragraph 5 is a special limitation in favor of the buyer. It provides that if and when the buyer has reduced the balance to $11,000, the seller will "execute a bill of sale of the aforesaid furniture and furnishings and release the second party (the buyer) from all obligations under the aforesaid conditional sales agreement". As so construed every paragraph is lawful, operative, definite, reasonable and capable of being carried into effect.

In opposing the foregoing interpretation the plaintiff asserts that the interpretation puts him in the position of releasing $11,000 of the debt owing to him. That is a strained construction. On the basic agreement either an action for the price of the goods sold or an action to replevy might have been maintained under certain facts. Holt Manufacturing Co. v. Ewing, 109 Cal. 353, 42 P. 435. Paragraph 5 as above set forth clearly limits the plaintiff, under the contingencies therein named, to remedies provided by law and constituted a waiver of the rights to proceed under the terms of the conditional sales contract. Nothing to the contrary being said, the seller still retained and held three of the original notes made by the buyer and which were of the face value of $27,000. It also held three hundred collateral notes executed by the members of Peninsula Properties Company which were of the face value of $35,000. In actions brought on the notes the law provides the remedies and on that subject paragraph 5 did not purport to speak. It follows that the plaintiff's rights provided by law, as distinguished from those provided in said conditional sales agreement, remain unimpaired, that the plaintiff has released no part of its debt but has waived some remedies it theretofore had. Such facts do not show that paragraph 5 is "meaningless" if interpreted just as it is written. But, on the contrary, it would seem to be more than reasonable, from the seller's point of view, as it held nearly $50,000 in promissory notes to secure the payment of some amount less than $11,000, namely, $5,685.13—the amount sued for.

[3-5] Nor can we agree with the plaintiff's contention that the agreement dated February 26, 1932, was, when read in its entirety, ambiguous. To us it seems to be free from ambiguity. But if it was ambiguous that fact does not help the plaintiff. Mr. Haven was the attorney for the seller. He wrote the agreement. If it was ambiguous the ambiguity must be resolved against the seller and its assignee. Nerski v. Hammond Lumber Co., 202 Cal. 643, 262 P. 755. A more exact statement of the plaintiff's position is that he contends the agreement contains a clause which was inserted by mistake and it should be reformed. But there was no such issue presented by the pleadings.

The plaintiff prayed for judgment for the balance of the purchase price, interest thereon at seven per cent per annum, and for attorney fees. The trial court awarded judgment in his favor as prayed. Each item contained in the judgment is attacked by the defendant. These matters if supported by anything are evidenced by the original notes. But said notes were not introduced in evidence and, apparently are still outstanding. What award they would justify the record does not disclose. But the record does show there has been a miscarriage of justice.

The judgment appealed from is reversed.

I concur: NOURSE, P. J.

SPENCE, Justice (dissenting).

I dissent as I cannot agree with the majority opinion in the construction to be placed upon paragraph 5 of the second supplemental agreement or with the conclusion reached in said opinion that the judgment should be reversed.

At the time said second supplemental agreement was executed in 1932, the notes given by the buyer to the seller had matured and the balance due from the buyer to the seller was in excess of $11,000. The parties recited the existence of said balance and their desire to provide a method for its payment. It was then agreed that certain membership notes held by the buyer should be assigned to the seller (par. 1); that Harold E. Haven should be employed to collect said membership notes, to account for the proceeds and, after making certain authorized deductions, to pay the balance over to the seller. (Pars. 2 and 3.) The authorized deductions consisted of deductions authorized in payment for services in the agreed amount of twenty-five per cent of the collections made, and also deductions authorized in payment of certain expenses. (Par. 2.) It was further agreed that the seller would "look solely to the moneys so received as long as said Harold E. Haven continues to collect said notes" and that if Mr. Haven should deliver his written opinion to the effect that he would be unable to collect any further sums and should account for the moneys collected and return the uncollected notes to the buyer, then the seller would be restored to all its rights under the original conditional sales agreement as to any moneys then due. (Par. 3.)

Then followed paragraphs 4 and 5 of said agreement in each of which paragraphs an amount of $11,000 was mentioned. It was agreed that "if and when there has been collected upon the aforesaid assigned notes a sum sufficient so that after the aforesaid authorized deductions there remains a balance payable to it" of $11,000, the seller would execute a bill of sale and release the buyer from "all obligations on the aforesaid conditional sales agreement". (Par. 5.) It was further agreed that if the sum of $11,000 had not been paid as provided in said second supplemental agreement prior to March 1, 1933, then upon a full accounting and return of the uncollected notes, the seller would be restored to "all its rights under the original conditional sales agreement as to any money that may then be due to it." (Par. 4.)

When all of the provisions of said agreement are considered together, it seems obvious that the parties intended that the seller should forego temporarily his rights under the original conditional sales contract and should temporarily look solely to the net amount to be paid to it as the result of the collections made upon the membership notes under the terms of said second supplemental agreement; that the parties contemplated that the entire transaction should be completed and all rights and obligations should be extinguished in the event that the seller should receive the sum of $11,000 as therein provided; and that if the sum of $11,000 had not been received by the seller prior to March 1, 1933, then upon an accounting and the return to the buyer of the uncollected membership notes, the seller should be restored to all its rights under the original conditional sales contract as to any balance remaining due. It seems to me that any reasonable construction of paragraph 5, when read in the light of the other provisions, shows this to be the intention. The majority opinion relates the word "balance", as found in said paragraph 5, to the balance due from the buyer to the seller. I am of the view that this construction is not in accord with the obvious intention of the parties, that it is unreasonable and that it leads to the startling conclusion that the seller agreed to part with title to the furniture and agreed to release the buyer from "all obligation" under the conditional sales contract whenever the sum of $845 might be received by the seller from Mr. Haven upon an admitted balance of $11,845 due from the buyer to the seller. It seems to me that the only reasonable construction is that the "balance" referred to in said paragraph 5 was the balance payable by Mr. Haven to the seller under the agreement "if and when there had been collected upon the aforesaid assigned notes a sum sufficient so that after the aforesaid authorized deduction" such balance equalled the sum of $11,000. In other words, the "balance" mentioned there was the net amount payable by Mr. Haven to the seller under the agreement after making his "authorized deductions" from the collections made upon the membership notes.

The remaining contentions of defendant appear to be without merit. They are practically all based upon the theory that the plaintiff did not declare upon the written contract of the parties. Defendant states that the action was "in no way grounded on the written contract". The complaint may not be a model pleading but plaintiff alleged therein that defendant became indebted to plaintiff, as assignee of the seller, "in the sum of $5,685.12, balance due for goods, wares and merchandise sold and delivered to defendants * * * under and pursuant to a written contract * * *; that subsequent to the making of said written contract", plaintiff's assignor assigned to plaintiff "all of its right, title and interest under said contract and all of its right to have and receive the balance of moneys due thereunder; that at all times since said assignment last above mentioned, plaintiff has been and now is the owner and holder of said contract and entitled to have and receive all moneys due and owing from defendants thereunder". An amendment to the complaint was filed by leave of court and it declared upon "the terms of said written contract of sale above referred to, dated August 1, 1930". It is therefore apparent that plaintiff's action was grounded upon the written contract. Defendant's plea of the statute of limitations was properly found to be unavailing as the second supplemental agreement temporarily suspended the rights of the seller under the conditional sales contract and the action was brought promptly after the restoration of said rights as provided in said second supplemental agreement.

I cannot agree that the record shows a miscarriage of justice. On the contrary, I am of the opinion that the action was properly brought for an admitted balance remaining unpaid upon the original conditional sales contract, that the judgment accorded to plaintiff only the relief to which plaintiff was entitled and that said judgment should be affirmed.

KYNE v. KYNE et al. *

Civ. 11063.

District Court of Appeal, First District, Division 2, California.

Jan. 22, 1940.

Rehearing Denied Feb. 21, 1940.

Hearing Granted March 21, 1940.

1. Gaming ⚷23

Betting agreements are void and may not be the basis of an action at law or in equity. Pen.Code, §§ 60, 61, 337a.

2. Contracts ⚷138(1)

The test whether a demand connected with an illegal transaction is capable of being enforced at law is whether plaintiff requires aid of illegal transaction to establish his case, and if plaintiff cannot open his case without showing that he has broken the law, the court will not assist him, whatever his claim in justice may be upon defendant. Pen.Code, §§ 60, 61, 337a.

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*For subsequent opinion see 106 P.2d 620.

3. Contracts ⚷140

A court of law or equity will not deny recovery to a party simply because he has been a violator of the law, if he can show his right to such recovery without reference to any illegal contract and without causing court to recognize or sanction any illegal conduct on his part.

4. Gaming ⚷29

Where execution was levied on wagers in hands of a betting commissioner, winners of the wagers were entitled to enforce their claims against the amount thereof as in an action for moneys had and received, limited to the amount of the wagers, since in enforcing their claims against the execution creditor and the sheriff who were strangers to the wagers, it was unnecessary to resort to any illegal transactions. Code Civ.Proc. § 689.

5. Execution ⚷194(3)

In proceeding on execution levied against betting commissioner wherein claimants filed third-party claims based on wagers placed with commissioner, evidence that commissioner received claimants' money, put it in a valise, and had it in his possession when sheriff made levy, established that money levied on was property of claimants. Code Civ.Proc. § 689.

6. Appeal and error ⚷931(3)

In support of judgment, reviewing court must assume trial court made finding necessary to support judgment.

7. Execution ⚷181

In proceeding on writ of execution levied against fund in possession of betting commissioner, wherein claimants filed third-party claims based on wagers placed with commissioner, fact that sheriff on levying writ did not take the entire fund in possession of commissioner did not preclude claimants from asserting their rights against that portion of fund taken by sheriff. Code Civ. Proc. § 689.

8. Pleading ⚷397

Although a party misconceives relief to which he is entitled, if, within scope of his proof, he establishes any cause of action, he should not be denied such relief as he is entitled to.

9. Execution ⚷192

In proceeding on levy of writ of execution against funds of betting commissioner wherein claimants filed third-party claims based on wagers which had been placed with betting commissioner and which had been won by claimants, irrelevant facts in claims, indicating that claimants misconceived relief they were entitled to, would be treated as surplusage, where claims containing allegations of amount, title, and possession of the deposit which each of the claimants put up stated a cause of action for specific moneys had and received. Code Civ.Proc. § 689.

10. Execution ⚷181

Claimants of wagers in the hands of a betting commissioner in asserting claims to the fund which had been levied upon by execution were in effect presenting a cause of action for specific moneys had and received, and where they identified the fund they were entitled to carve out of it the deposit made by each.

11. Execution ⚷194(1)

Claimants of fund in hands of a betting commissioner on which execution had been levied, in order to prevail against execution creditor, were bound to prove the right of each claimant to the money and the defendant's possession.

12. Gaming ⚷29

In proceeding on levy of execution against funds placed with betting commissioner wherein claimants filed third-party claims based on wagers placed with commissioner, which had been won by claimants, claimants were entitled to recover full amount of the stake deposited by them with commissioner without deducting the 5 per cent. commission which under betting agreement was to be paid commissioner. Code Civ.Proc. § 689.

SPENCE, J., dissenting in part.

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

Proceeding by Tom Kyne, Jr., a minor, by and through Ruth Filipello, his guardian ad litem, against Tom Kyne on a writ of execution levied on moneys of the defendant, wherein R. M. Wilson, Julius Wild, and Earl Eby filed third-party claims. From a judgment in favor of each of the third-party claimants, plaintiff appeals.

Reversed and remanded.

Allen Spivock, Philander B. Beadle, and Samuel Hauser, all of San Francisco, for appellant.

John J. Taheny, of San Francisco, for respondents.

STURTEVANT, Justice.

The plaintiff caused a writ of execution to be levied on moneys consisting of currency and coins in the possession of the defendant Tom Kyne. Three different claimants, Wild, Wilson and Eby, separately filed three third-party claims. Code Civ. Proc. sec. 689. Later the plaintiff filed a petition asking that said claims be heard and determined. Notice was duly given and the petition was heard before the trial court sitting without a jury. After the hearing the court caused a judgment to be entered in favor of each of said third-party claimants for the amount claimed by each, less a commission of five per cent, and from that judgment the plaintiff has appealed.

The facts pertinent to each claim are quite similar. They differ only as to dates, amounts, majorities, and the names of the claimants. The defendant for many years has maintained, and now maintains, a fixed place of business at No. 1 Opal street, San Francisco. He accepts, as a commissioner, bets on the happening of different events. To the better he issues a ticket showing the nature of the bet and accepts the money wagered by the intended better. He retains a coupon showing the same facts. There was testimony that he attempts to so conduct the business that other betters take the opposite side and deposit funds and receive tickets showing the facts. There was testimony that the defendant, ordinarily, did not put up his own funds on either side, but the record does not show that he never did. When the event has transpired the defendant, under the practice followed by him, deducts a commission of five per cent from each deposit so received by him and pays according to the terms of the betting agreement, to the winner of the bet so made at defendant's place of business.

A general election was held in California on Tuesday, November 8, 1938. The democratic nominee for governor was Culbert Olson and the democratic nominee for United States senator was Sheridan Downey. Prior to November 8 (midnight), 1938, the claimant, Julius Wild, placed with the defendant five bets in the total sum of $1,500, and deposited in the manner above stated $1,500. During the same period, and in the same manner, the claimant, Earl Eby, made four bets in the total sum of $790, and the claimant, Robert M. Wilson, made seven bets in the total sum of $1,650. Each of said bets was based on one of said candidates and on the guess that such candidate would win. But some bets were based on guesses of the majorities of the respective candidates. As the event transpired the claimants won each bet. Considering all of the terms of the bets the claimant Wild won $1,500, the claimant Eby won $790 and the claimant Wilson won $1,465. No claimant at any time attempted to disaffirm, but each sought to enforce the said illegal agreement. In framing his claim the claimant Wild asserted title to $3,000, Eby asserted title to $1,580, and the claimant Wilson asserted title to $3,115. The judgment awarded to each the amount so claimed less five per cent due the defendant under the betting agreement.

The defendant testified that when above-mentioned deposits were made he placed them in a valise and so kept them until the election was over. On the morning of November 10, 1938, he took the valise, which then contained about $10,000, to his place of business. Later he paid some small bets. Still later, at about 10:30 a. m., the sheriff came into defendant's office, levied the above-mentioned writ, and took from said moneys $7,702.87. Defendant testified that down to that time he had not deducted any of his commissions of five per cent. There was no evidence any one of said deposits was kept separate, was marked, or was identified in any other manner than as set forth above.

[1-4] The plaintiff cites sections 60, 61, 330 and 337a of the Penal Code and contends the above agreements were utterly void and may not be the basis of an action at law or in equity. That contention is the settled law of California. Matthews v. Lopus, 24 Cal.App. 63, 140 P. 306; Schenck v. Hirshfeld, 22 Cal.App. 709, 136 P. 725. The rule as to the test is also well settled. In Berka v. Woodward, 125 Cal. 119, at page 127, 57 P. 777, at page 779, 45 L.R.A. 420, 73 Am.St.Rep. 31, the court quoted with approval as follows: "The test * * * whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires the aid of the illegal transac-

tion to establish his case. If the plaintiff cannot open his case without showing that he has broken the law, the court will not assist him, whatever his claim in justice may be upon the defendant." The claimants reply that they concede the foregoing rules without reservation. However, they assert that in this proceeding the claim of one of the erring parties against the other erring party is not involved but that the claimants are challenging the rights of this plaintiff, a third party, and that the foregoing authorities and the cases there cited are not applicable. They stress the fact that they are making no claim against any better nor against Tom Kyne. They assert they are making their claim against this plaintiff and the sheriff acting as her agent. They particularly contend that whatever might have occurred in the past, neither this plaintiff nor the sheriff were parties to any illegal transaction. Where, as here, it is claimed that a person has entered into an illegal transaction, there is no case in this state that purports to state the law as to the rights of such person to recover and enforce his claim against a stranger. In Kearney v. Webb, 278 Ill. 17, 115 N.E. 844, at page 847, 3 A.L.R. 1631, at page 1635, the supreme court of Illinois said: "No court of law or equity has ever denied a recovery to a party simply because he has been a violator of the law, if he can show his right to such recovery without reference to any illegal contract, and without causing the court to recognize or sanction any illegal conduct on his part." In the case of Matta v. Katsoulas, 192 Wis. 212, 212 N.W. 261, at page 262, 50 A.L.R. 291, at page 292, the supreme court of Wisconsin said: "The rule that the law will not enforce an illegal contract has application only as between the immediate parties to the contract." To that case is appended an extended note. Numerous cases are cited by the editor supporting the text of the decision. The case entitled Kearney v. Webb, supra, decided by the supreme court of Illinois, is particularly in point as it involved the following facts: Thomas Kearney and Henry Becker were the proprietors of a gambling hall in St. Louis. They entrusted to John Snyder and John McGuire $1,536.75 to be used in conducting a crap game. The game was in full progress when the defendant, as the state's attorney, together with police officers, appeared, raided the gambling room, and took possession of the paraphernalia therein together with all of said moneys. After all of the criminal actions had been wholly disposed of, the defendant, as the state's attorney, retained possession of and refused to surrender the moneys which he had taken. As proprietors of the house and owners of the moneys, Kearney and Becker commenced an action for moneys had and received. The trial court rendered a judgment in favor of the plaintiffs. The district court reversed the judgment but on certiorari the supreme court reversed the district court and affirmed the judgment rendered by the trial court. On the authority of the foregoing cases it is clear the claimants had a cause of action against the plaintiff for moneys had and received. But that right is limited to the amount of the stake or deposit. Restatement of the Law, Contracts, sec. 524.

[5-7] However, the plaintiff earnestly suggests that this is an action to determine the rights of third-party claimants and that they have not identified their property. We think the point may not be sustained under the facts introduced in evidence. Each claimant testified he took so much of his money and deposited it with Kyne. The latter testified he received the money, put it in a valise, so retained it, and had it in his possession in the valise when the sheriff made his levy. There is no evidence to the contrary. In support of the judgment we must assume the trial court so found the fact. That evidence clearly established the identity of a fund. Lathrop v. Bampton, 31 Cal. 17, 89 Am.Dec. 141. The fact that the sheriff did not take the entire fund did not preclude the claimants from asserting their rights against that portion of the fund taken by the sheriff. Under similar facts it was held proper for a court of equity to take jurisdiction of the entire fund and administer it. Dauler et al. v. Hartley, 178 Pa. 23, 35 A. 857.

[8-11] In presenting their claims the claimants inserted certain irrelevant facts. However, it is not even claimed that the written claims did not set forth facts showing the amount, title, and possession of the deposit which each of the claimants put up. Apparently they misconceived their rights but it is the settled law of this state that although a party misconceives the relief to which he is entitled, if, within the scope of his proof, he establishes any cause of action he should not be sent out of court without such relief as he has shown he was entitled to receive. Hillyer v. Eggers, 32 Cal.App. 764, 766, 164 P.

27. Therefore, the surplusage contained in the written claims may be disregarded. In presenting their claims each claimant was in effect presenting a cause of action for specific moneys had and received. As shown above they identified the fund and were entitled to carve out of it the deposit made by each. Newport v. Hatton, 195 Cal. 132, 150, 231 P. 987. They were also bound to prove two things, to-wit: the right of each to the money and the defendant's possession. In Merchants' Bank of Macon v. Rawls, 7 Ga. 191, 50 Am.Dec. 394, on page 395, the supreme court of Georgia said: "The plaintiff in this action relied upon his counts for money had and received. We view it as an action brought by the bank for money claimed to belong to it, ex æquo et bono, in the hands of the defendant. By the proofs it seems that Mr. Rawls, whilst he was president of the bank, sold two judgments belonging to the bank to Joseph Bond, and received the money. This suit goes for that money. The principles upon which the equitable action for money had and received depends are settled. It lies in all cases for the plaintiff's money in the hands of the defendant, which in equity and good conscience he has no right to retain, *and it is necessary for the plaintiff, generally, to prove only two things, to wit: his right to the money, and the defendant's possession.* In this case the court below held, that he must go further, and prove that the defendant had not accounted for it. That decision gave rise to the first exception." (Italics ours.) To the general proposition that the claimant need prove only his title and the defendant's possession, the court cited many authorities. True, in the instant case much evidence was introduced of and concerning the transactions between each claimant, Tom Kyne, and others. However, that evidence was wholly immaterial. Kearney v. Webb, supra. As we have shown above, in order to prove their claims the claimants were not bound to introduce any evidence whatever concerning the bets and the immaterial evidence so introduced may be wholly disregarded. Each proved his title and it is not even claimed that the plaintiff had any title other than by virtue of the writ levied by the sheriff. Tom Kyne asserted no title whatever.

[12] The trial court allowed each claim as presented deducting therefrom five per cent. The amount was ascertained by taking into consideration the illegal betting agreement. As shown above evidence of that agreement was improperly admitted. The judgment should have been for the amount of the stake deposited by each claimant—no more, no less.

The judgment is reversed.

I concur: NOURSE, P. J.

SPENCE, Justice (dissenting in part).

I concur in the reversal of the judgment of the trial court but I cannot agree with the portions of the majority opinion which indicate that the third-party claimants were entitled to some relief in this proceeding. I therefore dissent from said portions of the majority opinion as I am of the view that the judgment should be reversed with directions to the trial court to enter judgment denying any relief to the third-party claimants.

This was a proceeding "for the purpose of determining title to the property in question". Code Civ.Proc. sec. 689. The property in question was the money upon which the sheriff had levied. I find nothing in the record which would warrant a judgment determining that the third-party claimants had title to said money or any part thereof.

Said section 689 provides that "for the purpose of determining title, the third party claimant shall have the burden of the proof". The money in question was in the possession of the defendant Kyne at the time of levy and it presumptively belonged to him. Code Civ.Proc. sec. 1963, subds. 11 and 12. The third-party claimants could not prove title in themselves by a mere showing that they had previously paid or delivered certain sums to defendant Kyne. Code Civ.Proc. sec. 1963, subds. 7 and 8. It was therefore necessary under the circumstances for the third-party claimants to prove the nature of their transactions with defendant Kyne in their attempt to show any interest in the money or any claim whatever against defendant Kyne. Such proof was not only material but it was absolutely indispensable. The claimants made such proof and they contend that it showed that defendant Kyne was a trustee, bailee or stakeholder in said transactions, that defendant Kyne had no title to the money and that they were therefore entitled to judgment determining that title was in them. I believe there are two complete answers to this contention.

First, it appears from the evidence presented by the claimants themselves that defendant Kyne was not a trustee, bailee or stakeholder in said transactions but was a principal in all of said transactions. Each transaction of each individual claimant was had solely with defendant Kyne and in each such transaction the claimant "bought" a ticket evidencing his bet with defendant Kyne. The testimony was that the claimant "bet him (Kyne) $1,500" or some other amount. In speaking of the transactions defendant Kyne testified that he would "sell" the tickets. No bet of any claimant was made contingent upon the ability of defendant Kyne to obtain any other bet but each transaction constituted a firm transaction between the defendant Kyne and the individual claimant at the time of the delivery of the ticket and the payment of the purchase price, the defendant Kyne agreeing to pay the amount specified on the ticket in the event of the happening of the specified contingency. The fact that defendant Kyne may have ordinarily endeavored to "balance" the bets in order that he would incur no risk and in order that he would be certain to profit to the extent of at least five per cent of the total amount bet did not change the nature of said transactions. Each bet made was essentially a bet made by the individual claimant with defendant Kyne and title to the money, paid by the claimant to defendant Kyne as the purchase price of his ticket, passed to defendant Kyne at the time of the purchase of the ticket. The mere fact that the defendant Kyne, who was the judgment debtor in the main action here, saw fit to keep his money in a valise rather than to deposit it in his bank account cannot be accorded any significance. Under the testimony said claimants were at most mere creditors of defendant Kyne by reason of their transactions with defendant Kyne and they were not entitled, as such creditors, to any relief in this proceeding to determine title.

Second, even if it be assumed, contrary to the fact, that the evidence concerning said transactions tended to show that it was the intention of the parties that defendant Kyne should be a mere trustee, bailee or stakeholder, I nevertheless believe that the third-party claimants should be denied any relief in the instant case. In making their essential proof regarding their transactions with defendant Kyne, they were compelled to disclose and did disclose that both they and defendant Kyne had committed criminal offenses in entering into said transactions. Pen.Code, secs. 60, 61 and 337a. Under these circumstances, it appears settled that they were not entitled to any relief. Matthews v. Lopus, 24 Cal.App. 63, 140 P. 306; Schenck v. Hirshfeld, 22 Cal.App. 709, 136 P. 725; see, also, Haruko Takeuchi v. Schmuck, 206 Cal. 782, 276 P. 345; Conte v. Busby, 115 Cal.App. 732, 2 P.2d 458; Chateau v. Singla, 114 Cal. 91, 45 P. 1015; Berka v. Woodward, 125 Cal. 119, 57 P.2d 777, 45 L.R.A. 420, 73 Am.St.Rep. 31; Smith v. California Thorn Cordage Co., 129 Cal. App. 93, 18 P.2d 393; Butler v. Agnew, 9 Cal.App. 327, 99 P. 395; Schur v. Johnson, 2 Cal.App.2d 680, 38 P.2d 844; Asher v. Johnson, 26 Cal.App.2d 403, 79 P.2d 457.

As was said in Matthews v. Lopus, supra, 24 Cal.App. at page 68, 140 P. at page 308, "Necessarily, under the circumstances, the plaintiff, in attempting to state a cause of action, was not only required to plead his own turpitude in the transaction, but was compelled to admit that the transaction itself constituted a crime under the laws of this state. As has heretofore been stated, the law, as administered either in courts of law or of equity, will not, obviously, interpose to grant relief to the parties to such a transaction from any of the effects thereof, but will leave them where it finds them". And in Schenck v. Hirshfeld, supra, 22 Cal.App. at page 711, 136 P. at page 726, the court said, "So in this case, when plaintiffs deposited the $500 with defendant, they committed a misdemeanor; defendant likewise committed a misdemeanor in accepting the money on the conditions stated. Shall the courts then lend their aid to enable persons who have committed a public offense to recover the property which was used in the perpetration thereof? It would seem that the plaintiffs, upon their own statement of the facts, have shown themselves not to be entitled to seek any aid in a court of justice." The authorities above cited do not confine the application of the foregoing rules to controversies involving only the parties to the illegal transactions as contended by the claimants. See Schur v. Johnson, supra; Asher v. Johnson, supra; Conte v. Busby, supra.

As the controlling principles of law appear to be well settled in this jurisdiction, authorities from other jurisdictions cannot be helpful to the third-party claimants in the instant case. It may be stated, however, that in Kearney v. Webb, 278 Ill. 17, 115 N.E. 844, 3 A.L.R. 1631, which is strongly relied upon by the claimants, the money was taken from the possession of the gambling hall proprietors and it presumptively belonged to them. They were not required to prove any prior illegal transactions in order to establish their claim against the officials who had raided their establishment and had taken the money from their possession.

For the foregoing reasons, I believe the judgment should be reversed with the directions above stated.

37 Cal.App.2d 58

CASPAR LUMBER CO. v. STOWELL.

Civ. 11220.

District Court of Appeal, First District,
Division 2, California.
Jan. 31, 1940.

1. Appeal and error 🔑854(3)

Where defendants interposed a general and special demurrer which was sustained without leave to amend and plaintiff did not request leave to amend, question before District Court of Appeal, on appeal, was whether demurrer to complaint was good upon any ground.

2. Specific performance 🔑114(2)

In action to recover balance due on contract for sale of real property, complaint which did not allege that transaction was fair and just and supported by an adequate consideration did not state cause of action for specific performance.

3. Vendor and purchaser 🔑328

A complaint failing to allege market value of land at time of purchaser's breach of contract was insufficient as complaint for damages under statute. Civ.Code, § 3307.

4. Vendor and purchaser 🔑328

Under statute, the excess of amount due seller over value of land to him is measure of damages for breach by buyer, and complaint failing to allege such value does not plead a cause of action for damages. Civ.Code, § 3307.

5. Vendor and purchaser 🔑314(1)

A complaint for recovery of balance due on contract to purchase real property was demurrable, in absence of allegation of a tender of performance by vendor, where the purchase price was to be paid in installments and deed was to be made when whole purchase price was paid.

6. Vendor and purchaser 🔑301

A vendor, in event of breach by vendee, may bring suit for purchase price installments which are due, for damages for breach, for specific performance, to foreclose, or to quiet title.

7. Pleading 🔑59

A general offer to do equity or a plea of readiness and willingness will excuse a plea of tender in a bill of equity.

8. Vendor and purchaser 🔑76

Where obligation of vendor is to convey upon payment of full purchase price, the two conditions are dependent and concurrent.

9. Vendor and purchaser 🔑314(1)

Where contract provided for payment of purchase price in installments, and required deed to be made when whole purchase price was paid, vendor who, upon breach by vendee, elected to claim entire purchase price could not excuse failure to plead a tender by reliance on fact that purchaser might not satisfy judgment or that purchaser might sue to quiet title or sue in equity to compel vendor to execute a deed.

10. Vendor and purchaser 🔑303

Where, under contract for sale of real property calling for payment of purchase price in installments with provision for acceleration in event of nonpayment of installments, vendor exercises acceleration option and declares whole amount due, the parties are in same condition as when final payments become due by lapse of time fixed in the contract, and hence vendor's demand for payment in full cannot put vendee in default without tender of deed.

11. Vendor and purchaser ⚷314(1)

Where vendor exercised acceleration option and declared whole amount of purchase money due, if conduct of purchaser waived a tender of deed, vendor in seeking recovery of balance of purchase money should have alleged the facts upon which claim of waiver was based.

12. Appeal and error ⚷917(1)

Where, in ruling on demurrer, trial court found nothing in complaint suggesting a waiver by purchaser of tender of deed by vendor, the District Court of Appeal could not assume such facts from statements in the briefs.

13. Appeal and error ⚷757(1)

A point which was not raised or stated as a "question involved" in appellant's brief was not properly before the District Court of Appeal.

14. Pleading ⚷416

Plaintiff who did not ask leave to amend insufficient complaint could not claim error in order sustaining demurrer without leave.

◆

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by the Caspar Lumber Company against Jean M. Stowell to recover the balance due on a written contract for the sale of real property. Judgment for defendant, and plaintiff appeals.

Affirmed.

Faulkner, Doyle & Sanford, of San Francisco (William T. Doyle and William P. Clecak, both of San Francisco, of counsel), for appellant.

Douglas M. Moore and Keyes & Erskine, all of San Francisco, for respondent.

NOURSE, Presiding Justice.

[1] Plaintiff sued to recover the balance due upon a written contract for the sale of real property. The defendant interposed a general and special demurrer, which was sustained without leave to amend. Since the plaintiff did not request leave to amend, the question before us is whether the demurrer to the complaint is good upon any ground. This limitation is stated clearly in Stillwell Hotel Co. v. Anderson, 4 Cal.2d 463, 464, 50 P.2d 441, as follows: "The record fails to show that leave to amend was asked and refused between the dates of order and judgment; hence no error may be claimed in that respect, and appellant, having declined to amend, must stand upon his pleading as against the demurrer on both its general and special grounds. Haddad v. McDowell, 213 Cal. 690, 3 P.2d 550." and in Swasey v. De L'Etanche, 17 Cal.App.2d 713, 715, 62 P.2d 753, 754, where it is said: "Although the order did not state the grounds upon which the demurrer was sustained, the judgment must be affirmed if the demurrer was good upon any ground therein stated. Penziner v. West American Finance Co., 133 Cal.App. 578, 24 P.2d 501. The record does not disclose that plaintiffs requested leave to amend, nor do they now claim that they made such request. Under such circumstances, if the special demurrer was well taken in any particular, the order sustaining it without leave to amend would not constitute reversible error even if the complaint stated a cause of action. Haddad v. McDowell, 213 Cal. 690, 3 P.(2d) 550; Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 16 P.(2d) 268; Fitzpatrick v. Fidelity & Casualty Co. [7 Cal.(2d) 230], 60 P.(2d) 276."

The complaint states generally that plaintiff agreed to sell and defendant agreed to purchase certain land for the full price of $8,000 plus incidentals, payable in semi-annual instalments; the seller retained title and possession and agreed to convey upon payment of the final instalments; $1,500 was paid, and the balance of $6,500 plus taxes and interest was declared due in its entirety by the seller on September 23, 1937. The complaint does not allege that the rights of the vendee have been forfeited or that tender of a conveyance was made; but does plead that plaintiff was willing and able to perform all its obligations under the contract.

The appellant suggests three possible remedies which he might have under the circumstances and argues that his complaint should be held sufficient as pleading at least one of the three. These are: (1) the right to specifically enforce the contract, (2) an action for damages for breach of the contract under section 3307 of the Civil Code, and (3) an action for the balance due under the terms of the contract.

[2-4] (1) The complaint fails to state a cause of action for specific performance because it does not allege that the transaction was fair and just and supported by an adequate consideration. 23 Cal.Jur., p. 493.

(2) It is insufficient as a complaint for damages under section 3307 of the Civil Code because it fails to allege the market value of the land at the time of the breach. The excess of the amount due the seller over the value of the property to him is the measure of damages fixed in the code section. A complaint failing to allege such value does not plead a cause of action for damages. Bohall v. Diller, 41 Cal. 532. These conclusions the appellant does not dispute.

[5] (3) By his failure to allege a tender of performance by the seller the pleader has rendered his complaint demurrable. The necessity of such a tender is not a matter of controversy in this state. The rule is thus stated in Boone v. Templeman, 158 Cal. 290, 297, 110 P. 947, 950, 139 Am.St. Rep. 126: "Where in a contract for the sale of land the price is made payable in installments at different times and the deed is to be made when the whole is paid, the vendor may, upon failure to pay any intermediate installment, forthwith sue for its recovery. But, if he allows the whole to become due, the payment of the price then becomes a dependent and concurrent condition, nonpayment alone does not put the vendee in default, the vendor must tender a deed as a condition to demanding payment of the price, and he cannot, without such tender, declare a forfeiture, or maintain a suit either for the whole price, or for an intermediate installment."

Appellant seeks to confine the application of the rule to those cases in which "the vendor waits until the maturity of the contract before filing suit". Appellant cites and relies upon Christian v. Johnson Construction Co., 161 Md. 87, 155 A. 181, as the only authority upon which the argument is founded that, when a vendor claims a default of the whole purchase price under an acceleration clause, his suit to recover the balance due is not a suit to recover the instalments due, but an action for the breach, and that no tender is necessary. The case stands alone and does not represent the California rule.

[6-10] In case of breach by the vendee, the vendor may bring suit (1) for the instalments which are due; (2) for damages for the breach; (3) for specific performance; (4) to foreclose; or (5) to quiet title. The first two actions are at law, the last three in equity. A general offer to do equity, or a plea of readiness and willingness will excuse a plea of tender in a bill of equity. 26 R.C.L. p. 626. This is on the principle that a court of equity once acquiring jurisdiction of the cause will assume full jurisdiction in order to do complete equity. But there is no such rule in respect to a pure action at law such as we have here. In such a case, where the obligation of the vendor is to convey upon payment of the full purchase price, the two conditions are dependent and concurrent. No other rule is possible. Paragraph IV of the contract of sale gives the vendor the option in case of any default of vendee, to claim the entire balance due, or to claim the rights of the vendee forfeited. The complaint pleads that the vendor elected to claim the entire purchase price, and the written notice to the vendee pleaded as an exhibit is to that effect. No forfeiture was attempted and none pleaded. The rights of the parties are plain—if the vendor recovers the full purchase price, the vendee is entitled to a conveyance of the property. We are not impressed with appellant's suggestion that respondent might not satisfy the judgment, and hence no tender would be necessary, or that respondent might sue to quiet title or sue in equity to compel appellant to execute a deed. The principle of the ruling cases is that where under a contract for the sale of real property calling for the payment of the purchase price in instalments, with an acceleration clause in event of nonpayment of any instalment, the vendor exercises the acceleration option and declares the whole amount due, the parties are in the same position as when the final payments become due by the lapse of time fixed in the contract. As above noted, the appellant herein did not claim a default or forfeiture, but demanded payment in full. Such a demand cannot put the vendee in default without a tender of a deed. Lemle v. Barry, 181 Cal. 6, 10, 183 P. 148.

[11-13] Appellant suggests that the conduct of respondent may have waived a tender. If so, the facts upon which the claim of waiver is based should have been pleaded. In ruling on the demurrer, the trial court found nothing in the complaint suggesting a waiver, and we are not permitted to assume such facts from statements in the briefs. Furthermore, the point was not raised or stated as a "question involved" in appellant's brief and is not properly before us.

[14] For these reasons the plaintiff should have asked leave to amend the complaint, but not having done so, he may not

claim error in the order sustaining the demurrer without leave.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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37 Cal.App.2d 108

ROSENBLATT v. CREDIT DISCOUNT CO. et al.

Civ. 11321.

District Court of Appeal, First District, Division 2, California.

Feb. 1, 1940.

1. Assignments ⇨85

An assignee who first gives notice to debtor acquires priority as between two bona fide assignees of creditor for value.

2. Assignments ⇨85

Assignee who for value accepted assignment of accounts receivable without notice of prior assignment to others, and who immediately gave notice to debtors of his assignment, was entitled to priority over others who gave no such notice.

3. Courts ⇨91(1)

The District Court of Appeal would feel impelled to follow rule firmly settled by decisions of the Supreme Court, even if it were impressed with argument for adoption of contrary rule.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Harry Rosenblatt against the Credit Discount Company and others to obtain a determination of the priority of plaintiff's claim to certain accounts receivable, as against the claim of defendant to the same accounts. Judgment for plaintiff, and defendants appeal.

Affirmed.

Samuel A. Miller, Samuel Reichler, and Bertram H. Ross, all of Los Angeles, for appellants.

Joseph Duchowny, of Los Angeles, for respondent.

SPENCE, Justice.

This action was brought to obtain a determination of the priority of plaintiff's claim to certain accounts receivable as against the claim of defendants to the same accounts receivable. A judgment was entered in favor of plaintiff and the defendants appeal.

The material facts are not in dispute. The original owner of said accounts receivable assigned said accounts for value to both plaintiff and defendants. The assignment to defendants was prior in point of time but defendants gave no notice of the assignment to the debtors. During the negotiations of the plaintiff with the assignor, plaintiff made inquiry of the debtors and ascertained the correctness of the assignor's statement of the accounts. Plaintiff entered into his transaction with the assignor without any notice of the assignment to defendants. He immediately gave notice to the debtors of his assignment. The only question involved is that of the priority between the claims of plaintiff and defendants.

[1-3] It is conceded by all parties that the settled rule in this jurisdiction is that found in Graham Paper Co. v. Pembroke, 124 Cal. 117, 56 P. 627, 44 L.R.A. 632, 71 Am.St.Rep. 26, which rule has been followed by the Supreme Court in numerous cases, the latest of which appears to be City of Los Angeles v. Knapp, 7 Cal.2d 168, 60 P.2d 127. The rule, as tersely stated in the last-mentioned case at page 171 of 7 Cal.2d, at page 129 of 60 P.2d, is as follows: "As between two bona fide assignees for value the one who first gives notice to the debtor acquires priority." Defendants argue for a contrary rule claiming that the settled rule in this jurisdiction should be discarded. We are not impressed with defendants' argument. The rule of the above-mentioned cases appears to be in accord with the majority view (see 31 A.L.R. 876), and it was adopted after a careful consideration of the conflict of authority in other jurisdictions. Graham Paper Co. v. Pembroke, supra. But even if we were impressed with defendants' argument, we would feel impelled to follow the rule thus firmly settled by the decisions of our Supreme Court.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

37 Cal.App.2d 41

PEOPLE v. MANNING.

Cr. 3282.

District Court of Appeal, Second District, Division 1, California.

Jan. 30, 1940.

1. Gaming ⚿98(5)

Evidence sustained conviction under statute denouncing as a crime the keeping or occupancy of any room, tenement, etc., with books, papers, or other devices or paraphernalia for purpose of recording or registering bets or wagers on the result of any horse race. Pen.Code, § 337a, subd. 2.

2. Gaming ⚿75(1)

Under statute denouncing as a crime the keeping or occupancy of any room, tenement, etc., with books, papers, or other devices or paraphernalia for purpose of recording or registering bets or wagers on the result of any horse race, it is not the actual making of bets, but the occupancy of a room with book or books, paper or papers, etc., for purpose of recording such bets, which constitutes offense denounced. Pen.Code, § 337a, subd. 2.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Gerald Manning was convicted under statute denouncing as a crime the keeping or occupancy of any room, tenement, etc., with books, papers, or other devices or paraphernalia for the purpose of recording or registering bets or wagers on the result of any horse race, and he appeals.

Judgment affirmed.

Maurice A. Gleason, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for respondent.

WHITE, Justice.

By an information filed in the superior court appellant was charged with violation of subdivision 2 of section 337a of the Penal Code, which denounces as a crime, among other things, the keeping or occupancy, for any period of time whatsoever, of any room, tenement, etc., with books, papers, or other devices or paraphernalia for the purpose of recording or registering bets or wagers upon the result of any horse race. When the case was called for trial a jury was waived, and by stipulation the cause was submitted to the trial judge upon the transcript of the testimony adduced at the preliminary examination and the exhibits introduced thereat. Appellant was adjudged guilty, and from the judgment pronounced against him he prosecutes this appeal.

The pertinent facts are that on June 2, 1939, at about 11:30 o'clock in the morning, police officers forced open the door of a residence in the city of Los Angeles and found therein two persons, the defendant and his wife. On a table in the living room the officers found four telephones, and in the fireplace where the ashes are put were found certain paraphernalia denominated as betting markers and run-down sheets. There was also a National Scratch Sheet, which contained information concerning races to be run on that same day, June 2. Also found in the room was a teleflash connected to the radio, although it was not in operation at the time the officers came in. Certain other paraphernalia testified to as being used in connection with the acceptance and recordation of bets on horse races was also found in the house. Following discovery of this paraphernalia, the officers had a talk with the defendant in which the latter stated that he had been working there about six months and that he took in about $400 or $500 worth of bets each day; that he was in business for himself.

It further appears from the transcript that a police officer was permitted without objection to testify that he was familiar with the paraphernalia in question; that it contained the names of horses that were racing on that day at various race tracks and also contained notations as to the amounts wagered and information as to whether the bet was placed for the horse to win or run second or third in the race. Illustrative of this type of testimony is the following:

"Q. Do you find the number '286' on that sheet? A. I do.

"Q. And is there a name set opposite to that number 286? A. There is.

"Q. What is the name? A. It is Tuley Rieslin.

"Q. What does that purport to be a name of? A. A horse.

"Q. Do you find the name of that horse on this National Scratch Sheet which is marked A for identification? A. I do.

"Q. Where? A. It is the fifth race at Delaware Park.

"Q. On what page of the scratch sheet, People's Exhibit A for identification, does that appear? A. On the third page.

"Q. About the middle of the column to the right on the third page? A. It is the second column to the left.

"Q. The column to the left on the third page? A. Yes.

"Q. The middle of that column? A. Yes, sir."

[1] Appellant contends that the evidence is insufficient to establish his guilt. This claim cannot be sustained. The character of the paraphernalia found on the premises, established by the testimony of the officer without objection, as above noted, coupled with the officer's testimony as to the use to which the same could be and in the instant case actually was being put, and the presence of the defendant and his wife alone on the premises, a residence, at 11:30 o'clock in the morning, all point unerringly to the conclusion that appellant had the paraphernalia in his possession and was occupying the premises in question for the unlawful purpose defined by the section. The offense with which appellant was charged is complete when it is shown that the accused occupied a room or enclosure with papers, etc., for the purpose of recording a bet or bets on the result or purported result of any horse race or purported horse race.

[2] It is not the actual making of the bets, but the occupancy of a room with a book or books, paper or papers, etc., for the purpose of recording such bets, which constitutes the offense denounced by subdivision 2 of section 337a of the Penal Code. Every element of the offense was therefore sufficiently established; and when there are added defendant's admissions, as reflected in the record, to one of the officers that he had been working there about six months and was receiving between $400 and $500 worth of bets each day, his guilt is demonstrated. Appellant can find no comfort in the cases relied upon by him (People v. Fisk, 32 Cal.App.2d 26, 89 P.2d 142; People v. Rabalete, 28 Cal.App.2d 480, 82 P.2d 707), for the reason that in those cases many persons other than the appellant were in the room at the time of the arrest, and the question there involved was the sufficiency of the evidence to connect the particular appellant with the paraphernalia or occupancy of the room; while in the instant case the evidence of such connection is ample. Appellant here did not take the stand to deny the testimony of the police officer, nor did he offer any defense whatsoever either to the charge of occupancy of the place or as to the verity of his alleged incriminatory admissions as testified to by the police officer. An examination of the record by us reveals no prejudicial error.

The judgment appealed from is affirmed.

We concur: YORK, P. J.; DORAN, J.

37 Cal.App.2d 120

MACKLIN v. BRITTAIN et al.

Civ. 2442.

District Court of Appeal, Fourth District, California.

Feb. 1, 1940.

1. Appeal and error 🔑110

An order denying a motion for new trial is not appealable. Code Civ.Proc. § 963.

2. Mines and minerals 🔑79(1)
Quieting title 🔑7(2)

Where a landowner assigns fraction of his royalty under oil lease unlimited in duration, assignee acquires a profit a prendre and a vested incorporeal hereditament, present estate, or interest in land, which is a chattel real, if it is to endure for years, and against which landowner cannot quiet title after conveyance of leased property to him by lessee's quitclaim deed.

◆

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by J. H. Macklin against Jack Brittain and others to quiet title to portions of landowners' royalty under an oil lease. Judgment for plaintiff, and defendants appeal.

Reversed.

Paul C. Hill and E. P. Peers, both of Los Angeles, for appellants.

MARKS, Justice.

[1] This is an appeal from a judgment and an order denying a motion for new trial in an action to quiet title against the owners of portions of the landowners' royalty under an oil lease. An order denying a motion for new trial is not appealable. Sec. 963, Code Civ.Proc.

We have no appearance by respondent who has furnished neither a brief nor an argument supporting the judgment.

On August 22, 1933, plaintiff, as owner, leased to the San Marque Oil Company, a corporation, land in the city of Huntington Beach, California, for the purpose of drilling for and producing oil and other hydrocarbons therefrom. The lease was for a period of five years and "so long thereafter as drilling operations on said premises are being conducted, or deferred under provisions herein, and should production of one or more of the products specifically mentioned in the next succeeding paragraph result from said drilling operations, then this lease shall remain in force so long thereafter as one or more of said products are producible from said premises, subject to compliance with the terms and conditions hereof". A twenty-five per cent royalty was reserved to the landowner.

On the same day the plaintiff and his wife assigned to Jack Brittain eight and one-third per cent landowners' royalty. Brittain assigned interests in the landowners' royalty to the other defendants. These assignments were duly acknowledged and recorded. Thereafter the lessee quitclaimed the leased property to plaintiff.

[2] It is now thoroughly settled in California that where a landowner assigns fractions of his landowner's royalty receivable under a lease which is unlimited in duration, the assignee acquires a profit a prendre and has vested in him, "an incorporeal hereditament, a present estate, an interest in the land, which is a chattel real if it is to endure for years" (Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788, 794, 101 A.L.R. 871), against which the landowner cannot quiet title under the circumstances here disclosed. Standard Oil Co. v. J. P. Mills Organization, 3 Cal.2d 128, 43 P.2d 797; Dabney-Johnston Oil Corp. v. Walden, 4 Cal.2d 637, 52 P.2d 237; Dabney v. Edwards, 5 Cal.2d 1, 53 P.2d 962, 103 A.L.R. 822; Scheel v. Harr, 27 Cal.App.2d 345, 80 P.2d 1035; Morrow v. Coast Land Co., 29 Cal.App.2d 92, 84 P.2d 301; Lever v. Smith, 30 Cal.App.2d 667, 87 P.2d 66; Pimentel v. Hall-Baker Co., 32 Cal.App.2d 697, 90 P.2d 588; Sandrini v. Branch, 32 Cal.App.2d 707, 90 P.2d 593; Andrews v. W. K. Company, Cal.App., 94 P.2d 605. It follows that the judgment cannot be sustained.

Judgment reversed. The appeal from the order denying the motion for new trial is dismissed.

We concur: BARNARD, P. J.; GRIFFIN, J.

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37 Cal.App.2d 65

PEOPLE v. ONE 1937 PLYMOUTH 6 4-DOOR SEDAN, ENGINE NO. P4-211565 (ANGLO CALIFORNIA NAT. BANK OF SAN FRANCISCO, et al., Interveners).

Civ. 11104.

District Court of Appeal, First District, Division 2, California.

Jan. 31, 1940.

Rehearing Denied March 1, 1940.

Hearing Denied March 30, 1940.

1. Forfeitures 🔑5

The innocence of owner is no defense to forfeiture proceeding where owner has intrusted automobile to person who, without owner's knowledge, used it in violation of state narcotic act. St.1935, p. 2210, § 15.

2. Forfeitures 🔑2

The owner of a vehicle who has given consent to its operation by another is not deprived of any constitutional right by forfeiture of his property on account of operator's violation of state narcotic act, even though owner is without knowledge of or has failed to acquiesce in its illegal use. St. 1935, p. 2210, § 15.

3. Forfeitures 🔑5

An automobile which was taken from owner without his permission, and which was used by taker in violation of state narcotic act, would not be declared forfeited to state. St.1935, p. 174, § 503; p. 2210, § 15.

4. Forfeitures 🔑2

That permitting owner to defend proceeding for forfeiture of an automobile for violation of state narcotic act, on ground that automobile was used without his consent or permission, opens way for collusion and perjury in attempt to defeat forfeiture, is not sufficient consideration to justify an apparent arbitrary invasion by legislature of property rights protected by both state and federal Constitutions. St.1935, p. 2210, § 15.

5. Forfeitures 🔑5

Evidence supported finding that use of automobile by owner's son in violation of state narcotic act was without permission or consent of owner, so as to support judgment denying forfeiture of automobile to state, where owner testified that following accident she had forbade son to use automobile in future but that son on numerous occasions had "sneaked" automobile. St.1935, p. 2210, § 15.

6. Forfeitures 🔑5

The provision in state narcotic act that lien claimant can defend proceeding for forfeiture of automobile for violation of state narcotic act on ground that his lien was acquired in good faith, without knowledge of actual or intended unlawful use of automobile, and after reasonable investigation of moral responsibility, character, and reputation of purchaser, is not intended to provide sole defense which lien claimant may assert, but is intended as defense in addition to those available to owner. St.1935, p. 2210, §§ 15, 15(e, f).

7. Forfeitures 🔑5

The interest of an owner of automobile who bases his claim upon lien, mortgage, or conditional sales contract, is not subject to forfeiture to state for violation of state narcotic act, in absence of proper forfeiture of purchaser's interest. St.1935, p. 2210, §§ 15, 15(e, f).

8. Forfeitures 🔑5

In proceeding for forfeiture of automobile for violation of state narcotic act, allowance of costs to prevailing interveners and claimants was error. St.1935, p. 2210, § 15.

◆

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

Proceeding by the People of the State of California for the forfeiture of one 1937 Plymouth 6 4-door Sedan, Engine No. P4-211565, wherein the Anglo California National Bank of San Francisco, California, a national banking association, and Grace Barry intervened and filed a claim. From a judgment denying forfeiture, the people appeal.

Affirmed in part, and reversed in part.

Earl Warren, Atty. Gen., and J. Albert Hutchinson, Deputy Atty. Gen., for appellant.

Robert G. Partridge, of San Francisco (Leo Marshall Cook, of San Francisco, of counsel), for claimant, intervener and respondent.

STURTEVANT, Justice.

In a proceeding pursuant to section 15 of the State Narcotic Act (Stats.1929, p. 380 as amended by St.1935, p. 2210, Deering's General Laws No. 5323), for the forfeiture of One 1937 Plymouth 6 4-door sedan, Engine No. P4-211565, the state has appealed from a judgment denying forfeiture and allowing costs to claimants and interveners.

It is undisputed that the automobile was purchased by Grace Barry from the J. E. French Co. on August 13, 1937, and that on said date she executed a conditional sales contract, which was later assigned by the J. E. French Co. to the claimant and intervener, Anglo California National Bank. According to the finding of the trial court there is now due under said conditional sales contract a sum in excess of the value of the automobile. It is also undisputed that on June 14, 1938, the automobile was used by Joseph Barry, a son of Grace Barry in violation of the State Narcotic Act.

Subsequent to the arrest of Joseph Barry and seizure of the automobile, the present action was instituted, and both the registered owner, Grace Barry, and the legal owner, Anglo California National Bank, were duly served. They filed separate answers. Grace Barry claimed an interest in said automobile as the registered owner and denied that the automobile was used in violation of the State Narcotic Act. As a separate defense, she alleged that the use of the automobile by Joseph Barry was without her permission or consent. The Anglo California National Bank intervened, claiming an interest as legal owner by virtue of the conditional sales contract, and likewise denied that the automobile was used in violation of the State Narcotic Act. It was further alleged that said intervener had no knowledge that said automobile was to be used in violation of the State Narcotic Act, and that, prior to the execution of the conditional sales contract, a reasonable investigation of the moral responsibility, character, and reputation of the purchaser was conducted by the claimant and intervener.

Since no contention is made that the automobile was not used in a manner prohibited by the State Narcotic Act, we need not review the facts relating to the unlawful use.

[1] Appellant contends that the trial court erred in finding "That on the said 14th day of June, 1938, and while said automobile was so being used by the said Joseph Barry in violation of the State Narcotic Act of the State of California, said Joseph Barry was driving and operating said automobile without the permission, consent, or knowledge of defendant, Grace Barry, that at said time said Joseph Barry was using and operating said automobile in contravention of the said State Narcotic Act of the State of California without the knowledge or consent of the said Grace Barry". We may readily agree with appellant that the latter portion of the finding, namely that Grace Barry had no knowledge of the unlawful use and did not consent thereto, is immaterial. It is well settled that the innocence of the owner is no defense to a forfeiture proceeding where the owner has entrusted the automobile to the person who, without the owner's knowledge, used it for an unlawful purpose. People v. One 1933 Plymouth Sedan De Luxe Automobile, 13 Cal.2d 565, 568, 90 P.2d 799; Van Oster v. Kansas, 272 U.S. 465, 47 S.Ct. 133, 71 L.Ed. 354, 47 A.L.R. 1044; Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 41 S.Ct. 189, 65 L.Ed. 376. However, we are unable to agree with appellant when it contends that proof that the owner of the automobile did not consent or permit the occupant of the automobile to use it is no defense to a forfeiture of the automobile under the State Narcotic Act. We are cited no case, and have been unable to discover any, holding that where an automobile is taken without the consent of the owner and is used without his permission, the interest of the owner may be declared forfeited, if at some time during the unlawful use the automobile is put to a use for which the law provides a forfeiture. It is true that the statute does not provide that the owner may prove as a defense that the use of the automobile for any purpose was without his consent or permission. Section 15(e) provides only that the owner "may show by competent evidence that the automobile or other vehicle was not in fact used or intended to be used to conceal, convey, carry or transport any of the drugs mentioned in section 1 of this act, or that said drugs were not unlawfully possessed by an occupant of said automobile or other vehicle". No other defenses are provided by the statute. In support of its contention, appellant cites People v. One Ford Coupe, 10 Cal.App.2d 321, 323, 51 P.2d 882. However, in that case this court was not confronted with the defense that the automobile was used without the owner's consent, it clearly appearing that the owner himself had used the automobile in violation of the statute.

[2] Appellant relies strongly upon Goldsmith, Jr.-Grant Co. v. United States, supra, and People v. One Ford V8 Tudor Sedan, 12 Cal.App.2d 517, 55 P.2d 908. In both of those cases the court was concerned only with the situation where the owner of an automobile had entrusted it to another who had put it to an unlawful use. Both cases stand only for the proposition, now well settled, that "the owner of a vehicle who has given consent to its operation by another, is not deprived of any constitutional right by the forfeiture of his property on account of the operator's violation of a statute such as is here involved, even though such owner is without knowledge of or has failed to acquiesce in its illegal use". People v. One 1933 Plymouth Sedan De Luxe Automobile, 13 Cal.2d 565, 568, 90 P.2d 799, 801. In Goldsmith, Jr.-Grant Co. v. United States, supra, the court specifically stated, in laying down the rule which our supreme court has adopted, "And we also reserve opinion as to whether the section can be extended to property stolen from the owner or otherwise taken from him without his privity or consent". 254 U.S. page 512, 41 S.Ct. page 191, 65 L.Ed. 376. See, also, United States v. One Ford Coupe, 272 U.S. 321, 333, 47 S.Ct. 154, 71 L.Ed. 279, 47 A.L.R. 1025. The court was there considering section 3450, R.S. (26 U.S.C.A. §§ 1156, 1441), which like section 15(e) of the State Narcotic Act, was silent upon the question here raised.

[3] In support of the position we have here taken, namely that property of an owner taken from him without his permission or consent and used by the taker for an unlawful purpose proscribed by the act cannot be declared forfeited to the state, we may rely upon the following cases. In United States v. One Buick Roadster, D.C., 280 F. 517, the court said at page 519: "The fiction that the thing is guilty is but a convenience of procedure, to visit justice by way of forfeiture upon those, perhaps unknown, whose conduct contributed to the thing's unlawful use. Otherwise, outlawry, the superstitions of deodand and trial and punishment of inanimate things, have disappeared, and it is doubtful if any modern law purports to confiscate lawful property because unlawfully used by trespasser or thief. If section 3450 does, how can it be maintained in view of the due process clause of the Constitution? What is it but a mere arbitrary act of government in violation of that fundamental right to own property, for the security of which society is organized and government maintained? What immemorial practice of government justifies this legislative power? Wherein are public welfare, and rights common to all, served by this invasion of individual right of property? What principle of justice permits it? To support the proponent no answer comes to mind, and until successfully answered it must be held that the literal import aforesaid of section 3450 contravenes the due process clause, to avoid which, its general terms permitting, again it will be presumed that Congress intended exceptions of trespasser and thief." See, also, United States v. One Reo Speed Wagon, D.C., 5 F.2d 372, 373; United States v. One Ford Coupe Automobile, D.C., 21 F.2d 639, 640; United States v. One Dodge Truck, D.C., 9 F.Supp. 157, and cases therein cited; State v. Goyette, 140 Kan. 732, 37 P.2d 1001; compare United States v. One Haynes Automobile, D.C., 290 F. 399. The line of demarcation established in these cases is whether or not the owner has consented to the use of his property. If he has not, his property is not subject to forfeiture. It he has, the property may be forfeited regardless of his lack of knowledge of or consent to the unlawful use. Such distinction appears sound in view of the decision in Goldsmith, Jr.-Grant Co. v. United States, supra, and the line of decisions in the Federal courts has sprung directly from that case.

We are unable to appreciate how appellant is able to draw any distinction, which he indicates should be drawn, between use by a thief, and use by a person without the consent or permission of the owner. The latter use is unlawful, constituting a trespass or conversion, and the act of driving an automobile without the owner's consent is now a crime. Vehicle Code, § 503 (St.1935, p. 174). The difference is one only of degree and is too slight to justify any distinction.

[4] Appellant strongly argues that if the owner may defend against a forfeiture by proof that the vehicle was used without his consent or permission, the way is opened for collusion and perjury in an attempt to defeat forfeiture. Such a consideration is one to be met by the careful scrutiny of the trial judge, who has at the trial an opportunity to view the witnesses and weigh the credibility of the evidence offered. It is not a sufficient consideration to justify an apparent arbitrary invasion by the legislature of property rights protected by both the state and federal Constitutions.

[5] It is next contended that the evidence does not support the trial court's finding that the use of the automobile by Joseph Barry was without the permission, consent, or knowledge of Grace Barry. After the acquisition of the automobile by Grace Barry in August, 1937, her son, Joseph Barry, had her permission to use the automobile. Grace Barry was nearly seventy years of age and could not drive an automobile. Her automobile was driven by various members of her family, who took her on pleasure trips and shopping excursions. About the first of the year 1938, Joseph Barry was involved in an automobile accident as a result of which the respondent automobile was injured. Grace Barry then forbade him the use of the automobile. Nevertheless, he used the automobile on numerous occasions after the first of the year. Grace Barry testified he would "sneak" the automobile, and that on one occasion his brother Charles attempted to prevent his use of the automobile and a fight ensued, which necessitated calling the police. In spite of the fact that Joseph Barry took the automobile without her consent, Grace Barry continued to keep the keys to the automobile in a bureau in her home. While Joseph

Barry did not reside with her, he had access to the home at all times and could have secured the keys. On the night of June 9, 1938, the automobile disappeared. Grace Barry testified she did not believe the automobile was stolen and that she thought Joseph Barry had it. It did not reappear until after the arrest of Joseph Barry on the night of June 14. Grace Barry testified positively that she did not consent to or permit the use of the automobile by Joseph Barry. While the evidence is sufficient to support a finding that Grace Barry impliedly consented to the use, the trial judge did not so conclude. The evidence on the issue of permission and consent is conflicting and it appears there is substantial evidence supporting the trial court's finding that the automobile was used by Joseph Barry without the knowledge, consent or permission of Grace Barry. For this reason we cannot disturb the trial court's finding.

[6, 7] No brief has been filed in behalf of Grace Barry, and she does not contest this appeal. The only respondent appearing before the court is the Anglo California National Bank. It bases its claim upon a conditional sales contract. The appellant argues the respondent bank cannot avail itself of the defense of lack of consent, but, on the contrary can successfully resist a forfeiture of its interest in the automobile only by proof that its interest was established in good faith, without knowledge that the automobile was to be used or was intended to be used in violation of the State Narcotic Act, and after a reasonable investigation of the moral responsibility, character and reputation of the purchaser. The other two defenses, i. e. that the automobile was not used in the transportation of forbidden narcotics and that the occupant of the automobile was in lawful possession of the narcotics, are not available under the facts of this case. We are unable to agree with appellant's contention. The State Narcotic Act does not contemplate and was not intended by the legislature to work a forfeiture of the lien claimant's interest in the absence of a proper case for forfeiture of the purchaser's interest. Forfeitures of vehicles are governed by section 15 of the State Narcotics Act. It provides: "Any automobile or other vehicle used or intended to be used to conceal, convey, carry, or transport any of the drugs mentioned in section 1 of this act, and any automobile or vehicle in which any of the drugs mentioned in section 1 of this act are unlawfully possessed by an occupant thereof, shall be forfeited to the State of California as in this section provided." Then follows provisions for seizure, notice of seizure, the filing of an answer, and for trial and hearing. In subsection (e) we find: "At the time set for the hearing, any of the *owners* who have verified answers on file may show by competent evidence that the automobile or other vehicle was not in fact used or intended to be used to conceal, convey, carry or transport any of the drugs mentioned in section 1 of this act, or that said drugs were not unlawfully possessed by an occupant of said automobile or other vehicle." Then follows a third defense given to any claimant who bases his claim upon a lien, mortgage, or conditional sales contract. He may prove that his lien was acquired in good faith, without knowledge of an actual or intended unlawful use of the automobile or vehicle, and after a reasonable investigation of the moral responsibility, character and reputation of the purchaser. Subsection (f) provides that in the event of such proof certain steps shall be taken for the protection of that claimant, and expressly provides, "it being the intention of this section to forfeit only the right, title or interest of the purchaser". This defense is not the sole defense which an owner who holds his title as security for some obligation may assert. It is an additional one given to persons falling within that class. Then follows a provision that if a forfeiture is not proper, the court shall order the release of the automobile or vehicle to the owner thereof. The act makes no specific provision for the release of the purchaser's interest and the forfeiture of the lien claimant's interest, and such a result should not be implied. The contention of appellant if correct would result in the return of the automobile or vehicle to the purchaser and the destruction of the lienholder's interest therein. Such a result is absurd and would serve no useful purpose whatever. Moreover, all of the reasons which applied and forced the conclusion that the purchaser may defend upon the ground that he did not consent to the use of the vehicle by the occupant thereof are equally applicable to the lien claimant. The lien claimant is in no manner at fault in entrusting the automobile or vehicle to a purchaser who is

himself innocent. The lien claimant has even less opportunity than the purchaser to prevent a third person's use of the automobile or vehicle without the purchaser's permission or consent. It is our conclusion, therefore, that the interest of an owner who bases his claim upon lien, mortgage, or conditional sales contract, is not subject to forfeiture in the absence of a proper forfeiture of the purchaser's interest.

This holding necessitates an affirmance of the judgment whether or not there was a reasonable investigation of the moral responsibility, character, and reputation of the purchaser by the respondent bank, and we need not discuss the question of the reasonableness of the investigation conducted.

[8] That portion of the decree allowing costs to the interveners and claimants is clearly erroneous and must be reversed. People v. One Plymouth Sedan, 21 Cal. App.2d 715, 69 P.2d 1011.

That portion of the judgment denying a forfeiture and ordering a return of the automobile is affirmed. That portion allowing costs to interveners and claimants is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

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37 Cal.App.2d 98

MONACI v. TURNER et al.

Civ. 2425.

District Court of Appeal, Fourth District, California.

Jan. 31, 1940.

1. Sales 🔑87(3)

In winery owner's action to recover payments made on price of wine filter and damages for defendant's alleged breach of contract to manufacture and deliver filter, evidence supported owner's theory that contract was for manufacture and sale of a complete filter and not a contract for special manufacture of a filter according to submitted specifications.

2. Sales 🔑422

In action for damages for alleged breach of contract to manufacture and deliver a wine filter, where complaint alleged a contract by defendant to manufacture and deliver filter, and defendant admitted the contract and filed cross-complaint to recover unpaid balance of price of filter, findings that facts alleged in complaint were true, except allegations on amount of damages, and that none of the allegations of answer were true and that all allegations of cross-complaint were untrue, except allegations that plaintiff was conducting a wine business and that defendant was conducting a certain business, were conflicting.

3. Sales 🔑87(3)

In winery owner's action to recover payments made on price of wine filter and damages for defendant's alleged breach of contract to manufacture and deliver filter, evidence did not support finding that filter was to be delivered within two weeks, as alleged by owner.

4. Sales 🔑417

In winery owner's action to recover payments made on price of wine filter and damages for defendant's alleged breach of contract to manufacture and deliver filter, evidence did not support owner's allegations with respect to special damages.

5. Sales 🔑418(19)

In winery owner's action to recover payments made on price of wine filter and damages for defendant's alleged breach of contract to manufacture and deliver filter, owner's damages allegedly sustained through having to sell unfiltered wine at less than what wine would have sold for if it had been filtered could not exceed reduction in market value of wine due to its not being filtered, less cost of filtering operation.

6. Sales 🔑418(3)

In winery owner's action to recover payments made on purchase price of wine filter and damages for defendant's alleged breach of contract to manufacture and deliver filter, as respects owner's damages by being compelled to go into open market and purchase a filter at a price greater than he had agreed to pay defendant, owner could only recover the difference in contract price of filter defendant agreed to make and market value of filter of same general type and capacity.

7. Appeal and error ⚷1071(6)

Where each item of special damage alleged in complaint was denied in answer, and trial court awarded damages in a lump sum to plaintiff, failure to find on allegations of special damage was prejudicial to defendant warranting reversal of judgment, especially where no combination of items of proven damages could be found that would make a total sum approaching amount awarded plaintiff.

Appeal from Superior Court, Orange County; Raymond McIntosh, Judge.

Action by Giovanni Monaci, doing business under the fictitious firm name of Garvey Winery, against Mrs. L. A. Turner, doing business under the fictitious firm name of Santa Ana Iron Works, and another, to recover damages for alleged breach of contract to manufacture and deliver a wine filter, wherein defendants filed a cross-complaint. From an adverse judgment, defendants appeal.

Judgment reversed. Appeal from order denying a new trial reversed.

Charles D. Swanner, of Santa Ana, for appellant.

J. Edward Keating, Harold H. Krowech, and Theodore E. Bowen, all of Los Angeles, for respondent.

MARKS, Justice.

This is an action to recover damages for breach of contract to manufacture and deliver a wine filter.

Plaintiff is the owner of the Garvey Winery located in Rosemead, California. He is engaged in the business of manufacturing and selling wines. During the process of manufacture it is necessary to filter the wines by running them under pressure, through a mechanical appliance called a wine filter.

Defendant Mrs. L. A. Turner, also known as Mrs. M. A. Turner, is the owner of the Santa Ana Iron Works located in Santa Ana, California. She testified that through the iron works she was engaged in the work of making "machine shop and foundry accessories, repair parts and so forth". It is admitted that prior to the instant case she had never attempted to manufacture a wine filter.

During the latter part of 1936 defendant employed one Truilizi, who had formerly manufactured and sold wine filters, to solicit business for her. He contacted plaintiff and on or about December 18, 1936, secured an order for the manufacture of a wine filter. A filter was manufactured by defendant for plaintiff and was delivered on March 9, 1937. Plaintiff tried for a week to operate it and it failed to filter and remove the impurities from the wine. Plaintiff then bought another filter of standard manufacture, and, after negotiations pointing to a settlement of the differences between the parties had failed, brought this action to recover payments he had made on the purchase price of the filter, and damages suffered as a result of breach of contract, and of the implied warranty of fitness for use.

The complaint alleges the contract, one of the terms of which was that the filter was to be delivered in two weeks; that the price of the filter was $875; that $200 in cash and $100 credit for an old filter delivered to defendant had been paid on the purchase price. Special damages were alleged as follows: $328.30, being a loss of five cents a gallon on 6,566 gallons of unfiltered wine sold between January 1 and March 9, 1937; $315 for 700 gallons of wine, at forty-five cents a gallon, put through the filter and "made impure and unmarketable"; $56, being one week's salary of Fermo Cuni, wine filterer, in attempting to make the filter work; $7 for electricity used in operating the defective wine filter; $18 worth of filtering aids used during the same operation; $120, the amount plaintiff was compelled to pay in the open market for a workable filter over the contract price of defendant's filter.

Defendant admitted a contract to build a wine filter similar to the West Coast filter, the payment of $200 in cash on its price and the receipt of the old filter, but denied a credit of more than $50 for that machine. She particularly denied that there was any agreement to deliver the filter within two weeks from December 18, 1936, or within any other specified time. All other material allegations of the complaint were denied. It was also alleged that a maritime strike delayed the delivery of materials necessary for the manufacture of the filter which was the reason for the considerable delay in its delivery. Defendant filed a cross-complaint seeking recovery of the unpaid balance of the contract price of the filter.

On the allegations of the complaint the trial court found as follows: "That all the facts alleged in the complaint herein are true except the allegations on the amount of damages and as to these allegations the court finds that plaintiff has sustained and is entitled to damages by reason of the premises in the sum of Six Hundred Eighty ($680.00) Dollars."

The trial court also found that none of the allegations of the answer were true, and that all allegations of the cross-complaint were untrue, except the allegations that plaintiff was conducting a wine business under the fictitious name of Garvey Winery at Rosemead, California, and that defendant was conducting business under the fictitious name of Santa Ana Iron Works at Santa Ana, California. There are no other findings of fact.

Plaintiff relies on a contract resting partly in writings and partly in parol evidence. The writings consist of two letters. The first letter merely stated that defendant would manufacture a "wine filter, complete, to be similar in construction to the West Coast Filter with pumps, motors, agitating tank etc., ready for operation", for $775, including the old filter, price to be "net F. O. B. your plant". The second letter more specifically stated the advance payment required, and contained the following description: "The filter proper shall be of copper and all fixtures to be chrome plated. Filtering screens shall total not less than 1152 square inches. West Coast pump shall be used. Motors shall be either U. S. Electrical Mfg. Co., or Sterling Electric Co. All motors shall be semi-enclosed, as set forth by said manufacturers. * * * P. S. Motor to be ball Brg. tipe filter prodocution to produce 750 to 1000 gl. H."

The portions of the contract relied upon by plaintiff, resting in parol, are found in a conversation held between plaintiff and Truilizi who was not available as a witness for either party. Generally speaking, plaintiff testified that defendant, through her employee, agreed to deliver, within thirty days, a filter capable of filtering and cleaning between 750 and 1000 gallons of wine per hour.

Defendant first urges that there is no liability on her part because, the contract was not one for the sale of a filter but one for the special manufacture of a filter according to the specifications furnished by plaintiff, she not being engaged in the wine filter manufacturing business which was known to him, and having furnished him a filter similar to the West Coast filter as required by him. Citing, Flynn v. Dougherty, 91 Cal. 669, 27 P. 1080, 14 L.R.A. 230; Bancroft v. San Francisco Tool Co., 120 Cal. 228, 52 P. 496; Remsberg v. Hackney Mfg. Co., 174 Cal. 799, 164 P. 792; Golden Eagle Milling Co. v. Old Homestead Bakery, 59 Cal. App. 541, 211 P. 56; United Iron Works v. Standard B. C. Co., 69 Cal.App. 384, 231 P. 567; Merchants' Finance Co. v. Acosta Bros., 82 Cal.App. 431, 255 P. 772; Thompson v. Fifth & Hill Bldg. Co., 110 Cal.App. 317, 294 P. 60.

[1] Without narrating the evidence in detail, it should be sufficient to say that, though not entirely clear and satisfactory, it is probably sufficient to support plaintiff's theory that the contract was for the manufacture and sale of a complete wine filter and not one for the special manufacture of a filter according to submitted specifications. That the filter as delivered would not filter and clean wine must be admitted.

Defendant urges that the findings are not supported by the evidence and do not support the judgment.

[2] That the findings are conflicting cannot be questioned. By finding that all of the allegations of the complaint were true, except as to the items of damage, the trial court found that there was a contract for the manufacture and sale of the filter. By finding that all of the allegations of the answer were untrue, except the two already mentioned, the trial court found that there was no contract to manufacture the filter.

[3] The trial court found that the filter was to be delivered within two weeks. This is contrary to all of the evidence on this question. Plaintiff testified that the filter was to be delivered in thirty days or on about January 17, 1937.

[4] There is no evidence to support the allegations of special damages of $7 for electricity used or for $18 for filter aids used in trying to operate the filter.

The evidence shows that Fermo Cuni was not paid $56 a week as alleged, but $150 per month. If he spent the entire week attempting to operate the filter, and did nothing else, plaintiff's damage from that source would have been about $34.

There is no evidence supporting the allegation of loss of $315 for wine spoiled in attempting to operate the filter. The evidence shows that between 250 and 300 gallons of unfiltered wine were thus lost. There is no evidence of the market value of this wine.

[5] There is no satisfactory evidence in the record supporting the allegation of a loss of $328.30 due to the failure to deliver the filter on time, within two weeks, according to the allegations of the complaint and findings of the trial court, and within thirty days according to the undisputed testimony of plaintiff. The evidence on this question may be summarized as follows: That during the months of January, February, and up to March 9, 1937, plaintiff sold 6,500 gallons of unfiltered wine; that it was sold for "five cents less than before" and that after the wine was filtered in March it sold for five cents more per gallon than the unfiltered wine. We presume that this should be construed as a statement that the unfiltered wine sold for five cents a gallon less than it would have sold for had it been filtered. The evidence shows that there would have been a substantial expense to plaintiff in the filtering operation, how much does not appear. Plaintiff's damage from this cause could not exceed the reduction in the market value of the wine due to its not being filtered, less the cost of the filtering operation. Further, the unfiltered wine was sold during the entire month of January, the first seventeen days of which (according to plaintiff's testimony) defendant was not in default in her contract. She caused him no loss or damage for the unfiltered wine sold during those seventeen days. There is nothing to indicate the amount of unfiltered wine sold during that time.

[6] There is no satisfactory evidence supporting the allegation that plaintiff was damaged in the sum of $120 by being compelled to go into the open market and purchase a filter at a price greater than he had agreed to pay defendant. True he promised to pay defendant $875 and paid $995 for the West Coast filter and the difference is $120. But there is nothing to indicate that the West Coast filter was not a larger, better and more expensive filter than the one defendant had promised to manufacture and deliver. Plaintiff would have had no lawful complaint had defendant's filter cleaned 750 gallons of wine an hour. There is evidence showing that the West Coast filter easily cleaned 1800 gallons of wine in two hours. Plaintiff can only recover the differences in the contract price of the filter defendant agreed to make and the market value of one of the same general type and capacity. There is no evidence on the question of the similarity and market values of the filter defendant agreed to make and deliver and the West Coast filter purchased by plaintiff.

Defendant urges that as each item of damage alleged in the complaint was denied in the answer, an issue was made on each item of damage on which she was entitled to a specific finding. A similar situation was decided in James v. Haley, 212 Cal. 142, 297 P. 920, 921, where the Supreme Court said: "Each allegation as to damage was specifically denied by defendant, so that an issue was formed in reference to each of these allegations. * * * It is also clear, however, that, when a plaintiff pleads special damage, which is denied by defendant, and offers evidence to support it, that issue becomes a material one on which the losing party is entitled to a finding. Here the findings are entirely silent as to each and every issue raised in reference to damage. Ever since the adoption of the Codes, it has been the rule that findings are required on all material issues raised by the pleadings and evidence, unless they are waived, and, if the court renders judgment without making findings on all material issues, the case must be reversed. 24 Cal.Jur., p. 935, § 183, and p. 940, § 186." See also, Klein v. Milne, 198 Cal. 71, 243 P. 420; Aspe v. Pirrelli, 204 Cal. 9, 266 P. 276; Miller & Lux Inc. v. Tulare Lake Basin Water Storage Dist., 219 Cal. 41, 25 P.2d 451; Scoville v. Keglor, 27 Cal.App.2d 17, at page 30, 80 P.2d 162.

[7] We are well aware that there are cases holding that where separate items of damage are alleged and denied, and the trial court finds and awards damages in a lump sum, the judgment will not be reversed unless prejudice to the losing party appears because of the failure to find on the specific items of damage. From what we have already said, we believe that because of failure to find on the allegations of special damage, prejudice to defendant sufficiently appears. Further, after diligent trial we have failed to find any combination of items of proven dam-

ages that will make a total sum approaching the $680 awarded plaintiff by the trial court.

Judgment reversed. The appeal from the order denying the new trial is dismissed.

We concur: BARNARD, P. J.; GRIFFIN, J.

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37 Cal.App.2d 116

KEHLOR v. SATTERLEE.

Civ. 6258.

District Court of Appeal, Third District, California.

Feb. 1, 1940.

1. Appeal and error 🔑979(2)

When an order granting a motion for new trial is predicated upon insufficiency of evidence, the order will not be disturbed upon appeal, except upon the showing of a clear and manifest abuse of discretion by trial judge, but trial judge's discretion with respect to such matters is governed by fixed rules of law, and is to be reasonably exercised within those rules to the accomplishment of justice.

2. New trial 🔑71

When there is a substantial conflict in the evidence upon the issues to be decided, a trial court is at liberty to find either way with respect to a motion for new trial on ground that evidence is insufficient to support verdict.

3. Appeal and error 🔑979(2)

Where there is no conflict in evidence and all proofs are favorable to one of the litigants, question as to the probative force or evidentiary value of the testimony, in a proceeding on a motion for new trial based upon ground that evidence was insufficient to justify verdict, is one whose determination is for trial court.

4. Automobiles 🔑245(43, 45)

In highway patrolman's action against motorist for injuries sustained when patrolman's motorcycle ran into a preceding patrolman's motorcycle after motorist, who was approaching from opposite direction, attempted to pass another automobile proceeding in same direction as motorist on a curve, where motorcycles and automobiles were traveling approximately 40 miles an hour, whether motorist was negligent was for jury.

5. Automobiles 🔑225

Where highway patrolman while proceeding at approximately 40 miles an hour on motorcycle was suddenly confronted with seeming imminent danger by motorist, who was traveling approximately 40 miles per hour in opposite direction, attempting to pass another automobile traveling in same direction as motorist on curve in highway, patrolman was not required to exercise that degree of care which is ordinarily required by law but was required to act only as a reasonably prudent man would act under similar circumstances.

6. Appeal and error 🔑977(2)
Automobiles 🔑245(89)

In highway patrolman's action against motorist for injuries sustained when patrolman's motorcycle ran into a preceding patrolman's motorcycle after motorist, who was approaching from opposite direction, attempted to pass another automobile proceeding in same direction as motorist on curve in highway, whether patrolman was in a position of imminent danger was for jury and for decision of trial court in passing on motion for new trial on ground of insufficiency of evidence to sustain verdict for motorist.

7. Appeal and error 🔑979(2)

Where whether plaintiff in personal injury action was in position of imminent danger was for jury, and trial court in passing upon plaintiff's motion for new trial on ground of insufficiency of evidence to sustain verdict for defendant, and District Court of Appeal, could not say as matter of law that plaintiff was guilty of contributory negligence, there was no abuse of discretion by trial court in granting motion.

8. Appeal and error 🔑979(2)

Where case presents an instance showing a reasonable or even fairly debatable justification for trial court's action in granting plaintiff's motion for new trial on ground of insufficiency of evidence to support verdict for defendant, such action will not be set aside by District Court of Appeal even if, as a question of first impression, reviewing court might feel inclined to take a different view from that of trial court as to propriety of its action on motion.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Victor H. Kehlor against Ivan C. Satterlee for personal injuries sustained by plaintiff when a motorcycle plaintiff was riding collided with another motorcycle as the alleged consequence of defendant's negligence in operating an automobile. From an order granting plaintiff's motion for new trial after a verdict for defendant, defendant appeals.

Order affirmed.

Butler, Van Dyke & Harris, of Sacramento, for appellant.

Gerald M. Desmond, of Sacramento, and Carlson & Collins, of Richmond, for respondent.

Mr. Justice TUTTLE delivered the opinion of the court.

This action was brought to recover damages for personal injuries sustained by plaintiff when the motorcycle he was riding collided with another motorcycle operated by a fellow member of the California highway patrol. Defendant was the driver of an automobile, and it was contended that the injuries suffered by plaintiff were due to the negligence of such driver. The jury brought in a verdict in favor of defendant, and the trial court granted plaintiff's motion for new trial, upon the sole ground of the insufficiency of the evidence to support the verdict. This appeal is from the order granting the motion.

The accident happened about one mile north of Hood on the River road in Sacramento county. This road, at the scene of the collision, is a curve some 800 feet in length. It is a 16-foot concrete road upon the top of the levee, with no obstruction whatever as to view, and daylight prevailed. Respondent and his fellow officer, Cockerton, were both on motorcycles, proceeding south at about 40 miles per hour. Respondent was in the rear, about 50 feet behind. Two cars approached from the other direction, going north, at a speed of 45 miles per hour. When respondent was about 100 feet away from the first automobile, the second automobile, driven by appellant, started to pull out into the left lane, in an attempt to pass the car ahead. Evidently seeing the motorcycle, and realizing that he could not safely pass, appellant dropped back into the right lane, immediately in the rear of the first car. In the meantime, the first motorcycle passed safely by. The second motorcycle, ridden by respondent, overtook and ran into the rear of the first motorcycle, inflicting the injuries for which compensation is sought. It was contended by respondent at the trial that the negligence of defendant in attempting to pass another car on a curve was the proximate cause of the collision between the two motorcycles. Appellant here contends that plaintiff was guilty of contributory negligence, and that this appears in the record as a matter of law.

[1] The general rule governing appellate courts in reviewing the action of a trial court granting a motion for new trial is too well known to require the citation of authorities. Such an order, when it is predicated upon the insufficiency of the evidence, will not be disturbed upon appeal, except upon a showing of clear and manifest abuse of discretion on the part of the trial court in respect to the granting of the same. This rule is subject, however, to the qualification "that such discretion is not a right to the exertion of the mere personal or arbitrary will of the judge, but is a power governed by fixed rules of law, and to be reasonably exercised within those rules, to the accomplishment of justice". Harrison v. Sutter St. Ry. Co., 116 Cal. 156, 47 P. 1019, 1020.

[2, 3] The rule is simple in its application when there is a substantial conflict in the evidence upon the issues to be decided. In such case, our inquiry need proceed no further as the trial court was at liberty to find either way. If there be no conflict, the discretionary power of the trial court still remains, as stated by this court in the case of Otten v. Spreckels, 24 Cal.App. 251–257, 141 P. 224, 226: "Moreover, even in cases where there may not appear to be a conflict in the evidence, and where all the proofs seem to be favorable to the one or the other of the parties litigant, the question as to the probative force or evidentiary value of the testimony, in a proceeding on a motion for a new trial based upon the ground that the evidence is insufficient to justify the verdict, is one whose determination is with the trial court."

[4-7] The facts in this case are practically without conflict. Appellant points out that plaintiff testified that his brakes were in good condition; that he could stop his motorcycle going 40 miles an hour,

within a distance of 50 feet; that he was about 100 feet away when he first saw defendant start to pass the leading automobile. Appellant argues that plaintiff should have stopped or slowed up sufficiently to avoid hitting the motorcycle in front of him, and that his conduct, under the circumstances, was such that but *one conclusion* could be reasonably drawn therefrom —contributory negligence upon the part of plaintiff. If this were the entire picture, we would be inclined to agree with the contention. But the story is only half told. The automobiles and the motorcycles were approaching from opposite directions at a speed of at least 40 miles per hour. When plaintiff first saw respondent start to turn out, it was only a matter of a second or two before they would meet in a head-on collision, unless either or both deviated from their course. Plaintiff could not anticipate that defendant would commit an act of negligence in attempting to pass a car on a curve with two motorcycles approaching him, and which were only 100 feet away, and when all vehicles were proceeding at a speed of 40 miles per hour. If defendant saw the motorcycles approaching, under such conditions, it might have been negligence for him to attempt to pass. If he could not see them, it might have been negligence to attempt to pass when his view of the road was obstructed by the car in front of him. These, of course, were matters for the consideration of the jury. Suddenly confronted with this seeming imminent danger, plaintiff was not required to exercise that degree of care which is ordinarily required by law. He was required to act only as a reasonably prudent man would act under similar circumstances. Whether he was in a position of imminent danger was a question of fact for the jury. 19 Cal.Jur., p. 599, sec. 36. Likewise, this was a question of fact to be decided by the trial court in passing upon the motion for a new trial. We therefore cannot say, as a matter of law, that plaintiff was guilty of contributory negligence. There was no abuse of discretion upon the part of the trial court in granting the motion.

[8] Concluding, the following excerpt from the Spreckels case, supra, clearly indicates the view which an appellate court should take in considering an appeal of this character: "But, so long as a case made presents an instance showing a reasonable or even fairly debatable justification, under the law, for the action taken, such action will not be here set aside, even if, as a question of first impression, we might feel inclined to take a different view from that of the court below as to the propriety of its action. * * * The opportunities of the trial court in such instances for reaching just conclusions are, as a general thing, so superior to our own that we will not presume to set our judgment against that of the former, where there appears any reasonable room for difference."

The order is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

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37 Cal.App.2d 22

In re IVORY'S ESTATE.

IVORY v. CALLAGHAN.

Civ. 11226.

District Court of Appeal, First District, Division 1, California.

Jan. 30, 1940.

Hearing Denied March 30, 1940.

1. Wills 🔑**421**

A collateral attack was permissible on an order setting aside an order admitting the will to probate if the order was void on its face but all inferences were in favor of the validity of the order setting aside probate.

2. Wills 🔑**421**

Where daughter by stipulation admitted that she in effect misled probate court by alleging in her petition for probate of will of father that she was the sole heir, when she knew that her mother was an heir and knew address of her mother and that mother was entitled to notice, stipulation conferred jurisdiction on probate court to set aside prior order admitting will to probate which read in connection with stipulation, was void on its face. Probate Code, § 328.

3. Wills 🔑**421**

Where daughter in probate proceeding did not disclose that mother was an heir, the probate court had jurisdiction to enter order admitting will to probate even though the mother was not named as an heir and was not given notice and order was immune to collateral attack. Probate Code, § 328.

4. Wills ⚷421

Finding of probate court on issue of testator's residence in admitting will to probate is conclusive unless vacated on direct attack.

5. Courts ⚷202(4)

Probate court has no general equity power to vacate its prior orders that have become final on ground that such orders were procured by extrinsic fraud.

6. Wills ⚷355

Order of probate court admitting will to probate, which is procured by extrinsic fraud, can be attacked in an independent suit in equity.

7. Wills ⚷355

Where order admitting will to probate showed that the probate court had jurisdiction and subsequently by stipulation parties agreed that recitals in the order were false and had been secured by extrinsic fraud of proponent, legal effect of such stipulation was to add to the judgment roll of that order the true facts, and probate court at any time, at least up to the time of the closing of the estate, would have had power to set aside order admitting will to probate.

8. Judgment ⚷17(1), 490(1)

Although a judgment cannot be collaterally attacked because of lack of service, if that fact is stipulated to, the judgment must be read as if that fact appeared on the face of the judgment, in which event the judgment is then void on its face.

◆

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Proceeding in the matter of the estate of John Ivory, also sometimes called J. Ivory, deceased. Emma G. Ivory, individually and as executrix of the will of John Ivory, deceased, filed amended petition for probate of the will, opposed by Elizabeth C. Callaghan, executrix of the will of Mary E. Ivory, deceased. From an order dismissing her petition and from certain specified parts of such order, petitioner appeals, and by stipulation both appeals were heard on one transcript.

Affirmed.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, for appellant.

Walker Peddicord, of San Francisco, for respondent.

PETERS, Presiding Justice.

Appellant, Emma G. Ivory, appeals from an order of the superior court in San Francisco dismissing her amended petition for the probate of the will of John Ivory, and also appeals from certain specified parts of said order. By stipulation both appeals are to be heard on one transcript.

The order dismissing the amended petition for probate is based on the finding that the decedent was not a resident of San Francisco at the time of his death, but was in fact a resident of the county of Modoc, and for that reason, it was held, the San Francisco probate court has no jurisdiction. Appellant does not challenge the sufficiency of the evidence to support that finding, but seeks a reversal of the order by collaterally attacking a prior order of the court, which itself was an appealable order, but which has long since become final, the ground of attack being that the prior order was void on its face, and, that because of that fact, the court had no jurisdiction to enter the order appealed from.

The facts giving rise to this controversy have been fully set forth in an opinion by the Supreme Court denying appellant's application to review the order here appealed from, and the prior order upon which it depends, on the ground that appeal was the proper remedy. Ivory v. Superior Court, 12 Cal.2d 455, 85 P.2d 894. So far as relevant here, the following summary sufficiently discloses the problems presented: April 10, 1936. John Ivory died, leaving surviving him as his heirs at law, Emma G. Ivory, his wife, appellant herein, and his mother, Mary E. Ivory. By will, the decedent left his entire estate to his wife and appointed her executrix. The appellant petitioned in San Francisco for probate of the will averring that decedent was a resident of that city and that she was his sole surviving heir. Notice of hearing was published and a copy mailed to appellant. The record shows that appellant knew of the existence of the decedent's mother, and knew where she was then residing in Modoc county. Section 328 of the Probate Code provides in part: "At least ten days before the hearing, copies of the notice must be personally served upon the heirs of the testator * * * or mailed, postage prepaid, from a postoffice within this state, addressed to them at their respective places of residence, if known to the petitioner

* * *." The mother, obviously, would have been an heir of the decedent had he died intestate and left any separate property. As such she was admittedly entitled to notice. The record shows that not only did the wife fail to mention the mother in the petition or to give her notice, although known to her, but also that on April 23, 1936 (the day before the petition for probate of the will was filed in San Francisco), the appellant filed, in Modoc county, a petition to terminate a joint tenancy between her and the decedent. Under former section 1723 of the Code of Civil Procedure such petition must be filed in the county of the residence of the decedent. Respondent contends the petition to terminate was filed in Modoc county to mislead the mother and to lull her into a sense of security.

May 8, 1936. The will was admitted to probate in San Francisco and appellant appointed executrix. The order admitting the will to probate is based on the finding that decedent was a resident of San Francisco at the time of his death, and recites that notice of the proceeding "had been given according to law". No appeal was ever taken from this order, nor was application made under section 473 of the Code of Civil Procedure to set it aside.

July 21, 1936. Respondent was appointed guardian of the estate and person of Mary E. Ivory, mother of decedent. Subsequently, the mother died and respondent was appointed executrix of her estate.

May 1, 1937. Respondent, as guardian of the mother of decedent, filed a notice of motion to set aside the order admitting the will to probate (order of May 8, 1936) on the grounds, first, that the probate court in San Francisco had no jurisdiction to enter the order because decedent, at the time of his death, was in fact a resident of Modoc county; and, secondly, that the order had been secured as the result of extrinsic fraud practiced on the court and on petitioner by appellant, in that appellant, by her actions, had deliberately attempted to keep the mother in ignorance of the probate of the estate. It was also alleged that the entire estate of decedent, with the exception of some livestock, was the separate property of decedent, and that the mother, by such fraud, was prevented from contesting the probate of the will which she desires to do. This motion was never acted upon.

May 14, 1937. Appellant and respondent, through their then respective counsel, filed a stipulation to set aside the order of May 8, 1936, admitting the will to probate "on the sole ground that Mary E. Ivory was not named as an heir of John Ivory * * * and that no notice of hearing the Petition to have the Will proved * * * was either personally served on Mary E. Ivory or mailed to Mary E. Ivory, as required by Section 328 of the Probate Code * * *." This stipulation reserved the right of appellant to file an amended petition for probate of the will. Pursuant to this stipulation, the court, on the same date, made its order setting aside the order of May 8, 1936, admitting the will to probate. No appeal was taken from this order, nor was relief sought within the period prescribed by section 473 of the Code of Civil Procedure. The order has long since become final. It is this order that appellant seeks to collaterally attack in this proceeding. Pursuant to the stipulation, appellant filed an amended petition for probate of the will in San Francisco. In this petition the mother was named as an heir and she was properly served. Respondent, as guardian, contested the probate on the ground that decedent was in fact a resident of Modoc county at the time of his death, and that appellant had so represented to the Modoc court in the proceeding to terminate the joint tenancy. After issue joined, the court, after hearing, stated its opinion to be that the evidence demonstrated that decedent was not a resident of San Francisco at the time of his death, but was in fact a resident of Modoc county. In due course, respondent presented to the court proposed findings of fact and conclusions of law and served opposing counsel therewith. At this point appellant changed attorneys. Her new counsel thereupon moved to set aside the order of May 14, 1937, and objected to any further action upon the amended petition, on the ground that the order of May 14, 1937, was void on its face and beyond the power of the court to make.

March 1, 1938. The court overruled the objections of appellant and entered its order dismissing the amended petition for the probate of the will on the ground it lacked jurisdiction of the proceeding because of lack of residence of the decedent. It is from this order, and certain specified parts thereof, that these appeals have been taken.

As already indicated, appellant sought by certiorari to have the orders of March 1, 1938, and May 14, 1937, reviewed. The Supreme Court held that, inasmuch as both orders were appealable, certiorari would not lie. The opinion points out that the order of March 1, 1938, apparently is dependent on the validity of the order of May 14, 1937, and, if the 1937 order is void on its face, that fact can be ascertained on appeal from the 1938 order.

It is appellant's theory that the order of May 14, 1937, is void on its face; that after a will has been admitted to probate by order from which no appeal has been taken, and more than six months from entry has elapsed, the superior court, sitting in probate, has no jurisdiction either on motion, or by stipulation of the parties, or in the exercise of its equitable powers, to set aside its order admitting the will to probate; that the order of May 8, 1936, admitting the will to probate was a conclusive adjudication of the questions of residence of the decedent and that notice had been properly given to all the heirs; that the sole methods of review of such order were by appeal, motion under section 473 of the Code of Civil Procedure, or by direct action in equity; that the respondent, not having availed herself of any of these remedies was without right to relief in the probate proceeding; that the court was without jurisdiction to entertain the motion or to enforce the stipulation that led to the entry of the order of May 14, 1937, vacating the order admitting the will to probate.

On behalf of respondent it is urged that the effect of the stipulation was to establish absence of notice to the heirs on the face of the record; that this renders the order of May 8, 1936, void on its face; that the entry of the order of May 14, 1937, was therefore within the power of the probate court; further, that the making of that order was a proper exercise by the probate court of its equitable powers; that appellant participated in the preparation and securing the entry of the order of May 14, 1937, acted upon it, and is now estopped to attack it; that the appellant was guilty of extrinsic fraud in securing the order of May 8, 1936; that respondent may secure relief from such fraud from the probate court without resorting to an independent action in equity.

[1] In interpreting the stipulation voluntarily entered into by the parties hereto, and in determining its legal effect, and the legal effect of the order of May 14, 1937, it must be kept in mind that appellant did not appeal from that order, nor move under section 473 of the Code of Civil Procedure for relief. Appellant is now appealing from the order of March 1, 1938, and on this appeal seeks to collaterally attack the order of May 14, 1937. It is true that such attack is permissible if that order is void on its face, but it is equally true that all presumptions and inferences are in favor of the validity of that order and of the order here appealed from.

[2] By the stipulation the appellant admitted, in effect, that, in securing the order of May 8, 1936, she had been guilty of extrinsic fraud. By that stipulation she admitted that the mother was an heir, entitled to notice under section 328 of the Probate Code; that she knew the mother was an heir, and knew the address of the mother, but nevertheless attempted to, and did, in effect, mislead the court by alleging in her petition for probate that she was the sole heir. It would indeed be an inequitable doctrine to hold that where, in a probate proceeding, extrinsic fraud has been practiced by a petitioner on the court and on an heir, and where that probate proceeding is still pending before the court, and where the petitioner voluntarily admits the facts demonstrating the fraud, and enters into a stipulation in an attempt to rectify that fraud, and then takes advantage of one of the provisions of that stipulation by invoking the jurisdiction of the court by filing an amended petition for probate, and then, when it becomes apparent to her that she is about to lose that proceeding, she could then have a change of heart and successfully contend that the probate court was entirely powerless to rectify the fraud practiced upon it. Fortunately, the law is not so impotent that it cannot prevent such an unfair and inequitable result.

[3-6] It is true that at the time the order of May 8, 1936, was made it was not void on its face. The court had jurisdiction to enter the order even though the mother was not named as an heir and was not given notice. Nicholson v. Leatham, 28 Cal.App. 597, 153 P. 965, 155 P. 98; Murray v. Superior Court, 207 Cal. 381, 278 P. 1033; Security-First Nat. Bank v. Superior Court of Los Angeles County, 1 Cal.2d 749, 37 P.2d 69. This order, under these cases, was not subject to collateral attack. It is also true that the court having found on the issue of residence, the finding is a conclusive determination of the place of residence of the decedent and is binding unless vacated or set aside on direct attack. In re Griffith's Estate, 84 Cal. 107, 23 P. 528, 24

P. 381; Holabird v. Superior Court of Fresno County, 101 Cal.App. 49, 281 P. 108. It is also apparently true that in a contested proceeding the probate court has no general equity power to vacate its prior orders that have become final on the ground that such orders were secured by extrinsic fraud. Security-First Nat. Bank v. Superior Court of Los Angeles County, supra. These cases establish the rule that the probate court probably would not have had jurisdiction to vacate the order of May 8, 1936, had such jurisdiction been entirely dependent on the motion filed by respondent. Such order, having been secured by extrinsic fraud, however, can be attacked in an independent action in equity. Purinton v. Dyson, 8 Cal. 2d 322, 65 P.2d 777, 113 A.L.R. 1230. But the order of May 14, 1937, was not based on a jurisdiction invoked by the motion of May 1, 1937, but upon a stipulation in which all interested parties participated. This serves to distinguish all the cases cited by appellant.

[7] The three cases above cited, which hold that an order secured by extrinsic fraud in failing to notify a known heir cannot be set aside by the probate court after it becomes final, are basically predicated on the theory that the order admitting the will to probate, on its face, shows jurisdiction in the court. The error does not appear on the face of the judgment roll. This clearly appears in Murray v. Superior Court of Marin County, 207 Cal. 381, at page 385, 278 P. 1033, at page 1034, where the court stated that the "omission from the petition of a statement of the names, ages, and residences of the heirs, legatees, and devisees of the decedent, even if known to the petitioner, could not operate to deprive the court of jurisdiction, and that when the petition is silent as to the names and residences of the heirs they must be deemed by the clerk to be unknown to the petitioner and he is not required to mail copies of the published notice". This language is quoted with approval in Security-First Nat. Bank v. Superior Court of Los Angeles County, supra. But that is not the situation here. In the present case, when the order of May 8, 1936, was entered it showed on its face that the probate court had jurisdiction. Subsequently, by stipulation, the parties agreed that the recitals in the order were false and had been secured by the extrinsic fraud of appellant. The legal effect of such stipulation was to add to the judgment roll of that order the true facts. As so corrected, the legal situation is the same as if the order of May 8, 1936, when entered disclosed that there was a known heir whose address was known, and that such heir had not been notified. By reason of the stipulation, the order of May 8, 1936, must be read as if it named the wife and mother as known heirs, and as if it recited that the mother had intentionally not been notified. If the order had so recited it would clearly be void on its face, and the probate court at any time, at least up to the time of the closing of the estate, would have power to set it aside.

That this was the legal effect of the stipulation is well settled in this state. One of the leading cases is Hill v. City Cab & Transfer Co., 79 Cal. 188, 21 P. 728. This was a suit on a judgment which had become final. The defendant sought to collaterally attack the judgment on the ground he had not been served. This fact the plaintiff conceded to be true. The lack of service, however, did not appear on the face of the judgment. The court, after pointing out the rule that a judgment cannot be collaterally attacked unless it is void on its face, held that the admission by the plaintiff corrected the judgment so as to make it appear therefrom that the judgment was void on its face. In so holding the court stated 79 Cal. page 191, 21 P. page 728: "But this rule is not that a judgment which is void will be enforced as if it were valid, but that it cannot be shown to be void except in certain ways. If the party, however, *should admit the facts which show the judgment to be void,* or if he should allow them to be established without opposition, *then, as a question of law, upon such facts, we do not see why the case is not like that where a judgment is void upon its face.*" (Italics ours.)

In People ex rel. Lynch v. Harrison, 107 Cal. 541, 40 P. 956, a similar point was presented. After quoting from the Hill case, supra, the court stated 107 Cal. page 546, 40 P. page 957: "The foregoing quotation is taken from an action brought upon a domestic judgment of a court of general jurisdiction, in which action defendant set up that he had not been served with summons in the original action, and that, therefore, the judgment was void for that reason. The court found his claims to be true, and that no service was ever made upon him, and upon appeal the case was decided upon the law as above declared. *In its decision the court assumes that evidence to impeach the judgment by showing a want of service* *of summons would not be admissible, but declares in effect that, if the parties stipulate that there was no service,* or the evidence is admitted at the trial to that effect, without objection, *it is then established that the judgment is void, and that, whenever such fact is brought to the attention of the court, it is the duty of the court to so declare.* A judgment roll is received as evidence in an attack upon the validity of a judgment, because it imports absolute verity; yet it is no more conclusive, as to the fact of service or nonservice of summons, than the stipulation of both parties to the litigation to that effect, or the admission of evidence to that point, upon the offer of one party, and without objection by the other." (Italics ours.)

The same problem was presented in Lake v. Bonynge, 161 Cal. 120, 118 P. 535, where the court stated 161 Cal. page 133, 118 P. page 540: "We may assume, purely for the purposes of this decision, that, while a party relying on a judgment which is valid on its face may successfully resist any attack upon it which is collateral and not direct, *still where the attack might be resisted as collateral, if he admits facts which show that a service of summons, constructive or personal, was not made on the defendant to the judgment, and allows evidence to be introduced without objection showing this fact, as it is then established that the judgment is void, it is the duty of the court to so declare.*" (Italics ours.)

[8] These cases establish the rule that, although a judgment cannot be collaterally attacked because of lack of service, if that fact is stipulated to, the judgment must be read as if that fact appeared on the face of the judgment. In such event the judgment is then void on its face. This distinguishes the above three cases from Security-First Nat. Bank v. Superior Court of Los Angeles County, 1 Cal.2d 749, 37 P.2d 69. In that case the court recognized the rule of the above cases but held that such rule was not applicable to the facts there presented because the party relying on the order there involved did not admit or stipulate that service was required and omitted. As stated on page 757 of 1 Cal.2d, on page 73 of 37 P.2d: "Such an admission is not revealed by the record on this proceeding. In fact, the record is to the contrary."

We think the rule of the above three cases is decisive here. Just as was the fact in those cases, the appellant in the present case could have successfully resisted the motion of May 1, 1937, on the ground that it was a collateral attack on the order admitting the will to probate. But appellant stipulated to the true fact of lack of service. This stipulation served to confer on the court (just as a stipulation or admission did in the above cases) the jurisdiction it would not otherwise possess to set the judgment aside on the ground that, by reason of the stipulation, the judgment was rendered void on its face.

This reasoning disposes of these appeals. It is not necessary, therefore, to consider the other grounds urged by respondent to sustain the order of May 14, 1937.

The appeals from the order of March 1, 1938, dismissing the amended petition for the probate of the will, and from specified parts of said order are, and each is, affirmed.

We concur: WARD, J.; GOODELL, Justice pro tem.

MOORE et al. v. PURSE SEINE NET et al.*

Civ. 11319.

District Court of Appeal, First District, Division 2, California.

Jan. 31, 1940.

Hearing Granted March 30, 1940.

1. Fish 🔑8

The state has the supreme power to regulate and control fishing within its territorial waters.

2. Fish 🔑8, 16

In the regulation of fishing within a state's territorial waters, the state has policing jurisdiction over such waters and to accomplish the end may enact such reasonable regulations as it may deem proper and may prohibit use of dynamite or firearms for taking fish within its waters and may seize and confiscate such articles if necessary to make its regulations effective.

3. Admiralty 🔑1
Fish 🔑9

The statutes determining procedure for forfeiture of nets unlawfully used in fishing within state's territorial waters are justified on doctrine that power to make regulations includes power to enforce them, and are not invalid as in conflict with admiralty jurisdiction of the federal government. St.1933, p. 471, § 845.

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*For subsequent opinion see 105 P.2d 919.

4. Fish ⚿16

In proceeding to secure the forfeiture of a fish net, petition charging that net was used willfully and unlawfully in violation of Fish and Game Code and stating date and place of alleged violation and the character of the relief sought was not insufficient for failure to allege that net was used in "taking fish." St.1933, pp. 470, 471, §§ 842, 845.

5. Fish ⚿16

A proceeding to secure the forfeiture of a fish net unlawfully used in fishing within territorial waters is not a criminal proceeding as respects sufficiency of petition.

6. Courts ⚿488(4)

Where appeal was taken to District Court of Appeal of Second Appellate District, which transferred cause to Supreme Court, as a cause in equity, and Supreme Court transferred it to District Court of Appeal of First Appellate District, such court did not lack jurisdiction to hear the cause on ground that transfer to Supreme Court was void because cause was not one in equity, since, if transfer was void, cause remained in District Court and Supreme Court under the Constitution could transfer it to any other District Court of Appeal and if transfer were voidable for error, it became valid by lapse of 60-day period. Const. art. 6, § 4c.

7. Courts ⚿488(1)

Any descriptive matter in an order transferring an appeal by the Supreme Court to a District Court of Appeal is immaterial as long as cause is identified and purpose of order is within court's jurisdiction. Const. art. 6, § 4c.

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Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by E. C. Moore, I. Zellerbach, A. T. Jergins, as the Fish and Game Commission of the State of California, against Purse Seine Net, approximate length 325 fathoms, approximate depth 32 fathoms, approximate size of mesh five to eight inches, and the C. J. Hendry Company, a corporation, and Frank Sematovich to have adjudged forfeited the net. From a judgment adjudging the net forfeited, defendants appeal.

Affirmed.

Alfred T. Cluff and Sawyer & Cluff, all of Los Angeles, and Arch E. Ekdale, of San Pedro, for claimants and appellants.

Earl Warren, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for petitioners and respondents.

NOURSE, Presiding Justice.

The petitioners sued to have adjudged forfeited to the State Fish and Game Commission a purse seine net used by the owners unlawfully for fishing in the waters of the state. The petitioners had their judgment.

The single question stated by appellants in their opening brief is whether the state courts have jurisdiction of the proceeding. Asserting that the fishing net was a part of the "apparel and furniture" of a seagoing vessel, the appellants advance the argument that the federal courts alone have jurisdiction of such forfeiture proceedings. Section 845 of the State Fish and Game Code (St.1933, p. 471) provides for proceedings in the state superior courts leading to the forfeiture, sale or destruction of nets in violation of the terms of the code. No provision is made for such proceedings in the federal courts, hence, the question here is whether the code sections are constitutional. Appellants concede the state's power to regulate and control fishing and to forfeit the net, but they state that the forfeiture is a "cause of admiralty cognizance", and hence, that the state courts have no jurisdiction. The Moses Taylor, 4 Wall. 411, 18 L.Ed. 397, and similar cases are cited holding that maritime contracts and torts are exclusively within maritime jurisdiction. We do not find that any of these cases have any bearing upon the question before us. The controlling authority is Smith v. Maryland, 59 U.S. 71, 18 How. 71, 15 L.Ed. 269, involving a state statute providing for the forfeiture of a scoop or drag used for catching oysters within state waters. The point involved was whether the statute conflicted with the federal jurisdiction in admiralty. At page 76 of 18 How., 15 L. Ed. 269, the court says: "It was also suggested that it is repugnant to the 2d section of the 3d article, which declares that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction [U.S.C.A.Const.]. But we consider it to have been settled by this court, in United States v. Bevans, 3 Wheat. [336], 386 [4 L.Ed. 404], that this clause in the Constitution did not affect the jurisdiction, nor the legislative power of the States, over so much of their territory as lies below high water mark, save that they parted with the power so to legislate as to conflict with the admiralty jurisdiction or laws of the United States. As this law conflicts neither with the admiralty jurisdiction of any court of the United States conferred by Congress, nor with any law of Congress whatever, we are of opinion it is not repugnant to this clause of the Constitution." To the same effect are Manchester v. Massachusetts, 139 U.S. 240, 260, 11 S.Ct. 559, 35 L.Ed. 159; and Miller v. McLaughlin, 281 U.S. 261, 50 S. Ct. 296, 74 L.Ed. 840. This language is found on page 264 of the latter decision in 281 U.S., 50 S.Ct. page 297, 74 L.Ed. 840: "The claim under the Fourteenth Amendment is also groundless. A state may regulate or prohibit fishing within its waters, Manchester v. Massachusetts, 139 U.S. 240, 11 S.Ct. 559, 35 L.Ed. 159, * * * and, for the proper enforcement of such statutes, may prohibit the possession within its borders of the special instruments of violation, regardless of the time of acquisition or the protestations of lawful intentions on the part of a particular possessor." (Citing cases.)

[1] The supreme power of the state to regulate and control fishing within its territorial waters cannot be denied. Bayside Fish Flour Company v. Gentry, 297 U.S. 422, 56 S.Ct. 513, 80 L.Ed. 772.

[2, 3] For these purposes the state has policing jurisdiction of these waters, and to accomplish the end may enact such reasonable police regulations as it may deem proper. Thus the state may prohibit the use of dynamite or fire arms for taking fish within its waters, and may seize and confiscate such articles if necessary to make its regulations effective. The code sections fixing the procedure for the forfeiture of nets unlawfully used in fishing within its territorial waters are justified upon the accepted doctrine that the power to make regulations includes the power to enforce them. In such legislation there is no conceivable conflict with the admiralty jurisdiction of the United States.

[4, 5] It is argued that the petition is insufficient because it does not specifically allege that the net was used "in taking fish". The charging part of the petition is that it was used "wilfully and unlawfully * * * contrary to the provisions of the existing statutes * * * in violation of the provisions of section 842 of the Fish and Game Code. * * *" This is not a criminal proceeding. The pleading meets all the requirements of section 845 of the Fish and Game Code. The petition acquainted the owners with the nature of the proceeding. It also stated the date and place of the alleged violation, the statute claimed to have been violated, and the character of the relief sought, namely, the forfeiture of the net. Such notice was all that the statute required. People v. One 1933 Plymouth Sedan, 13 Cal.2d 565, 569, 90 P.2d 799.

[6, 7] There is no merit in the contention that this court is without jurisdiction to hear the cause. The appeal was taken to the District Court of Appeal of the Second Appellate District. That court, deeming that the cause was in equity, transferred it to the Supreme Court. That court transferred the cause here for determination. The appellant now contends that the cause is not one in equity, that jurisdiction of the appeal lay in the District Court of Appeal of the Second District, and that its transfer by that court to the Supreme Court was therefore void. Under section 4c of article VI of the Constitution the Supreme Court has power to transfer any cause "pending" before it, or any cause "pending before a district court of appeal" to any other district court of appeal for hearing and decision. Under section 4a a district court may transfer a cause to the supreme court if the appeal was not taken to the "proper" court. Hence, if the order of transfer from the District Court to the Supreme Court was void because the cause was not in equity, then the order was ineffective and the cause was still "pending" in the district when transferred here by the Supreme Court. If that transfer was not void, but voidable for error, it has become valid by the lapse of the sixty-day period. If the original transfer to the Supreme Court was valid, then, too, the transfer here from the latter court was in accord with the constitutional provision. Any descriptive matter in the order of transfer is immaterial so long as the cause is identified and the purpose of the order is within the court's jurisdiction.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

37 Cal.App.2d 39

Ex parte COHN.

Cr. 3296.

District Court of Appeal, Second District, Division 1, California.

Jan. 30, 1940.

1. Indictment and Information 🔑63

A complaint charging a misdemeanor must allege facts and not conclusions.

2. Indictment and Information 🔑63

Peacocks are not a "nuisance per se," and hence complaint charging maintenance of peacocks on certain premises was insufficient to charge maintenance of a "nuisance" in absence of allegation of facts to support charge. Pen.Code, § 373a.

[Ed. Note.—For other definitions of "Nuisance" and "Nuisance Per Se," see Words & Phrases.]

Proceeding in the matter of the application of Leon Cohn for a writ of habeas corpus.

Petitioner discharged from custody.

James R. Jaffray, of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

DORAN, Justice.

Petitioner was charged in a complaint in the justice's court of San Antonio township, Los Angeles county as follows: "That on the 1st day of June, 1939, in the City of Bell, in the above named Township, in the County of Los Angeles, State of California, the crime of violation of Section 373a, Penal Code (crime of) maintaining a Public Nuisance a misdemeanor, was committed by Leon Cohn, who, at the time and place last aforesaid, did wilfully and unlawfully maintain a nuisance which was injurious to the health of the people living in the neighborhood and obstructing the free use of property, and which did interfere with the comfortable enjoyment of life and property of a considerable number of people, said nuisance being the maintenance of peacocks on those certain premises known as the So. Calif. Bird and Pet Ex. located at 4016-24 Ea. Florence Ave. in the City of Bell, Co. of L. A. * * *" Upon this charge the defendant was adjudged guilty and sentenced and committed to ninety days in the county jail.

[1, 2] It is contended that petitioner's imprisonment is illegal in that the complaint upon which the judgment is based does not allege a public offense. It is elementary that in the circumstances facts must be alleged, and not conclusions. Obviously peacocks are not a nuisance per se. When and where it is contended that they constitute a nuisance in violation of section 373a of the Penal Code, facts in support of such contention must be alleged. People v. Seccombe, 103 Cal.App. 306, 284 P. 725. The complaint is insufficient.

It is ordered that the petitioner be discharged from custody.

We concur: YORK, P. J.; WHITE, J.

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37 Cal.App.2d 63

In re O'CONNOR'S ESTATE.

Civ. 11317.

District Court of Appeal, First District, Division 2, California.

Jan. 31, 1940.

Insane persons 🔑42(2)

Evidence sustained order confirming referee's report and findings in relation to accounts of guardian for incompetent, concerning unreasonableness of charges made by incompetent's attending physician for services, payments made by attending nurses to guardian and appropriation to guardian's own use of proceeds from certain checks cashed by him.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Proceeding in the matter of the estate and guardianship of Mary O'Connor, an incompetent person. From an order confirming in part a referee's report and findings in relation to the accounts of Joseph P. Donahue, guardian, the guardian appeals. May G. Burns, executrix of the last will of Mary O'Connor, deceased, was respondent.

Affirmed.

Frank J. Perry, of San Francisco, for appellant.

James M. Thomas, of San Francisco, for respondent.

NOURSE, Presiding Justice.

The guardian of the person and estate of Mary O'Connor, an incompetent person, has appealed from an order of the superior court confirming in part the referee's report and findings in relation to the guardian's accounts. The appeal is presented upon a bill of exceptions and involves these questions as stated by appellant: "Is the evidence sufficient to support the findings as to the unreasonableness of charges made by the ward's attending physician for services; as to payments made by attending nurses to guardian and as to appropriation to guardian's own use of proceeds from certain checks cashed by him?"

On a former appeal involving this guardian's accounts this court directed that he be charged compound interest because of the unimpeached showing of the guardian's misappropriations, defalcations, and wilful violations of his trust. As evidence of the guardian's misconduct, which we held sufficient to require a reversal and a direction to allow the ward compound interest, we said on the former appeal, 28 Cal.App.2d 527, 529, 83 P.2d 65, 66: "* * * he permitted his doctor to present a highly exorbitant bill for services which he claimed to have rendered for the ward; he drew checks on the estate in favor of the nurses far in excess of the amount of their wages, had them cash the checks and give him the difference for his own use; he purchased large quantities of liquor for his own use and paid the dealer with checks drawn on the estate; he bought drugs, groceries, flowers, clothing and household supplies for which he paid with checks upon the estate. In many of these transactions, small quantities of goods were purchased and checks far in excess of the amount charged were given and cashed. The proceeds he put in his pocket, and his only explanation was that he 'gambled it.' In the same manner he purchased his own clothing and household supplies, and paid his dentist, occulist and barber, and his wife's laundry."

The foregoing statement of facts was based upon the findings of the referee and of the superior court. They are as final as any findings on disputed issues of facts could be. It would be a useless task to copy the portions of the evidence which support the findings which are now under attack. The evidence is all in the bill of exceptions, much of it admitted without objection, and sufficient of it competent and free of any objection as to its admissibility or materiality. We do not have on this appeal any question of law or error. The position of appellant is that his evidence is more reasonable and more probable, that the evidence which the referee and the trial court believed, we should view with suspicion and reject as unsatisfactory or improbable. The argument of counsel is simply a discussion of reasons why the testimony of some of respondent's witnesses should not be believed. It cannot be disputed that, if this evidence is taken as true, it is sufficient to support the findings and order.

The order is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

YOUNG v. SUPERIOR COURT IN AND FOR SAN DIEGO COUNTY et al. *

Civ. 2362.

District Court of Appeal, Fourth District, California.

Jan. 31, 1940.

Hearing Granted March 30, 1940.

1. Parties 🔑51(4), 53

In action to quiet title to realty, order joining as party defendant one claiming judgment lien on realty and seeking annulment of judgment debtor's deed thereof to plaintiff was not in excess of superior court's jurisdiction, but such court had no jurisdiction to grant motion, made by plaintiff over six months after entry of such order, to strike it from files or set it aside. Code Civ. Proc. §§ 379, 473.

2. Judgment 🔑153(2)

An order setting aside default on cross-complaint over six months after clerk's entry thereof was not only erroneous, but beyond superior court's power and jurisdiction to make. Code Civ.Proc. § 473.

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*For subsequent opinion see 105 P.2d 363.

3. Parties 🔑61

In action to quiet title to realty, trial court was authorized to strike out order, substituting bankruptcy trustee as party defendant for assignee of judgment against bankrupt, who conveyed realty to plaintiff, on proper motion, made within six months after entry of such order, by trustee or plaintiff, or on court's own motion. Code Civ.Proc. § 473.

4. Dismissal and nonsuit 🔑56
Parties 🔑50

The trial court has power, incidental to its exercise of jurisdiction in any cause pending before it, to bring in new parties thereto and dismiss action as to any person improperly joined or brought in as party.

5. Pleading 🔑85(3)

An answer, filed by plaintiff to defendant's cross-complaint after clerk's entry of default thereon, was ineffective, as party against whom default is entered is out of court and not entitled to take any further steps in cause affecting adverse party's right of action.

* * *

Action to quiet title to realty by John Crofton against the Pacific Coast Joint Stock Land Bank, in which O. F. Neal was joined as a party defendant and filed a cross-complaint to establish a judgment lien on realty and declare a deed thereof to plaintiff void. The order bringing in defendant Neal and his answer and cross-complaint were stricken from the files, and a default, entered on the cross-complaint by the clerk, and an order substituting Fred S. Young, trustee in bankruptcy of the bankrupt estate of Thomas Nugent Crofton, for O. F. Neal as defendant and cross-complainant, were set aside by the Superior Court in and for the County of San Diego and Edward J. Kelly, Judge thereof, and the trustee petitions for a writ of review.

Portions of order, striking out the order bringing in O. F. Neal as party defendant, striking out his answer and cross-complaint, and setting aside default, annulled, and portion striking out order substituting petitioner as defendant and cross complainant affirmed.

F. L. Richardson, of San Diego, for petitioner.

O. A. Thorpe and Gray, Cary, Ames & Driscoll, all of San Diego, for respondents.

GRIFFIN, Justice.

Petition for writ of review. On March 28, 1938, in an action numbered 89218 in the superior court of the state of California, in and for the county of San Diego, the Pacific Coast Joint Stock Land Bank, a corporation, obtained a judgment against Thomas N. Crofton in the sum of $4,951. On June 30, 1938, the Land Bank Corporation, judgment creditor, duly assigned and sold the judgment to O. F. Neal. On July 18, 1938, one John Crofton commenced an action numbered 93426, in the superior court of San Diego county, state of California, against the Land Bank Corporation to quiet title to certain real estate. On October 1, 1938, O. F. Neal, by order of the court, was joined as a party defendant in said action with the Land Bank Corporation and was given ten days from said date to file an answer and cross-complaint. The answer and cross-complaint were duly filed, alleging the assignment of the Land Bank Corporation judgment to him, and seeking to have it adjudged that he (Neal) had a first lien upon the real estate by virtue of the judgment, and also seeking to have a certain recorded deed of the same property from Thomas N. Crofton to John Crofton, dated April 26, 1935, declared void for the reason that the deed was without consideration and was given for the purpose of defrauding creditors. On July 2, 1938, Thomas N. Crofton was adjudged a bankrupt. On October 20, 1938, plaintiff John Crofton having failed to answer the cross-complaint, O. F. Neal, as defendant and cross-complainant, caused a default to be entered on the cross-complaint. On November 9, 1938, after default had been entered, plaintiff John Crofton filed an answer to said cross-complaint. In May, 1939, Fred S. Young, petitioner, as trustee in bankruptcy for Thomas N. Crofton, filed in said action a motion seeking substitution in the place of O. F. Neal as a party defendant and cross-complainant. On June 5, 1939, the motion was granted and an order of court making the substitution followed. In June, 1939, petitioner trustee, as defendant and cross-complainant, filed a motion to strike the answer of plaintiff John Crofton to the cross-complaint for the reason that the said answer was filed after default had been duly entered on the cross-complaint, and on June 12, 1939, the court made such an order. On July 17, 1939, the respondent court, upon motion of plaintiff John Crofton filed June 24, 1939, made an order striking from the files of the court the order made on October 1, 1938, bringing in O. F. Neal as a party defendant, struck the answer and cross-complaint of O. F. Neal filed thereunder, and set aside the default of the clerk on the cross-complaint, and also set aside the order theretofore made substituting petitioner trustee as party defendant and cross-complainant in the place and stead of O. F. Neal.

Petitioner now contends as a ground for review, that the respondent judge had no power to set aside the order of October 1, 1938, bringing in O. F. Neal as a party defendant, nor the authority to set aside the default entered on October 20, 1938, nor to strike the answer and cross-complaint, nor to set aside the order of June 5, 1939, substituting petitioner trustee in the place of O. F. Neal, for the reason that more than six months had elapsed from the time of the making of the said orders and from the entry of default. Sec. 473, Code Civ. Proc. By the instant proceeding petitioner seeks an order annulling the last-mentioned order of respondent court and seeks a further order to be directed to said court to reinstate the answer and cross-complaint of the substituted defendant O. F. Neal and the substitution of petitioner trustee therein, and that the court be ordered to strike from the files the answer of John Crofton to the cross-complaint of the said O. F. Neal. Petitioner alleges that he has no speedy and adequate remedy at law by appeal from said order for the reason that the order has deprived him of his right to appear in the action and protect his interest in the income-producing real property involved. Respondent has furnished no brief or argument supporting the order.

[1] Unless the order of October 1, 1938, joining O. F. Neal as a party defendant was void for lack of jurisdiction, no authority to grant such a motion is given under section 473 of the Code of Civil Procedure unless made "within a reasonable time, in no case exceeding six months, after such * * * order or proceeding was taken". If the order was merely erroneous, such erroneous action was not in excess of jurisdiction, but was an erroneous exercise thereof, which may be corrected on appeal. County of Sutter v. Superior Court, 188 Cal. 292, 296, 204 P. 849. The order bringing in Neal as a party defendant was not in excess of jurisdiction. Sec. 379, Code Civ.Proc. However, from the record, it appears that more than six months had elapsed before the order was attacked by motion to strike or to set it aside. The trial court, therefore, in that respect had no jurisdiction to grant the motion. In re Morehouse, 176 Cal. 634, 169 P. 365.

[2] That portion of the order setting aside the default not having been made within the prescribed six months' period as provided by section 473 of the Code of Civil Procedure was not only erroneous but beyond the power and jurisdiction of the court to make. Hunt, Mirk & Co., Inc. v. Hesperides Mining Co., 200 Cal. 382, 253 P. 317; Mader v. Christie, 52 Cal.App. 138, 198 P. 45; Title Insurance & Trust Co. v. King etc. Co., 162 Cal. 44, 120 P. 1066.

[3, 4] Respecting the order finding that the petitioner as trustee of the bankrupt estate of Thomas N. Crofton succeeded to all the right, title and interest of O. F. Neal and ordering him substituted in his place and stead, the trial court may have determined that this finding was an erroneous conclusion. From the record before us, their interests do not appear to be identical. The trial court on proper motion made within the six months' period was therefore authorized under section 473 of the Code of Civil Procedure to correct such an order by striking it from the files. Upon proper application the trustee may be made a party defendant, or should it develop that the petitioner is a necessary party, it is the duty of the plaintiff to amend and bring in such parties as may have succeeded to defendant's interest, in whole or in part, and if he neglects to do so the court, of its own motion, should order it to be done at the proper time in order that the whole controversy may be settled in one action. Robinson v. Gleason, 53 Cal. 38; Moffatt v. Moffatt, 5 Cal. 280. The trial court's power extends not only to the bringing in of new parties to the action but also to the dismissal of the action as to any person improperly joined or brought in as a party. These are matters incidental to its exercise of jurisdiction in any cause pending before it. Agassiz v. Superior Court, 90 Cal. 101, 27 P. 49.

[5] The answer filed by the plaintiff Crofton to the cross-complaint of O. F. Neal, in view of the conclusion herein reached, is ineffective, for a defendant

against whom a default is entered "'is out of court and is not entitled to take any further steps in the cause affecting plaintiff's right of action'". Title Insurance etc. Co. v. King etc. Co., supra, 162 Cal. at page 46, 120 P. at page 1067.

Summarizing the conclusions reached, it is our judgment that that portion of the order striking the order bringing in O. F. Neal as an additional party defendant, the portion of the order striking the answer and cross-complaint of O. F. Neal, and the portion of the order setting aside the default of John Crofton for failure to answer the cross-complaint should be and is annulled. That portion of the order striking the order substituting petitioner in the place and stead of O. F. Neal is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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37 Cal.App.2d 105

PEOPLE v. SAVIN.

Cr. 449.

District Court of Appeal, Fourth District, California.

Jan. 31, 1940.

1. Criminal law 🔑274

Where, on account of duress, fraud or other fact overreaching the free will and judgment of accused he is deprived of right of trial on the merits, the court in which accused was sentenced may, after judgment and after time for appeal has passed, if a properly supported motion is seasonably made, grant accused privilege of withdrawing plea of guilty and of reassuming situation occupied by him before plea was entered.

2. Criminal law 🔑741(1)

All questions of weight and sufficiency of evidence are addressed in the first instance to the trier of fact.

3. Criminal law 🔑1158(1)

The District Court of Appeal could not reverse order of trial court granting writ of error coram nobis, vacating judgment pronounced on accused and permitting him to withdraw plea of guilty to charge of burglary if there was substantial evidence or a reasonable inference to be drawn from the evidence which supported the order, and if two conflicting inferences might be drawn from the evidence, District Court of Appeal had duty to adopt the one supporting the trial court's order.

4. Criminal law 🔑997

Evidence that accused entered plea of guilty of burglary in reliance on representations that maximum sentence he would receive would not exceed nine months' confinement in county road camp sustained order granting writ of error coram nobis, vacating judgment of conviction and permitting accused to withdraw plea of guilty.

Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Henry Savin was convicted of burglary on plea of guilty and from an order granting writ of error coram nobis, vacating the judgment and permitting defendant to withdraw his plea of guilty, the People of the State of California appeal.

Affirmed.

Earl Warren, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for appellant.

Hervey & Holt, of San Diego, for respondent.

MARKS, Justice.

This is an appeal by the People from an order of the trial court granting a writ of error coram nobis, vacating the judgment pronounced on defendant and permitting him to withdraw his plea of guilty to the charge of burglary.

The evidence submitted on the hearing of the petition consisted of three affidavits and two letters. No evidence was offered by the People and the affidavits stand uncontradicted. A portion of this evidence related to the mental incompetency of defendant with which we need not concern ourselves here other than to remark that it would tend to support a plea of not guilty by reason of insanity.

One affidavit was by the father of defendant. He was present at the preliminary examination and at a conversation immediately following it between the then counsel for defendant and the deputy district attorney who conducted the examination. During this conversation the deputy district attorney stated that, on the evidence, should defendant enter a plea of guilty, the maximum sentence to be imposed would not exceed nine months' confinement in the county road camp. Subsequently affiant talked to the assistant district attorney of San Diego county and was advised by him "that should the defendant Henry Savin plead guilty to said charge that the punishment would be confinement in the county road camp of San Diego county. * * *" Affiant also talked to the district attorney of San Diego county and was informed by him "that, in his opinion, the punishment which would be imposed in the event a plea of guilty was entered would be confinement in the County Road Camp. * * *" Affiant and the then counsel for defendant communicated the substance of these conversations to defendant prior to the time of the entry of the plea of guilty. None of these statements were controverted except the one which we will next mention.

Defendant presented the affidavit of the deputy district attorney who conducted the preliminary examination, in which the conversation at the close of the preliminary examination was summarized. The only conflict in this affidavit with the affidavit of the father of defendant was that he stated that it was his opinion that a sentence to the county road camp would follow a plea of guilty. This is the only conflict in the evidence disclosed in the record.

The verified petition of defendant alleged that the statements contained in the affidavit of his father concerning the sentence were communicated to him by his father and his then attorney; that he believed those representations and relied upon them when he entered his plea of guilty; that he would not have entered such a plea had he not believed and relied upon those representations and had he not been advised by his father and his attorney to do so, they believing and relying upon them. There was no denial of these allegations except in the particular contained in the affidavit of the deputy district attorney already mentioned.

[1] The rule governing the issuance of the extraordinary writ coram nobis is thus stated in People v. Campos, 3 Cal.2d 15, 43 P.2d 274: "It is settled in this state that where on account of duress, fraud, or other fact overreaching the free will and judgment of a defendant he is deprived of the right of a trial on the merits, the court in which he was sentenced may after judgment and after the time for appeal has passed, if a properly supported motion is seasonably made, grant him the privilege of withdrawing his plea of guilty and of reassuming the situation occupied by him before plea of any kind was entered. People v. Schwarz, 201 Cal. 309, 314, 257 P. 71. In other words, as stated in People v. Miller, 114 Cal. 10, 16, 45 P. 986, 987, 'the law seeks no unfair advantage over a defendant, but is watchful to see that the proceedings under which his life or liberty is at stake shall be fairly and impartially conducted. It holds in contemplation his natural distress, and is considerate in viewing the motives which may influence him to take one or another course. Therefore it will permit a plea of guilty to be withdrawn, if it fairly appears that defendant was in ignorance of his rights and of the consequences of his act, or was unduly and improperly influenced, either by hope or fear, in the making of it.'"

[2-4] All questions of the weight and sufficiency of the evidence are addressed, in the first instance, to the trier of fact, in this case, the trial judge. We cannot reverse his order if there is substantial evidence or a reasonable inference to be drawn from it which supports the order. Where two conflicting inferences may be drawn from the evidence it is our duty to adopt the one supporting the challenged order. While the case is a close one, we cannot say as a matter of law that the conclusion drawn from the evidence by the trial judge that the representations of the prosecuting officers did not overreach the free will and judgment of the defendant is an unreasonable inference to be drawn from the evidence. Under such circumstances we cannot disturb the order here. In a case of this kind the trial judge should be given the opportunity to exercise a sound discretion so that justice may be done.

The order is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

37 Cal.App.2d 8

PEOPLE v. HOBBS.

Cr. 1716.

District Court of Appeal, Third District, California.

Jan. 29, 1940.

1. Criminal law ⚷1202(4)

A reference to accused's prior conviction by court clerk in reading to jury count of information charging petit theft, without eliminating words "with prior conviction of petit theft" therefrom, was error, where defendant admitted such prior conviction on arraignment. Pen.Code, § 1025; § 1093, subd. 1.

2. Criminal law ⚷1202(4)

An error in court clerk's reference to accused's prior conviction in reading to jury count of information charging petit theft, without eliminating words "with prior conviction of petit theft" therefrom, was not cured by court's instruction at conclusion of all evidence that jury must not consider such reference. Pen.Code, § 1025; § 1093, subd. 1.

◆

Appeal from Superior Court, Yolo County; J. G. Bruton, Judge.

William Hobbs was convicted of petit theft, and he appeals.

Reversed.

Huston, Huston & Huston, of Woodland, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Appellant was charged with petit theft in stealing two gang plows, and also with having suffered a prior conviction of petit theft, and a prior conviction of robbery.

In a second information defendant was charged with grand theft, a felony, in stealing a disc plow, and was therein charged with a prior conviction of robbery.

He entered pleas of not guilty to each of the two informations, except that in both he admitted the prior convictions.

The two cases were consolidated for trial, and the jury found the defendant guilty of petit theft as charged in the first information, and guilty of petit theft, an offense included in the charge contained in the second information.

This appeal is from the judgment and from the order denying a new trial. The only ground for reversal is based upon the fact that although upon his arraignment defendant admitted the prior convictions alleged in the informations, the clerk of the court, following the impanelment of the jury, read the first count of the first information in its entirety and without eliminating therefrom the words, "with prior conviction of petit theft".

Immediately upon the completion of the reading of the information, defendant moved for a mistrial and a discharge of the jury on the ground that it was error for the clerk to make any reference to the prior conviction. This motion was denied, but at the conclusion of the trial, the court, in its instructions to the jury, charged them upon this matter as follows: "When Count One of that Information was read to you, it being a formal charge, it contained certain language which does not concern you in this matter at all. It referred to petty theft, known as a felony and it was this: 'The said William Hobbs is accused by the District Attorney of and for the county of Yolo, State of California, by this amended Information, of the crime of petty theft, with prior conviction of petty theft, a felony, committed as follows:' Any reference to a prior conviction has nothing to do with your consideration at all. You must not consider it in the least. You would be violating your oath if you did. The only question for you to decide is whether or not William Hobbs did, on or about the 18th day of July, 1939, in the County of Yolo, State of California, then and there being, did then and there wilfully, unlawfully and feloniously steal, take and carry away one four gang P and O plow and one three gang P and O plow, all of the value of $100.00 in lawful money of the United States, and the personal property of M. E. Dole, and you should only consider the evidence submitted to you here in court on that matter."

[1] The question for solution is, first, did the reference to the prior conviction constitute error, and secondly, if so, was it cured by the court's instruction? That it was error is not seriously denied. Section 1025 of the Penal Code provides that, "In case the defendant pleads not guilty, and answers that he has suffered the previous conviction, the charge of the previous conviction must not be read to the jury, nor alluded to on the trial"; and in subdivision 1,

section 1093, of the Penal Code, in prescribing the order of the proceedings at the trial, it is set forth that if the indictment or information be for a felony (as was in the instant case) the clerk shall read it, and state the plea of the defendant, and in cases where a previous conviction is charged, and the defendant has confessed the same, the clerk, in reading it, shall omit therefrom all that relates to such previous conviction.

The People cite People v. Darnel, 28 Cal.App.2d 122, 82 P.2d 209, where a witness inadvertently confused one defendant with another and referred to a prior conviction, thinking he was speaking of the other defendant. The Appellate Court there held that the mistake and misunderstanding was that of the witness for which counsel was not to blame. Upon discovering the mistake the witness corrected his testimony and the court admonished the jury to disregard the former testimony. It was held the defendant could not complain.

In People v. Mock Don Yuen, 67 Cal.App. 597, 227 P. 948, 949, the district attorney inadvertently asked a question involving a prior conviction. The court admonished the jury "to disregard any statement about any prior or previous conviction". This court held the defendant was not prejudiced. It is to be remembered, however, that in that case the defendant at first denied the previous conviction, but during the course of the trial, changed his plea and admitted the prior conviction. The previous conviction had therefore been alluded to several times, so the inadvertent reference to the fact by the district attorney very probably did not prejudice the defendant in the minds of the jury, especially after the court's admonition to disregard it.

Respondent also cites People v. Smith, 96 Cal.App. 373, 274 P. 451, 452, where the court interrupted the clerk before he had finished reading the objectionable portion of the information, the clerk merely reading, " 'that before the commission of the offense charged in this information said defendant, Henry J. Peterson, in the superior court of the state of Washington'—". No objection was noted by counsel, and the court did not admonish the jury, the reviewing court held all that the words read to the jury said was that a codefendant had been in the superior court of the state of Washington, and therefore the error was harmless.

In People v. Rogers, 94 Cal.App. 470, 271 P. 351, 352, the reading by the clerk to the jury, of a prior conviction which the defendant had admitted, was held to be error but did not result in a miscarriage of justice because the defendant took the stand in his own behalf (contrary to the fact here) and upon impeaching cross-examination, admitted the same priors referred to by the clerk. As the court there pointed out, "It would not be reasonable to believe that, if the references to prior convictions made by the clerk in reading the information and by the trial judge in giving his instructions had been eliminated, the jury's verdict would have been different, where evidence of the same priors remained before them, given from the mouth of the defendant himself."

In People v. Sansome, 84 Cal. 449, 24 P. 143, the clerk read to the jury the entire indictment including the charge and confession of a prior conviction. This was held to be reversible error in spite of the fact defendant, during the trial, offered in evidence a pardon for the offense, and also in spite of an instruction by the court to the jury that they had nothing to do with the prior conviction, but their sole duty was to determine whether the alleged robbery was committed, and if it was, whether defendant committed it. Here the instruction given did admonish the jury that any reference to a prior conviction had nothing to do with their consideration of the case and that they must not consider it in the least, and to do so would be a violation of their oath as jurors. They were not told, however, that the fact of a prior conviction had been wrongfully imparted to them. Also the instruction was not given at the time of the error, which occurred at the very beginning of the trial, but came at the conclusion of all of the evidence and after the jury had been allowed, throughout the course of the whole trial, to take such fact into consideration in weighing the testimony submitted.

The present situation is somewhat analogous to the reference to an insurance carrier in a personal injury action. There the courts are quick to protect the injured party,—here the appellant stood to lose his freedom rather than his money.

[2] In view of the clear and specific provisions of the code, and having in mind the quite universal conviction that a man having once committed an offense is more

inclined to offend again, we do not believe under the circumstances here that an instruction by the court could or did entirely remove the taint of such prior conviction.

The judgment and order denying a new trial are reversed.

We concur: THOMPSON, J.; TUTTLE, J.

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37 Cal.App.2d 56

McPHERSON v. MUTUAL BENEFIT HEALTH & ACCIDENT ASS'N.

Civ. 11210.

District Court of Appeal, First District, Division 2, California.

Jan. 31, 1940.

Insurance 🔑665(5)

In action for monthly installments, claimed to be due plaintiff for confining illness under clause of insurance policy obligating insurer to pay stated sums monthly for disability resulting from disease, cause of which originated over 30 days after effective date of policy, uncontradicted evidence that insured suffered from arterial cerebral condition for many months before such date and had to quit work thereafter because of such condition, but was not confined until after lapse of policy, precluded recovery by him.

◆

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Action by Lynn Clifford McPherson, an incompetent, by and through his guardian, Clifford H. McPherson, against the Mutual Benefit Health & Accident Association to recover monthly installments under an insurance policy for confining illness. Judgment for defendant, and plaintiff appeals.

Affirmed.

Gillis & Edwards, of Oakland (Adrian A. Kragen, of Oakland, of counsel), for appellant.

Donahue, Richards & Hamlin, of Oakland, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued through his guardian to recover monthly instalments claimed due under a policy of insurance containing a clause for monthly payments for "confining" illness. The cause was tried without a jury, and the defendant had judgment. The facts are undisputed; the plaintiff alone offered oral testimony; the defendant relied entirely upon the failure of proof to meet the terms of the policy.

The clause of the policy obligating the insurer to pay illness benefits reads: "The Association will pay, for one day or more, at the rate of Fifty ($50.00) Dollars per month for the first fifteen days and at the rate of One Hundred ($100.00) Dollars per month thereafter for disability resulting from disease, the cause of which originates more than thirty days after the effective date of this policy, and which confines the Insured continuously within doors and requires regular visits therein by legally qualified physician; provided said disease necessitates total disability and total loss of time."

The issue on this appeal is whether appellant proved a case which would entitle him to recover on this clause of the policy. The trial court found that he did not. He attacks these findings on five separate grounds. We will confine our examination to one of these as that alone requires an affirmance of the judgment.

The insured offered testimony tending to prove his allegation that on June 12, 1936, he became totally disabled "by reason of a disease, to-wit: Arterio-cerebro-sclerosis. That by reason of said disease the plaintiff became insane and has been insane since June 13th, 1936 * * *." The only medical witness called was Dr. Hart of whose testimony appellant says: "Dr. Hart further testified that before there are any outer symptoms of the disease the patient actually has a hardening of the cerebral arteries for many months; it is a gradual growth so that patient would not be aware of it and that plaintiff was afflicted with arterio-cerebro-sclerosis on the 13th day of April, 1936, and probably had it for six or eight months prior to June, 1936." This witness was unable to state when insanity began, but the only reasonable inference to be drawn from his testimony and from that of other witnesses is that insanity began after the lapsation date of the policy which was September 1, 1936. The trial court found that it had not been proved that the insured became insane on June 13, 1936, or at any time prior to September 1, 1936; that he became insane sometime subsequent to the latter date, but the exact time could not be ascertained from the evidence.

These facts stand uncontradicted: The insured had suffered from the arterio-cerebral condition for many months before the date of the policy; he was compelled to quit work because of that condition about June 12, 1936, but was not confined until after the lapse of the policy; this arterial hardening would have caused his subsequent confinement without the additional insanity condition; but the artery condition which brought on the insane condition was "the cause" of the "illness" referred to in the clause of the policy quoted as necessary to have "originated" more than thirty days after the effective date of the policy. Thus the illnesses which did confine the insured came from a "cause" which originated long prior to the effective date of the policy, and the trial court's findings were in accord with the evidence and the inferences to be drawn reasonably from it.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

37 Cal.App.2d 32

Ex parte LA BELLE.

Cr. 2107.

District Court of Appeal, First District, Division 1, California.

Jan. 30, 1940.

1. Statutes ⚷181(1), 184, 205, 211

A statute is to be construed according to the intention or the apparent or evident intention of the lawmaking power, which must be ascertained, as far as possible, from statute itself as a whole, including the title, viewed in light of its scope and apparent object and purpose.

2. Constitutional law ⚷48
Statutes ⚷181(2)

If a statute is susceptible of different constructions, that construction will be adopted which will make the statute constitutional and not lead to absurd and disastrous results.

3. Automobiles ⚷395

The purpose of the Petroleum Products Fraud Prevention Law, as amended, as expressed in the legislative title, was to prevent fraudulent sales of petroleum products, and the section prohibiting sale of gasoline from dispensing apparatus, unless there is displayed thereon a sign showing the total price, was designed for protection of purchasers of gasoline. St.1937, pp. 1564, 1570, §§ 1, 11(A).

4. Automobiles ⚷395

The Petroleum Products Fraud Prevention Law, as amended, does not manifest a legislative intent to make the act of selling a genuine or advertised brand or grade of gasoline for less than the price posted on dispensing apparatus a crime, since the act is not a price-fixing statute. St.1937, pp. 1564, 1570, §§ 1, 11(A).

5. Automobiles ⚷395

The Petroleum Products Fraud Prevention Law, as amended, does not purport to interfere with the right of a gasoline dealer to charge a different price for each successive sale of gasoline, or a price based on quantity of gasoline purchased. St.1937, pp. 1564, 1570, §§ 1, 11(A).

6. Criminal law ⚷13

A statute undertaking to define a new offense and provide for its punishment should express the Legislature's will in language that will not deceive the common mind.

7. Statutes ⚷181(2)

Where language used in statute was ambiguous and its meaning uncertain, for purpose of ascertaining legislative intent, the District Court of Appeal could look beyond the law itself and consider consequences of a particular construction or interpretation, and, if language used permitted, give to the statute a construction which was in harmony with sound sense and wise policy.

◆

Proceeding in the matter of the application of T. A. La Belle for a writ of habeas corpus.

Petitioner discharged.

Pierce & Sherwin, of Oakland, for petitioner.

Ralph E. Hoyt, Dist. Atty., J. F. Coakley, Chief Asst. Dist. Atty., and Folger Emerson, Deputy Dist. Atty., all of Oakland, for respondent.

KNIGHT, Justice.

The petitioner, T. A. La Belle, was arrested and imprisoned in the city of Oakland on a criminal complaint charging that at his place of business he displayed a sign on a gasoline dispensing apparatus showing that the total price of the gasoline to be sold therefrom was 18½ cents per gallon, whereas he did sell gasoline therefrom at a total price of 16½ cents per gallon. Claiming that his arrest and imprisonment were illegal and therefore that he was being unlawfully deprived of his liberty, he petitioned for and obtained a writ of habeas corpus.

The criminal charge was founded on the first sentence of subdivision A of section 11 of the Petroleum Products Fraud Prevention Law of 1931, as amended in 1937 (Stats.1931, p. 1313; Stats.1937, p. 1564; Act 2967, Deering's General Laws of 1937); and petitioner's main contention is that the mere act of selling gasoline from an apparatus for less per gallon than the price posted thereon does not constitute a violation of the provisions of said statute. The merit of petitioner's contention depends, therefore, upon the construction that shall be given to the statute. The portion of subdivision A of section 11 here involved reads as follows: "No person shall sell, offer for sale, or advertise for sale, any gasoline or other motor vehicle fuel from any place of business in the State of California by use of or through or from any dispensing apparatus, unless there is displayed on such dispensing apparatus in a conspicuous place at least one sign showing the actual total price, including taxes, per gallon of all gasoline or other motor vehicle fuel sold, offered for sale, or advertised for sale from the particular dispensing apparatus from which all such gasoline or other motor vehicle fuel is sold, offered for sale or advertised for sale. * * *"

Respondent expressly concedes that the Petroleum Products Fraud Prevention Law of 1931, as amended, "is not price-fixing legislation in any sense"; and it would seem that if it were to be construed as price-fixing legislation, serious doubts would arise as to its constitutionality. Williams v. Standard Oil Co., 278 U.S. 235, 49 S.Ct. 115, 73 L.Ed. 287, 60 A.L.R. 596. In other words, respondent specifically admits that the act does not purport to fix the price at which motor vehicle fuel shall be sold; that it does not prohibit price cutting or rebating, nor forbid sales below cost or below the price fixed by the manufacturer; that it does not curtail the right to contract nor require the maintenance of the same price level for any given period of time; that thereunder prices may be raised or lowered at the will of the dealer, and that he is not required to sell to all persons at a uniform price; that he "may charge a different price for each successive sale or he may have different prices based upon the quantity of fuel purchased by the customers or for any other reason"; nevertheless respondent contends that under the wording of the statute a dealer is guilty of a crime if after having complied with the statutory requirement of posting a price on the dispensing apparatus and while that price remains posted he sells a single gallon of gasoline from that particular apparatus for a fraction of a cent less than the posted price. The interpretation thus contended for by respondent cannot be approved.

[1-4] Laws are to be construed according to the intention, or at least the apparent or evident intention of the lawmaking power, which shall be ascertained and determined as far as possible from the statute itself as a whole, including the title, viewed in the light of its scope and apparent object and purpose; and if the statute is susceptible of different constructions, that will be adopted which will make it constitutional and not lead to absurd and disastrous results. Here the title of the act declares that it is "An act to prevent fraud or misrepresentation in the distribution and sale of gasoline or other motor fuel, distillate, kerosene and lubricating oil; regulating the distribution and sale of such products and the use of brands and trade-marks in connection therewith; providing for the licensing of persons, firms, associations or corporations, installing and using motor vehicle fuel pumps; regulating signs, placards, posters, streamers, cards and other advertising media advertising gasoline or other motor vehicle fuel or the price thereof; defining the powers and duties in relation thereto of the Division of Weights and Measures of the Department of Agriculture, and persons authorized by it, sealers of weights and measures, and their deputies and other officers; defining 'gasoline' and prescribing specifications for products sold or offered for sale as 'gasoline'; prescrib-

ing penalties for the violation of provisions hereof; and repealing acts and parts of acts inconsistent herewith." St.1937, p. 1564, § 1. And upon analyzing the separate provisions of the body of the act under the rules of statutory construction above mentioned, it becomes apparent that as expressed in the legislative title, the real purpose of the act was to prevent fraudulent sales of petroleum products, and that section 11 was especially designed for the protection of purchasers of gasoline, by requiring retail dealers to display on every gasoline dispensing apparatus used by them a sign showing the brand, grade and price of gasoline sold therefrom, and thus prevent unscrupulous vendors from fraudulently selling a spurious brand or an inferior grade of gasoline at the higher prevailing market price for which the genuine or superior grade was being sold; but we find nothing in the wording of subdivision A of section 11 or elsewhere in the act which would justify the conclusion that as contended by respondent it was the legislative intent to go further and make it a crime to sell the genuine or advertised brand or grade of gasoline for less than the posted price; nor can it be said that the act of doing so contravenes the avowed purpose of the legislation because obviously such a transaction in no manner works a fraud upon the purchaser, but, to the contrary, operates to his financial gain. It was so held by the appellate division of the superior court of Los Angeles in disposing of an appeal involving the precise question here presented; and we are in full accord with the majority opinion there rendered. People v. Paul Mason,[1] No. 90043, decided August 19, 1939. In part the court said: "The title to the act is worded broadly enough to cover the creation of many crimes, as we have stated, but as we are impressed when we read the provisions of the statute, the opening words of its title give the clue to its purpose: 'An act to prevent fraud or misrepresentation in the distribution and sale of gasoline.' Section 1 gives the specifications of gasoline, and section 2 makes it unlawful to sell any product as gasoline that does not conform to the specifications. Section 3 makes it a public offense to sell any gasoline unless there is a sign on the pump from which it is sold, bearing the word 'gasoline' and its brand or trade name or that it is 'gasoline, no brand'. Section 4 interdicts the sale of any petroleum product not gasoline unless its brand or trade name is on the pump, or the words 'no brand'. Section 5 requires the valves of tank wagons to be labeled according to the products that flow through the valves. Section 6 requires that a pump so located as to serve more than one driveway shall have the signs required by sections 3 and 4 clearly visible from each driveway. Section 8 forbids the sale of any gasoline that is falsely represented to be the product of any other than the true producer. Section 9 declares it to be unlawful to place in a pump any gasoline other than that indicated on the pump. Section 10 prohibits the advertisement of any gasoline that is not actually for sale. The provisions of section 11 not already before us describe with particularity the character of the sign that is to be posted; prohibit the advertisement of any gasoline without giving its price; forbid misleading signs and otherwise insure that the signs may be easily seen and legible. Section 12 forbids the mixing and fraudulent sale of gasoline. By section 13, a tank which has contained any petroleum product must be emptied and relabeled before any different petroleum product kept for sale may be placed in it. Section 14 prohibits the use of a pump to deliver any petroleum product other than that indicated on its sign. We have not attempted, of course, to cover every provision in the statute; much the same safeguards are thrown around the sale of lubricating oil that we have listed concerning gasoline, for example. What we have sketched, however, indicates the scope of this legislation. A clear, positive, uniform purpose pervades the act; it is the protection of the customer. With the possible exception of section 8, which prohibits a dealer from selling another's product as his own brand without the written authority of the producer, we find the consumer the object of the statute's solicitude. Into such a statute the first sentence of section 11 fits without distortion; a sale of gasoline is prohibited unless the protection that the customer needs is afforded, viz., a sign clearly indicating the particular brand or lack of brand and the gross price which will be demanded therefor, that is, 'the actual total price, including taxes' of all the gasoline (then and thereby offered to be) sold from the pump on which the sign hangs. If the sign, giving the customer the protection that the statute desires, is in place, the subsequent sale is valid, even though, by philanthropy of the seller or mutual agreement it differs from the posted price. If the legislature desires to make such philanthropy or mutual agreement unlawful, it can easily be accomplished. We are of the opinion that it has neither been attempted nor accomplished in this statute."

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[1] No opinion for publication.

[5, 6] On the other hand, if the interpretation contended for by respondent were to be adopted, it would doubtless lead to absurd consequences and render this particular part of the statute practically inoperative. For instance, as respondent concedes, the act does not purport to interfere with the right of a dealer to charge a different price for each successive sale or based on the quantity of fuel purchased or for any other reason; that is to say, he may, if he chooses, lawfully maintain a price of 16 cents a gallon for his employees; 17 cents for outside customers purchasing in quantities of 100 gallons or more a month; and 18 cents for the general public in the ordinary retail sales. But according to respondent's argument, in order to exercise such right, without committing a crime, the dealer must, before making any sale, change or rechange the posted price to conform to the particular sale he is about to make; or else he must install and operate as many dispensing pumps as he has prices. Evidently, according to the letter of the law, he may not post more than one price on one apparatus, because, as will be seen, in framing the mandatory provisions of the statute requiring the display of price signs, the legislature employs the singular—"price", and nowhere uses the plural—"prices". We are not prepared to hold that it was the legislative intent to bring about a situation of the kind above described. Moreover, in order to give any support to the strained interpretation sought by respondent it is necessary, as intimated in People v. Mason, supra, to read the statute backwards; and as there stated, it does not seem reasonable that the legislature intended in this back-handed way to make the selling of gasoline below the posted price a crime. In this regard, the language quoted in the case of In re Peppers, 189 Cal. 682, 209 P. 896, and United States v. Reese, 92 U.S. 214, 220, 23 L.Ed. 563, appears to be especially appropriate. It was there said: "If the legislature undertakes to define * * * a new offence, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime. * * * It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."

[7] The most that can be said in favor of respondent's position is that the language used in the enactment of this particular portion of the statute is ambiguous and consequently its meaning is uncertain; and in such cases, for the purpose of ascertaining the legislative intent, the court under well-settled rules may look beyond the law itself and take into consideration the consequences of a particular construction or interpretation, and if the language used permits, give to the statute a construction which is in harmony with sound sense and wise policy—one which will make the statute practically operative with the least injury to those upon whom it spends its force so that a statute designed to regulate will not be so construed as to destroy. 23 Cal. Jur., p. 766.

It is our conclusion, therefore, that if a dealer complies with all statutory requirements relating to the display of signs, he does not commit a criminal offense under the statute in question if he sells gasoline for less per gallon than the price posted on the dispensing apparatus.

The petitioner is discharged.

We concur: PETERS, P. J.; WARD, J.

37 Cal.App.2d 81

DISTRICT BOND CO. v. HILLIKER et al.

Civ. 6341.

District Court of Appeal, Third District, California.

Jan. 31, 1940.

1. Municipal corporations 🔑454, 484(1)

Street assessment proceedings are "in invitum" and nothing is to be presumed against property owner and in favor of proceedings upon sale of property to enforce lien for tax or assessment. St.1911, p. 1192.

[Ed. Note.—For other definitions of "Trust in Invitum," see Words & Phrases.]

2. Municipal corporations 🔑579

The failure of purchaser at sale for delinquent street assessments, under Street Opening Bond Act, to have certificate of sale recorded was not fatal to deed issued by city treasurer upon property owner failing to redeem, where act at the time bond was issued did not expressly require any one to record certificate of sale. St.1911, p. 1198, § 17.

3. Municipal corporations 🔑566

The notice of sale of property for delinquent street assessments under Street Opening Bond Act properly required purchaser to pay a 50 cent charge for certificate of sale, and properly included item of 50 cents which purchaser paid for certificate in the certificate of sale. St.1911, pp. 1196, 1197, §§ 11, 13.

4. Municipal corporations 🔑581

Purpose of provision in Street Opening Bond Act requiring that notice to redeem property sold for delinquent street assessments be served upon owner or agent, if named in certificate of sale, and upon party occupying property, if property is occupied, is to insure notice to owner of intention to apply for a deed. St.1911, p. 1198, § 18.

5. Municipal corporations 🔑581

Under provision in Street Opening Bond Act requiring that notice to redeem property sold for delinquent street assessments be served upon owner or agent, if named in certificate of sale, and upon party occupying property, if property is occupied, where brother of owner occupied some kind of structure at rear of lot and used it for sleeping purposes and front part of lot was used by owner of neighboring apartment house to provide space for tenants to park their automobiles, service of notice to redeem on owner and owner's brother was sufficient compliance with statute, notwithstanding no notice was served on apartment house owner. St.1911, p. 1198, § 18.

6. Municipal corporations 🔑579

A deed issued by city treasurer to purchaser at sale for delinquent street assessments, under Street Opening Bond Act, was not void because treasurer had previously issued deed which was void because some necessary preliminary steps had not been complied with. St.1911, pp. 1197, 1198, §§ 16, 18; St.1933, p. 2098, § 15.

7. Municipal corporations 🔑579

In action by purchaser of property at sale for delinquent street assessments to quiet title, description of property that plaintiff sought to quiet title to as "Lot 5 less the westerly 20 feet in Hays Addition to the Sunset Tract" and description of property used in assessment and subsequent proceedings as "Fractional Lot 5, Hay's Addition to the Sunset Tract", did not constitute a "variance" rendering deed void, where purchaser introduced ample evidence to identify both descriptions as describing the same parcel of property. St.1911, p. 1192.

[Ed. Note.—For other definitions of "Variance," see Words & Phrases.]

8. Municipal corporations 🔑579

A deed issued by city treasurer to purchaser of property at sale for delinquent street assessments under Street Opening Bond Act was not void because of failure to make reference to assessment number. St. 1911, p. 1198, § 18.

9. Municipal corporations 🔑581

The notice to redeem from sale for delinquent street assessments, under Street Opening Bond Act, need not include the 50 cent charge for service thereof. St.1911, p. 1198, § 18.

10. Municipal corporations 🔑579

Evidence failed to show that the statement in notice of sale for delinquent street assessments under Street Opening Bond Act, "that name of owner of property is unknown," was untrue, so as to render deed issued by city treasurer thereunder void, where notice of sale was dated December 1, 1932, and there was nothing in record to show that name of owners of property was known to city treasurer on such date. St. 1911, p. 1192.

11. Municipal corporations ⚷579

Evidence that city treasurer did not enter in the O & W Bond Register the name of deliveree of bond, issued under Street Opening Bond Act, but which did not show that city treasurer did not keep book in which he entered record of such bond, as required by the act, was insufficient to show that deed issued by city treasurer to purchaser of property at sale for delinquent street assessments was void because of treasurer's failure to enter in his book to whom bond was delivered, since it would be presumed that city treasurer performed his official duty in such respect. St.1911, p. 1195, § 5.

12. Judgment ⚷948(1)

In action by purchaser of property at sale for delinquent street assessments under Street Opening Bond Act, to quiet title, if owners of property wished to rely upon former judgment in previous action to quiet title brought by purchaser, owners should have set up such defense in their answer. Code Civ.Proc. § 1962; St.1911, p. 1192.

13. Judgment ⚷714(1)

A judgment in previous action by purchaser of property at sale for delinquent street assessments under Street Opening Bond Act to quiet title, which decreed that purchaser was not owner of property at time such suit was begun, was not conclusive on subsequent action to quiet title, where deed upon which purchaser relied in second action was acquired subsequent to first action. St.1911, p. 1192.

14. Judgment ⚷714(1)

A party is not estopped to assert title or interest accruing subsequent to a judgment adjudicating his rights or title in property in question.

15. Municipal corporations ⚷579

In action by purchaser of property at sale for delinquent street assessments under Street Opening Bond Act to quiet title, introduction by purchaser of deed issued to him by city treasurer threw upon defendants burden of showing a want of compliance with precedent steps required by the act. St.1911, p. 1199, § 19.

Appeal from Superior Court, Los Angeles County; Frank G. Smith, Judge.

Action by the District Bond Company against William M. Hilliker, Elizabeth Hilliker, and others, to quiet title. From judgment for plaintiff, William M. Hilliker and Elizabeth Hilliker appeal.

Affirmed.

William M. Hilliker and Elizabeth Hilliker, in pro. per.

Dryer, Castle & Richards, of Los Angeles, for respondent.

SCHOTTKY, Justice pro tem., delivered the opinion of the court.

This is an action to quiet title. The plaintiff framed its complaint in the ordinary form of an action to quiet title. The defendants in their answer denied all of the material allegations of the complaint. The court found in favor of the plaintiff, the findings and judgment following the allegations of the complaint.

The record in the case is very brief, and the facts appear to be as follows: On January 4, 1929, the city of Los Angeles issued bond No. 895, series 28, for the widening of Third street, under the provisions of the Street Opening Bond Act of 1911. (Stats.1911, chap. 630, p. 1192.) Said bond was in the principal amount of $440. (Exhibit AA.) The first principal payment, due July 1, 1929, was made, but no further payments were made and three and one-half years later, on December 1, 1932, notice of sale for default in payment was given and published. (Exhibits C and D.) Sale was held December 21, 1932, and the land sold to plaintiff. (Exhibit E.) After waiting more than two years plaintiff gave notice to redeem on March 21, 1934, and the city treasurer's deed was issued pursuant to said notice on April 18, 1934, and recorded May, 4, 1934. (Exhibit AA.) On June 14, 1934, suit to quiet title by the same plaintiff and against the same defendants was commenced, being action No. 374824, and on December 28, 1934, judgment was made and entered therein that plaintiff take nothing. Thereafter, on May 3, 1935, notice to redeem was served on H. B. Hilliker, as occupant of the property in question, and on William M. Hilliker, defendant and owner of the property in question. (Exhibit F.) There being no redemption, the city treasurer issued his deed to District Bond Company dated June 5, 1935, which was recorded June 7, 1935 (Exhibit 1), and the action from which this appeal is taken was filed June 25, 1935.

[1] It is, of course, the well-settled rule that street proceedings are "in invitum", and as was said by the court in the case of

Chapman v. Jocelyn, 182 Cal. 294, 300, 187 P. 962, 964: "Nothing is to be presumed against the owner of the lot and in favor of the proceedings upon a sale of property to enforce a lien for a tax or assessment."

Defendants and appellants attack the judgment upon the ground that it is not supported by the evidence, and contend that the proceedings that resulted in the deed relied upon by plaintiff were defective in at least nine particulars.

[2] Appellants' first contention is that the certificate of sale was not recorded in the office of the county recorder, and such failure to record the certificate was fatal to the deed. Appellants quote section 17 of the act in question, which reads as follows: "On receiving the certificate of sale, the recorder must file it, and make an entry in a book similar to that required of the city treasurer, the fee for which shall be fifty cents, and on presentation of the receipt of the * * * redemption money, the recorder must, without charge, mark the word 'Redeemed,' the date, and by whom redeemed, on the margin of the book where the entry of the certificate is made."

Respondent does not dispute appellants' statement that the certificate of sale was not recorded, but contends that such recordation was not required by the act.

We must of course take the act as it was in effect on the date the bond was issued, namely, January 4, 1929. On that date the act provided that the certificate of sale should be delivered to the purchaser by the city treasurer, but it did not require that the purchaser or anyone else should record it, although section 17, already quoted, did provide that upon receiving the certificate of sale the recorder must file it. No doubt it was contemplated by the author of the act that the certificate should be recorded, but it cannot be fairly said that the act does not require anyone to record, but only goes so far as to provide what the recorder shall do with it "on receiving it". No doubt the oversight was what caused the legislature in 1933 to amend this act by repealing section 17, and amending section 15, St.1933, p. 2098, to provide that the treasurer "shall deliver the original certificate to the purchaser and shall record the duplicate in the office of the recorder".

Inasmuch as the act did not expressly require anyone to record the certificate of sale, we cannot hold that the failure to record it in this case is fatal to the deed.

[3] Appellants' second contention is that the notice of sale was erroneous because it included a fifty cent charge for the certificate of sale, and that the sale was void because the sale price included a charge of fifty cents for the certificate of sale.

The notice of sale, dated December 1, 1932 (Defendants' Exhibit C), after stating the default and the amount of principal and interest due, went on to state that *"unless the amount of said bond, and the interest due thereon together with the cost of publication of this notice are paid"*, the property would be sold on December 21, 1932. The notice then went on to say that "said sale will be made at public auction to the bidder offering to pay the *amount then due on said bond, together with the cost of publication of this notice and fifty cents for the certificate* of sale for the least portion of said lot or parcel of land offered for sale".

We believe that the notice of sale complies with section 11 of the act and that there is no error in providing in the notice of sale that the purchaser shall pay the fifty-cent charge for the certificate. Section 13 of the act provides that the "city treasurer must collect, in addition to the amount due on such bond the cost of the publication of such notice, and fifty cents for the certificate of sale delivered to the purchaser". If the notice of sale provided that the owner must pay the fifty-cent charge for the certificate in order to prevent the sale, it would of course be in error, but it does not so provide. We see no error in including in the notice of sale that the purchaser must pay the fifty-cent charge for the certificate of sale, which section 13 of the act states that the city treasurer must collect. Certainly no possible injury can result to the owner through such inclusion, and it is only fair that prospective purchasers be advised of the fifty-cent charge for the certificate.

Likewise we see no error in including in the certificate of sale the item of fifty cents which the purchaser has paid.

The cases cited by appellants to the effect that the failure to state the correct amount due on the bond in the notice of sale makes the deed void are not applicable under the facts in the case at bar.

[4, 5] Appellants' third contention is that the notice to redeem was not served on all of the occupants of the property in

question, and that therefore the deed is void.

Section 18 of the act provides that the purchaser "must, thirty days prior to the expiration of the time of the redemption, or thirty days before his application for a deed, serve upon the owner or agent of the property purchased, if named in such certificate of sale, and *upon the party occupying the property, if the property is occupied,* a written notice," etc. (Italics added.)

It appears from the evidence that one Richard W. Malloy owned some apartments on the adjoining lot, and had from the owner of the lot here in dispute the right to have his tenants who owned automobiles park them on the front part of the lot. It was stipulated that a brother of appellant, Wm. M. Hilliker, occupied a structure of some kind at the rear of the lot and used it for sleeping purposes.

Service of the notice to redeem was served on applicant Wm. M. Hilliker, and upon his said brother, but no service was made upon Mr. Malloy, and appellants contend that by such failure, there was no sufficient service of notice "upon the party occupying the property".

The purpose of the provision for service of the notice to redeem is to insure notice to the owner of intention to apply for a deed, and the owner here not only had notice through service upon his brother who actually lived on the property, but through personal service on himself.

We believe that service upon a person actually living on the property is service upon "the party occupying the property", and that the implied finding of the trial court that Malloy was not an occupant of the property is sustained by the evidence.

[6] Appellants' fourth contention is that the deed from the city treasurer is void, because the treasurer had no authority to issue a second deed.

We see no merit in this contention of appellants. Section 18 of the act provides that if the property is not redeemed within the time allowed by section 16 of the act, the city treasurer "must make to said purchaser, or his assignee, a deed to the property". There is nothing in the section or the act to compel the conclusion that if for any reason a deed issued by the treasurer is void because some necessary preliminary steps had not been complied with, another deed may not be issued, if the proper steps have been taken.

In the case of Richards v. Sellers, 104 Cal.App. 30, 285 P. 391, a case which declared a deed invalid because of insufficient service of notice to redeem, the court said, 104 Cal.App. at pages 32 and 33, 285 P. 392: "Because the plaintiff did not serve the occupant and because the owner received no notice at all, the service was incomplete and the owner's title was not divested. In making findings against the plaintiffs the trial court did not hold that the plaintiffs had no rights. It merely held that the plaintiffs' deed was invalid. [4] By the terms of section 72 of the statute the payments theretofore made by the plaintiffs together with interest thereon constituted a lien. That lien still exists and will continue to exist until a redemption is had or a valid deed is made. In no respect did the trial court hold to the contrary."

See, also, Warden v. Bittleson Law & Collection Agency, 41 Cal.App. 1, 181 P. 834.

The Street Opening Bond Act of 1911, which is the act involved in the case at bar, expressly provides in section 15 that the purchaser's lien is only divested by payment of the purchaser's money, and the cases cited hold that the issuance of an invalid or irregular deed does not affect the lien of the holder of the certificate of sale, or the power of the city treasurer to issue a subsequent deed.

[7] We are unable to agree with appellants' fifth contention which is that there is a variance in description which rendered the deed void.

The property that plaintiff sought to quiet title to was described as "Lot 5 less the westerly 20 feet in Hays Addition to the Sunset Tract" and the description of the property used in the assessment and subsequent proceedings was "Fractional Lot 5, Hay's Addition to the Sunset Tract". Plaintiff introduced ample evidence to identify both descriptions as describing the same parcel of property.

In the case of Warden v. Brandes, 103 Cal.App. 744, 284 P. 1050, the court said:

"In McLauchlan v. Bonynge, 15 Cal.App. 239, at page 242, 114 P. 798, 799, it is said:

"'In order to identify the property by such description, there should be evidence not only of the existence of a map, but such map itself, with proof that it was the only map of any tract in the city of Los Angeles known as the Clifton tract existing at the time when the assessment was made, and showing that the lots in question were delineated thereon, should be presented to the court.'

"To the same effect is Thompson v. McKenna, 22 Cal.App. 129, 133 P. 512 [supra], and Campbell v. Shafer, 162 Cal. 206, 121 P. 737 [supra].

"Under the above decisions the plaintiff was entitled to introduce evidence that lot 78 described in the complaint and fractional lot 78 were the same. This could have been done by the method pointed out in McLauchlan v. Bonynge, supra, or any other appropriate method, but, having failed to do so, the court was correct in granting the motion for a nonsuit."

[8] Appellants' sixth contention is that the deed is void, because it refers to and relies for its basis upon a nonrecorded deed, and fails also to make reference to the assessment number.

We have already discussed the point as to the certificate of sale not being recorded.

Appellants cite no section of the act or any authority that the deed must recite the assessment number. We do not find in the act any requirement that the certificate of sale shall recite the assessment number, but section 18 provides that the deed shall recite "substantially, the matter contained in the certificate, and that no person has redeemed the property during the time allowed for its redemption".

[9] We find no merit in appellants' next contention that the notice to redeem should include the fifty-cent charge for service thereof. Section 18 of the act sets forth the matters to be included in the notice to redeem, and there can be found therein no requirement that the notice shall contain any such provision.

[10] Appellants' contention that the statement in the published notice of sale "that the name of the owner of the property is unknown" is untrue and fatal to the deed cannot be sustained. The notice of sale is dated December 1, 1932, and there is nothing in the record to show that the name of the owners of the property was known to the city treasurer on that date.

[11] Appellants' next contention is that the deed is void, "because the treasurer failed to enter in his book to whom the bond was delivered".

The evidence merely shows that the treasurer did not enter in the O & W Bond Register the name of the deliveree of the bond, but the record does not show that the city treasurer did not keep a book in which he entered a record of such bond, specifying its date, amount, to whom delivered, its duration, and a description of the lot against which issued, as required by section 5 of the act. This court will presume that the city treasurer performed his official duty in that respect. Furthermore, section 6 of the act makes the bonds issued under the act "conclusive evidence of the regularity and validity of all proceedings thereto".

[12] Appellants' final contention is that a judgment in a former action was conclusive against respondent in the action in which this appeal is taken. The former judgment merely decreed that plaintiff take nothing; in other words that plaintiff was not the owner of the property at the time the first suit was begun. Thereafter plaintiff secured a new deed and filed the suit to quiet title. Appellants' answer denied plaintiff's ownership, but did not plead the former judgment in bar. We believe that as required by section 1962 of the Code of Civil Procedure "such judgment or order must be alleged in the pleadings if there be an opportunity to do so", and that if appellants wish to rely upon the former judgment as conclusive as to the validity of the certificate of title, they should have set up such defense in their answer, as it cannot be said that they did not have opportunity to do so.

[13, 14] But even if such a defense was properly before the court, there is nothing in the record to show that there was anything adjudged by the former action except that at the time of its commencement respondent was not the owner of the property. The deed upon which respondent relies was acquired subsequently, and the law is well settled that "a party is not estopped to assert a title or interest accruing subsequent to a judgment adjudicating his rights or title in the property in question". 15 Cal.Jur. sec. 207, p. 165. See, also, Thorne v. McKinley Bros., 5 Cal.2d 704, 56 P.2d 204.

There is therefore no merit in appellants' contention that the former judgment is conclusive against respondent.

[15] Section 19 of Street Opening Bond Act of 1911 declares that the deed is conclusive evidence of all things of which the bond upon which it is based is conclusive evidence, and prima facie evidence of the regularity of all proceedings subsequent to the issuance of the bond. The introduction

of the deed therefore threw upon appellants the burden of showing a want of compliance with the precedent steps required by the statute (Empire Securities Co. v. Mathews, 179 Cal. 239, 176 P. 160), and this burden they did not meet. The record in our opinion shows a substantial compliance with the provisions of the act.

The judgment of the court below should be affirmed. It is so ordered.

We concur: PULLEN, P. J.; TUTTLE, J.

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37 Cal.App.2d 44

PEOPLE v. DAWES.

Cr. 3286.

District Court of Appeal, Second District, Division 1, California.

Jan. 30, 1940.

1. Criminal law 🔑1023(10)

A person who is placed on probation after execution of a judgment of conviction has been suspended has right to appeal, and it is only where no judgment is pronounced, and proceedings are suspended and defendant is placed on probation, that a defendant is without right of appeal except from order denying motion for a new trial.

2. Criminal law 🔑409

The rule that admissions of a defendant are inadmissible until corpus delicti is proved does not require that elements of body of crime be proved beyond a reasonable doubt or by direct or positive evidence, but corpus delicti may be proved by circumstances shown in evidence, by inferences drawn from proved facts, and by slight or prima facie proof.

3. Criminal law 🔑409

In prosecution for injuring a person while operating an automobile under the influence of liquor, in making a prima facie showing of "corpus delicti" which would justify introduction into evidence of admissions of defendant, proof only was required that defendant was driver of automobile which caused injuries and that he was intoxicated. Vehicle Code, § 501, St.1935, p. 174.

[Ed. Note.—For other definitions of "Corpus Delicti," see Words & Phrases.]

4. Criminal law 🔑409

In prosecution for injuring a person while operating automobile under influence of liquor, evidence that defendant was intoxicated, that he was sole occupant of automobile which struck a parked automobile causing injury to third person, and that defendant immediately after accident got out of automobile and shook injured person, established the "corpus delicti" so as to justify introduction into evidence of admissions of defendant made to police officer. Vehicle Code, § 501, St.1935, p. 174.

5. Automobiles 🔑355(6)

In order to sustain a conviction for causing injury to third person by operating automobile under influence of liquor, evidence must establish not only that defendant was driving an automobile while intoxicated, that while in such condition he committed some act forbidden by law, or that he neglected to perform some duty imposed by law, but that such act or such neglect proximately caused bodily injury to some person. Vehicle Code, § 501, St.1935, p. 174.

6. Automobiles 🔑355(6)

Evidence that defendant while driving automobile in a reckless manner while intoxicated ran into rear of a lighted disabled automobile standing within a few feet of sidewalk, and injured driver of automobile towing disabled automobile, who had gotten out of automobile to fix a broken tow chain, sustained conviction of defendant for causing injury to a third person by operation of automobile while intoxicated. Vehicle Code, § 501, St.1935, p. 174.

7. Automobiles 🔑330, 332, 335

A defendant who, while driving an automobile at night in a reckless manner, struck rear of a lighted disabled automobile violated the statutes prohibiting operation of automobile in a manner indicating a willful disregard for safety of persons or property and requiring defendant to follow disabled automobile and its tow car at a reasonable distance, which violations justified his conviction for injuring third person while operating automobile under influence of liquor. Vehicle Code, §§ 501, 505, subd. (a), 531, subd. (a), St.1935, pp. 174, 175, 183.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Truman Dawes was convicted of injuring a person by driving an automobile in an unlawful manner while under influence of liquor, and he appeals.

Affirmed.

Horace Appel, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an information filed by the district attorney of Los Angeles county, defendant was accused of a violation of section 501 of the Vehicle Code, St.1935, p. 174, in that he did, while under the influence of liquor, drive an automobile and in an unlawful manner cause bodily injury to one Theodore Gonzales.

Upon the entry of a plea of not guilty, coupled with appropriate waiver of trial by jury, the cause was submitted to the court on the transcript of the testimony given at the preliminary examination. Following his conviction and the denial of his motion for a new trial, defendant was sentenced to a term in the county jail, which sentence was suspended, and he was placed on probation. From such judgment and order denying him a new trial defendant prosecutes this appeal.

[1] It is the contention of the attorney-general that because probation was granted an appeal from the judgment is ineffective. Such is not our understanding of the law. It is only where no judgment is pronounced, and where prior to the rendition of any judgment the proceedings are suspended and the defendant is placed on probation, that he is without a right of appeal except from the order denying his motion for a new trial if such last-named motion is made. People v. De Voe, 123 Cal.App. 233, 11 P.2d 26; People v. Johnson, 14 Cal.App.2d 373, 375, 58 P.2d 211. Where, as here, a judgment was pronounced, the defendant may appeal therefrom even though the execution thereof is suspended and probation is granted.

Two grounds are here presented for a reversal: (1) that the court erred in receiving admissions of the defendant when a corpus delicti had been established: and (2) that the evidence is insufficient to sustain a conviction for violation of section 501 of the Vehicle Code.

Epitomizing the pertinent facts, we find in the record evidence that between 6 and 7 o'clock on the evening of January 20, 1939, Theodore Gonzales, the injured victim, an automobile mechanic, was towing a disabled car in an easterly direction along Sunset boulevard, the latter car being steered by one Frank Marcus. Before they crossed the intersection of Alvarado street Mr. Gonzales' attention was attracted to a coupe being driven by a man and with no other passenger therein, which car was zigzagging in and about the street car tracks and over to the left side of the street, so that Gonzales had difficulty in passing such automobile. He signaled Marcus in the disabled car to watch out for the zigzagging automobile. After the tow car and the disabled automobile had passed the above-mentioned automobile, the tow chain uniting the tow car and the disabled automobile broke. When this happened Gonzales stopped the tow car, and Marcus, who was steering the rear car, coasted up close to the tow car and stopped. At that time the right sides of their respective cars were about three or four feet from the sidewalk, and both the front and rear lights on the car that was being towed were lighted. Gonzales got out of the tow car and was between the bumpers of the two cars hooking the chain on again, when the same automobile which had been zigzagging from side to side on the street and which they had passed came from behind and struck the disabled car, pinning Gonzales between the two automobiles. Extricating himself, Gonzales fell down, unconscious, with his left arm broken and both legs and his breast injured. Defendant, who was driving the car which collided with the disabled car, emerged from his machine, saying to Gonzales and Marcus, "Don't pull them tricks on me," and shaking Gonzales, told him to get up, "that he had them tricks done before on him". At this time Marcus told defendant the man was badly hurt and to leave him alone, at which time the defendant turned round toward Marcus and said, "Now, you little runt, if you don't keep quiet and keep out of my business I am going to smack you." During the conversation just related defendant was within a couple of feet of Marcus, who testified that defendant's breath smelled of liquor, that he could not walk steadily; and Marcus stated that he formed an opinion that defendant was intoxicated. A police officer who arrived at the scene of the accident found the defendant standing by his car, and upon being questioned by the officer defendant stated that he was driving his automobile east on Sunset boulevard when the disabled car being towed stopped suddenly in front of him and he had no opportunity to avoid the accident. This police officer also testified that defendant's breath smelled of alcohol, that his speech was thick, and he staggered when he attempted to walk. In the opinion of the police officer, defendant was under the influence of intoxicating liquor.

[2-4] Appellant's first contention, that his admissions made to the police officer were inadmissible because the corpus delicti was unproved, cannot be sustained. The rule in this regard has never been extended so far in its scope as to require that the elements or the body of the crime be proved beyond a reasonable doubt before the admissions or confessions may be received and considered as evidence. People v. Rowland, 12 Cal.App. 6, 10, 106 P. 428. Slight or prima facie proof of the corpus delicti will suffice. People v. Bausell, 18 Cal.App.2d 15, 19, 62 P. 2d 774, and cases therein cited. It is also established that the requisite preliminary element of the corpus delicti may be proved by circumstances shown in evidence or by inferences drawn from proved facts. People v. Vicunia, 105 Cal.App. 145, 286 P. 1061; People v. Ford, 85 Cal. App. 258, 258 P. 1111. It is not essential that direct or positive evidence be produced. People v. Wilkins, 158 Cal. 530, 111 P. 612; People v. Hudson, 139 Cal. App. 543, 34 P.2d 741. In the case at bar the prosecution, in making a prima facie showing of the corpus delicti, was not required to go further than to furnish proof that the defendant was the driver of the automobile in question and that while so driving he was intoxicated. That defendant was intoxicated was shown by overwhelming evidence. That he was the driver of the automobile which collided with the disabled automobile was certainly established, at least inferentially, by the testimony that there was but one person in the automobile seen zigzagging along Sunset boulevard and that such lone person was driving the car, coupled with the testimony that this same automobile, within six blocks after being first observed, caused the personal injuries here in question, and the further fact that defendant immediately after the accident got out of the automobile, went over to the injured man, shook him and told him to get up, saying, "Don't pull them tricks on me." It would do violence to reason and challenge one's credulity in the face of these facts to say other than that the corpus delicti was established by ample evidence, and without the admissions of the defendant. People v. Ellena, 67 Cal. App. 683, 228 P. 389.

[5, 6] Appellant's final claim, that the evidence is insufficient to establish a violation of section 501 of the Vehicle Code, is equally without merit. It is true, as claimed by appellant and stated by this court in People v. Levens, 28 Cal.App.2d 455, 459, 82 P.2d 698, 699, that "in order to sustain a conviction under section 501 of the Vehicle Code, it must appear in the evidence adduced at the trial not only that the defendant therein was driving an automobile while under the influence of intoxicating liquor, and that while in such condition he committed some act forbidden by law, or that he neglected to perform some duty imposed by law, but in addition that such act or such neglect, proximately caused bodily injury to some person". In the same case, however, it is stated that from a consideration of the facts and circumstances in each case it must be determined whether the acts shown to have been committed constitute a violation of the section in question. A comparison of the facts in the case just cited with the situation revealed by the record in the instant case immediately suggests the dissimilarity between the two. In the Levens case, supra, the evidence indicated that the defendant was driving carefully at a rate of approximately 25 miles per hour, observing all boulevard stops, and that the car he struck was parked at a 45-degree angle to the curb, at 2:30 o'clock in the morning, without lights, while in the case before us the evidence shows that the defendant was recklessly driving along Sunset boulevard, zigzagging from side to side, sometimes on the left side of the street, and finally ran in-

to the rear of a lighted disabled car standing within a few feet of the sidewalk on its right side of the street, and which car had been stopped there long enough to permit the driver of the car towing it to get out and fix a broken tow chain.

[7] The acts forbidden by law and committed by appellant while driving his automobile when intoxicated which support the conviction are driving upon a highway in such a manner as to indicate a wilful and wanton disregard for the safety of persons or property (subd. (a), sec. 505, Vehicle Code), coupled with his failure to follow the disabled automobile and its tow car at a reasonable and prudent distance, having due regard for the speed of such vehicles and the traffic upon, and the condition of, the roadway. (Subd. (a), sec. 531, Vehicle Code.) That the reckless, illegal and unlawful manner of defendant's driving proximately contributed to the injuries sustained by Theodore Gonzales admits of no doubt.

For the foregoing reasons, the judgment and the order denying defendant's motion for a new trial are, and each of them is, affirmed.

We concur: YORK, P. J.; DORAN, J.

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36 Cal.App.2d 721

McMILLAN v. SIEMON.

Civ. 2295.

District Court of Appeal, Fourth District, California.

Jan. 25, 1940.

1. Elections 🔑18

The proviso in constitutional amendment that elector moving from precinct in which registered to another precinct in same county within 40 days before election shall be deemed resident and qualified elector of precinct from which he moved for purpose of such election is controlling in determining whether elector may vote in precinct wherein registered at general city election within 40 days after his removal from such precinct to another precinct, if in conflict with statute prescribing voters' qualifications, though both such proviso and statute were adopted by people of state as initiative measures at same election. Pol.Code, § 1044; § 1120, as amended; St.1915, pp. 1568, 1572; Const. art. 2, § 1, as amended in 1930; art. 4, § 1.

2. Constitutional law 🔑38

A constitutional amendment contravened by statute prevails, whether statute was adopted by Legislature or by people as initiative measure. Const. art. 4, § 1.

3. Elections 🔑60

The term "qualified elector," in proviso of constitutional amendment that elector moving from precinct in which registered to another precinct in same county within 40 days before election shall be deemed resident and qualified elector of precinct from which he moved for purpose of such election, is used in same sense as in statute providing that person having qualifications outlined in such amendment and conforming to registration law shall be qualified elector at all elections and means an elector entitled to vote. Pol.Code, § 1083; Const. art. 2, § 1, as amended in 1930.

[Ed. Note.—For other definitions of "Qualified Elector," see Words & Phrases.]

4. Elections 🔑60

The proviso in constitutional amendment that person moving from precinct in which registered as elector to another precinct in same county within 40 days before election shall be deemed resident and qualified elector of precinct from which he moved for purpose of such election gives elector within its provisions privilege of voting at election in precinct from which moved. Const. art. 2, § 1, as amended in 1930.

5. Constitutional law 🔑14
Contracts 🔑175(1)
Statutes 🔑188

In construing Constitution, as well as statutes, contracts, and all written or spoken language, words are presumed to have been used in their natural and ordinary meaning, in absence of technical terms.

6. Constitutional law 🔑12

Constitutional provisions must receive a liberal, practical common-sense construction.

7. Constitutional law ⚿12

New constitutional provisions must be considered with reference to situations intended to be remedied or provided for.

8. Constitutional law ⚿13

The object in construing constitutional provisions is to give effect to intent of people, in whom sovereignty of state resides.

9. Elections ⚿10

An election law should not be so construed as to disfranchise any voter, if reasonably susceptible of any other meaning.

10. Elections ⚿73

The statute providing that person, who was qualified elector 40 days immediately before election and registered and qualified elector of any special election or consolidated election precinct, continues to reside within such precinct until holding of election, and voted at either primary or general election of even-numbered year next preceding, may vote at such election without additional registration, does not prohibit elector, moving from precinct in which registered within 40 days before election, from voting in such precinct, though not consolidated with precinct of his residence, as such construction of statute would render it unconstitutional. Pol.Code, § 1120, as amended; §§ 1094–1121; Const. art. 2, § 1, as amended in 1930.

11. Elections ⚿19

Laws requiring electors to register as condition precedent to voting and providing for reasonable methods of registration do not add to electors' qualifications or abridge right to vote, but are only reasonable regulations for purpose of ascertaining who are qualified electors and preventing others from voting, and hence do not contravene constitutional provisions as to electors' qualifications. Pol.Code, §§ 1094–1121; § 1120, as amended.

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Appeal from Superior Court, Kern County; H. Gans, Judge.

Proceeding by J. J. McMillan to contest the election of Alfred Siemon as City Councilman in the City of Bakersfield. From a judgment declaring contestant elected to such office and directing issuance of a certificate of election to him, contestee appeals.

Affirmed.

Alfred Siemon and Bennett Siemon, both of Bakersfield, for appellant.

W. C. Dorris, of Bakersfield, for respondent.

THOMPSON, Justice pro tem.

This is an appeal from a judgment in an election contest in which the contestant and respondent was declared elected by a majority of one vote to the office of city councilman for the sixth ward of the city of Bakersfield, and the judgment directed the issuance of a certificate of election to contestant.

The election was the regular city general election held April 11, 1939, under the Bakersfield city charter (Stats.1915, p. 1568) which provides that such elections are subject to the general election laws of the state (id., p. 1572.)

The controversy arises over the rulings of the trial court on the issue of illegal votes. Five witnesses were called by contestee who proved that they were electors otherwise qualified to vote, but who had removed from the respective precincts from which they were registered within forty days next prior to the election; that, at the time of the election, they resided in different precincts from the ones in which they registered and that they voted in the respective precincts from which they registered and in which they no longer resided. It was stipulated that it was not a special election and that none of the precincts involved had been consolidated. Contestee offered to prove that these five witnesses voted for contestant. The court rejected the offer.

The appeal presents but one main issue, namely, does an elector otherwise qualified, who has removed from and no longer resides in the precinct from which he registered, have the right to vote in such precinct at an election held within forty days after his removal when it is not a special election or when the precinct to which he has removed has not been consolidated with the precinct from which he has removed, for the purposes of the election.

The answer necessitates a construction of article II, section 1 of the Constitution of California in connection with section 1120 of the Political Code, both of which provisions of law were presented to and adopted by the people as initiative measures at the election in November, 1930 (Stats.

1931, pp. lxxxix, xci[xcvii]; id. p. 812; id. p. vii).

Article II, section 1, of the Constitution, after specifying the qualifications of an elector, contains the following proviso: "Provided, any person duly registered as an elector in one precinct and removing therefrom to another precinct in the same county within forty days prior to an election, shall for the purpose of such election be deemed to be a resident and qualified elector of the precinct from which he so removed until after such election."

Section 1120 of the Political Code reads as follows:

"Qualifications of voters. All persons shall be entitled to vote at the elections mentioned in section 1044 of this code, who come within the terms or comply with the requirements of this section.

"1. Every person who was a qualified elector forty days immediately preceding the holding of any of the elections mentioned in section 1044 of this code, and who was registered as required by law as a qualified elector of any one of the precincts which together compose the special election or consolidated election precincts, and who continues to reside within the exterior boundaries of such special election or consolidated election precinct, until the time of the holding of the election provided for and held under said section 1044, and who voted at either one or both of the August primary or general election of the even-numbered year next preceding, shall be entitled to vote at said election, without other or additional registration, except as provided in the second paragraph of this section. All other persons, in order to be entitled to vote at any of the elections provided for in said section 1044, must be registered in the manner required by sections 1094, 1096 and 1097 of this code, as an elector of and within one of the precincts which composes the special election or consolidated election precinct wherein he claims to be entitled to vote. Such registration must be made and had in accordance with the provisions of sections 1094, 1096 and 1097 of the Political Code; provided, that such registration shall be in progress at all times except during the thirty-nine days immediately preceding any such election held under said section 1044 of this code.

"2. Elections on or after April 1, 1932. When any of the elections mentioned in section 1044 of this code is held on or after the first day of April of the year 1932, any person to be entitled to vote at such election must have been registered since the opening of registration for such even-numbered year on January 1, 1932, in the manner required by sections 1094, 1096 and 1097 of this code as an elector of and within one of the precincts which compose the special election or consolidated precinct wherein he claims to be entitled to vote. [Amendment approved May 12, 1931; Stats.1931, p. 812.]"

Section 1044 referred to in section 1120 includes the election in controversy.

[1, 2] If the constitutional provision is applicable to the facts of this case, and if there is a conflict between the constitutional provision and the statutory one, then the Constitution will prevail and be controlling, regardless of the fact that the statute was adopted as an initiative measure. We cannot subscribe to appellant's suggestion that, because the two measures were adopted as initiatives at the same election, they must be considered as parts of one act and that consequently the code provision is equal in force and not subject to the currently adopted constitutional proviso. Article IV, section 1, of the Constitution, which reserved to the people the power to propose laws and amendments, known as the initiative, itself distinguishes between a law or act and a constitutional amendment. When initiative measures are voted upon by the people they are apprised by the title and the contents, as well as by other available information, whether they are passing upon a statute or an amendment to the organic law of the state. There is no reason why a constitutional amendment should not prevail if contravened by a statute, by whatever means the statute was adopted. Wallace v. Zinman, 200 Cal. 585, 593, 254 P. 946, 62 A.L.R. 1341; Hammond Lbr. Co. v. Moore, 104 Cal.App. 528, 531, 286 P. 504.

[3, 4] Appellant urges, however, that there is no conflict because the Constitution deals with the qualifications of electors for general purposes such as holding public office, signing election petitions, initiatives, recalls, serving as jurors, and similar rights which are accorded to electors generally, while section 1120 of the Political Code deals with the right of qualified electors to vote. Appellant distinguishes between qualified electors and registered qualified electors, and argues that the constitutional proviso does not say that the person

shall be deemed a registered qualified elector, but only a residential qualified elector, and it does not say he shall have the right to go back and vote in the precinct from which he moved. The constitutional proviso itself is, perhaps, the best answer to this contention, for, in order to have the benefit of its provisions, the person is required to be duly registered as an elector in one precinct and, under the conditions outlined, he is deemed to be a resident and "qualified elector" of that precinct. The term "qualified elector" is defined in section 1083 of the Political Code, which provides that a person who has certain qualifications (being the ones outlined in article II, section 1, of the Constitution) and "who has conformed to the law governing the registration of voters, shall be a qualified elector at any and all elections * * *." The term "qualified elector", as used in article II, section 1, of the Constitution, we think, is used in the same sense and means an elector who is entitled to vote. Bergevin v. Curtz, 127 Cal. 86, 89, 90, 59 P. 312; Russell v. McDowell, 83 Cal. 70, 80, 23 P. 183. The draftsmen who prepared the proviso in article II, section 1, of the Constitution could scarcely have used language which would more clearly indicate a deliberate intention to give the elector who comes within its provisions the privilege of voting at the election in the precinct from which he moved.

[5–9] In construing the Constitution the same rule which applies in construing statutes, contracts, and all written or spoken language obtains. In the absence of technical terms the words are presumed to have been used in their natural and ordinary meaning. Oakland Pav. Co. v. Hilton, 69 Cal. 479, 491, 11 P. 3. The provisions of the Constitution must receive a liberal, practical common-sense construction and new provisions must be considered with reference to the situation intended to be remedied or provided for. People v. Stephens, 62 Cal. 209, 233. The object is to give effect to the intent of the people in whom the sovereignty of the state resides. The exercise of the franchise is one of the most important functions of good citizenship, and no construction of an election law should be indulged that would disfranchise any voter if the law is reasonably susceptible of any other meaning.

Let us glance back into the history of this constitutional provision to ascertain what condition or situation gave rise to the necessity or the desire for such an amendment. Even before the adoption of the Constitution in 1879 the legislature recognized the importance of extending the privilege of voting to electors situated like the five witnesses in the instant case, and adopted, as subdivision 3 of section 1239 of the Political Code, the following provision of law: "A person must not be held, by reason of having moved from one precinct to another, in the same county, within thirty days prior to the election, to have lost his residence in the precinct so moved from, provided he was an elector therein on the thirtieth day prior to such election." It is interesting to note that our Supreme Court, in the case of Russell v. McDowell, supra, interpreted that provision to mean that such a person was entitled to vote at such election. But this interpretation was obiter dictum, as it was not essential to the determination of the case. Such legislation was valid under the old Constitution which did not require any length of residence in a voting precinct as a prerequisite of the right to vote. Russell v. McDowell, supra. However, by the Constitution of 1879 (art. II, sec. 1) residence in his election precinct for thirty (now forty) days preceding the election was made an essential qualification to the right to vote, and in the case of Garibaldi v. Zemansky, 171 Cal. 134, 135, 152 P. 296, it was held that a statute adopted May 26, 1915 (Stats.1915, p. 859) and similar in all material respects to section 1239, subdivision 3, above mentioned, was invalid as in violation of article II, section 1, of the Constitution. In 1926 the provision of the Constitution in controversy in this case was adopted as an amendment to the Constitution, and this provision was retained in a 1928 amendment and reenacted as a part of a constitutional amendment by an initiative measure in 1930, except that the thirty-day period was increased to forty days. Before this amendment was adopted a person situated as the five witnesses above mentioned were situated lacked only one essential requirement to give him the right to vote, namely, residence in his precinct for the required period of thirty (now forty) days, by reason of his removal therefrom within said period. But the amendment provides that, for the purpose of the election, he shall be deemed a resident and qualified elector of the precinct from which he so removed, and therefore he has such necessary residence for the required time and should be entitled to vote.

In further aid of its interpretation we may resort to the pamphlet distributed to the voters with the sample ballot just prior to the election at which the constitutional provision was reenacted as a part of said initiative measure. Pol.Code, §§ 1195, 1195a; Beneficial Loan Soc. Ltd. v. Haight, 215 Cal. 506, 515, 11 P.2d 857; Yosemite Lumber Co. v. Industrial Acc. Com., 187 Cal. 774, 781, 204 P. 226, 20 A.L.R. 994. The material portion of the official description of the measure to be voted upon, as it appeared in said pamphlet, is as follows: "Suffrage * * * amends section 1 of article II of Constitution * * * declares person removing within forty days of election from precinct wherein registered to another precinct in same county shall for that election be deemed elector of former precinct and may vote therein; * * *." From this it would appear that the voters were informed that they were voting upon the question of the right of such persons to vote, and not upon their residential qualifications to sign petitions, serve on juries, and enjoy like privileges, as urged by appellant.

From this history it is manifest, and we are of the opinion, that the constitutional proviso involved in this case was plainly intended to, and does, apply to situations like the one that arose with respect to the five witnesses above mentioned and that they were entitled to vote in said election in the respective precincts in which they did vote.

[10, 11] In determining that the constitutional proviso above mentioned applies to the situation involved in the instant case we do not conclude that it nullifies the provisions of section 1120 of the Political Code, but are of the opinion that the Constitution and the statute may be reconciled. We do not agree with appellant's contention that an elector cannot go back to the precinct in which he registered and vote, if he has moved within forty days, unless the precinct of his residence has been consolidated with the precinct of his registration. Such a construction of said section 1120 would place it in direct conflict with article II, section 1, of the Constitution, and it would then be unconstitutional and void. While it may be difficult in a cursory examination of the language of the statute to harmonize it with the constitutional provision, still, when it is considered with the other sections of the chapter of the Political Code in which it appears, its meaning is more apparent. Part 3, title 2, chapter III (secs. 1094 to 1121) relate to the subject of "Registration of Electors" and the chapter is so designated in the code. The Constitution does not prohibit the enactment of laws, either by the legislature or by the people by means of the initiative, which require electors to register as a condition precedent to their exercising the privilege of voting and to provide for reasonable methods of registration. "Such provisions do not add to the qualifications required of electors, nor abridge the right of voting, but are only reasonable regulations for the purpose of ascertaining who are qualified electors, and to prevent persons who are not such electors from voting." Bergevin v. Curtz, supra, 127 Cal. at page 88, 59 P. at page 312. Such laws, therefore, do not contravene the constitutional provisions relating to the qualifications of electors. People ex rel. Martin v. Worswick, 142 Cal. 71, 76, 75 P. 663. Said chapter III outlines in numerous sections the manner in which such registration of voters shall be accomplished. Chapter IV of the same title relates to election precincts and precinct officers and section 1133 thereof provides that the board or body charged with the duty of conducting elections may subdivide the municipality or territory in which the election is to be held into special election or consolidated election precincts for such elections, and requires such board or body to number such precincts for the purpose of such election. Said section 1133 and said section 1120 were both added by the legislature as new statutes in 1907 (Stats.1907, p. 662) and, with the exception of a few minor changes immaterial to this issue, remained the same at the time said Bakersfield election was held. Obviously, when special election precincts or consolidated precincts are created, and an elector within the forty-day period moved from his registration precinct to another precinct within the same special election or consolidated precinct, he is still in the same voting precinct for that election, and it would be placing an unnecessary burden on such an elector and on the registration officer to require the elector to register again when his voting place is the same as if he were still residing in his original precinct. It seems logical to conclude, and we are convinced, that said section 1120 means that, under such a situation, no "other or additional registration" is required of the elector in order to vote at such an election at the precinct polling place in the special

election or consolidated election precinct, except as provided in subdivision 2 of said section, which subdivision provides that, in order to vote after April 1, 1932, he must have been registered since the opening of registration in January, 1932, which was the time fixed for beginning permanent registration under the amendment of 1930. It is just as obvious that those voters who are listed in one of the special election or consolidated precincts for a particular election, and who have not changed their residence within the forty-day period, should not have to reregister merely because their registration precinct is temporarily suspended and they are, for the purposes of such election, in a precinct temporarily created for such election only.

We take the position that the proviso contained in article II, section 1, of the Constitution applies to the facts of this case and that the questioned rulings of the trial court were correct and must be sustained; and also that section 1120 of the Political Code does not apply to this case for the reasons above stated.

The judgment appealed from is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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37 Cal.App.2d 12

In re FERAUT'S ESTATE.

FERAUT v. SACKETT.

Civ. 6313.

District Court of Appeal, Third District, California.

Jan. 29, 1940.

1. Wills 🔑719

Where real property was devised by wife to her husband, but before distribution to him, husband conveyed a portion to his son and upon husband's death son stood by and permitted property that had been given to him to be distributed in the estate of the husband, the son could not upon final distribution have set aside to him out of cash on hand in the husband's estate the value of the real property given to him.

2. Courts 🔑200½

A dispute regarding conveyance of interest of heir in real property could not be determined in probate court.

3. Executors and administrators 🔑315(3)

The probate court was without jurisdiction to grant motion to amend decree of final distribution where motion was made more than six months after the entry of decree, notwithstanding notice of motion had been given within six months.

4. Executors and administrators 🔑315(3)

It is not sufficient that notice of motion to amend final decree of distribution be given within six months after entry of order of distribution but motion must be made and action requested prior to the expiration of six months.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Proceedings in the matter of the estate of Julien Feraut, deceased, wherein Joseph B. Feraut filed a petition for an order to amend a decree of final distribution, which petition was opposed by Tessie Feraut Sackett, as administratrix of the estate of Julien Feraut, deceased. From an order denying the petition, the petitioner appeals.

Affirmed.

Darold D. DeCoe, of Sacramento, and Charles Reagh, of San Francisco, for appellant.

Charles A. Bliss, of Sacramento, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This appeal is from an order refusing to modify a final decree of distribution in the estate of Julien Feraut, deceased. To properly understand the controversy it is necessary to recite in some detail the history of the entire proceeding.

In 1933 Ella Shaff Feraut, the wife of Julien Feraut, the father of the parties concerned in this appeal, died testate, making her husband the beneficiary of her estate, which included the property here involved. Julien Feraut qualified as executor, but died June 4, 1935, before the administration of her estate was completed.

During the pendency of the probate proceedings of the Estate of Ella Shaff Feraut, Julien Feraut deeded a part of this realty to his son, Joseph, appellant herein, purporting to convey to him the title in fee, and making no reference to a mortgage which covered the entire tract. This deed was recorded on March 7, 1935, and thereafter on May 22, 1935, filed among the papers in the case of Ella Shaff Feraut. Julien Feraut also signed, but did not acknowledge, a deed to the remaining portion of the real property in question to George I. Lewis, as trustee for Tessie Feraut, his daughter, "subject to all valid mortgages * * * and * * * proceedings of the Probate Court * * * now administering said real property left me by the will of my deceased wife". This deed was never recorded, but was filed among the papers in the Estate of Ella Shaff Feraut on May 22, 1935.

Julien Feraut died intestate, and Joseph Feraut and Tessie Feraut Sackett, his son and daughter, were appointed administrator and administratrix, respectively, of his estate. Although both applicants qualified, Joseph took no active part in the administration of the estate, and the administration was carried on by the administratrix.

After the death of Julien Feraut, leaving the administration of the estate of his deceased wife uncompleted, Tessie Feraut Sackett petitioned for, and was appointed administratrix with the will annexed of the Estate of Ella Shaff Feraut, deceased. Thereafter she filed an inventory and appraisement of all of the property coming into her hands as administratrix with the will annexed, and included therein the property here in controversy.

Thereafter, the Estate of Ella Shaff Feraut being considerably indebted, Joseph Feraut petitioned the probate court that the administratrix be directed to borrow on the assets of the estate an amount sufficient to pay off the indebtedness. This petition was denied, but thereafter the real property of the estate, including the property here involved, was by the court directed to be sold. Objections upon technical grounds were urged by Joseph Feraut to the confirmation of sale, and an attempted appeal was taken, but the appeal was dismissed by this court, and the sale confirmed and a deed given. No claim was made, however, that Joseph Feraut had any interest in the real property to be sold.

Thereafter a petition for final distribution was filed in the Estate of Ella Shaff Feraut asking that the residue of her estate be distributed as provided by law, and it was distributed into the Estate of Julien Feraut. No objection was made by appellant herein to the distribution of the proceeds from the sale of the real property into the Estate of Julien Feraut, although he claimed to be the owner of the real property, by virtue of a deed from Feraut to himself.

Thereafter, on March 21, 1938, distribution in the Estate of Julien Feraut was made, one-half to Joseph B. Feraut and one-half to Tessie Feraut Sackett. Again no objection was made until on September 8, 1938, Joseph B. Feraut petitioned for an order to amend the decree of final distribution made on March 21, 1938, in the estate of his father, distributing the estate, share and share alike, to Joseph B. Feraut and his sister, Tessie Feraut Sackett, it being the claim of petitioner that inasmuch as the deed from the father to him made no reference to any mortgage, while the deed to the daughter specifically referred to the mortgage and costs of administration, that he should therefore have the proceeds from the sale of the property deeded to him, free of any mortgage or costs of administration. This petition was set for hearing for September 19th, and thereafter regularly continued from time to time until October 3, 1938, at which time the parties, represented by counsel, appeared and submitted the matter upon the records on file, the contents of which have been set forth above. Thereupon an order was made denying said motion, and from that order this appeal is taken.

Appellant contends that upon the sale of the real property, the proceeds therefrom remaining for distribution should have been distributed as the realty would have been had it passed under the deeds; he also claims to have relied upon certain statements made by the attorney for the administratrix, which promises, it is alleged, the administratrix failed to carry out, and therefore such failure should have been treated as constructive fraud, and also that a decree of distribution in probate is in the nature of a decree in equity, and upon timely distribution may be amended if the same had been improperly entered.

[1] Several answers are suggested. The first is that the objection to the manner of distribution, or the rights of appellant in the real property, cannot be deter-

mined in the Estate of Julien Feraut, but should have been presented in the Estate of Ella Shaff Feraut. All objections made in that estate were withdrawn before hearing, except as to certain moneys paid out, which are not here involved. This real property was devised by Ella Shaff Feraut to Julien Feraut. Before distribution to him he conveyed a portion to appellant. Upon his death his grantee stood by and permitted the property that had been given to him to be distributed to the Estate of Julien Feraut, and now, upon the final distribution seeks to have set aside to him out of the cash on hand in the Julien Feraut estate, the value of the real property.

[2] During all the stages of the administration of the Estate of Ella Shaff Feraut, deceased, appellant was represented by an attorney. If Julien Feraut had conveyed to him any property during his lifetime, as claimed by appellant, that transaction cannot be inquired into upon the distribution of his estate. The time to have asserted that claim was when the court was considering the interest that the Estate of Julien Feraut had in the estate of his wife. That was not done. If there was a dispute as to any conveyance of the interest of the heir, the probate court is not the proper forum for the determination thereof. Parr v. Reyman, 215 Cal. 616, 12 P.2d 440; Chever v. Ching Hong Poy, 82 Cal. 68, 22 P. 1081; Martinovich v. Marsicano, 137 Cal. 354, 70 P. 459.

[3, 4] Also, the probate court was without jurisdiction to grant the motion of appellant, having been made more than six months after the entry of the order of distribution. It is not sufficient that notice of the motion be given within the six months but the motion must be made and action requested prior to the expiration of six months. Wheelock v. Superior Court, 67 Cal.App. 601, 227 P. 931; Estate of Hunter, 99 Cal.App. 191, 278 P. 485.

Some contention is made that the account or decree is admittedly in error as to an item of $25, and therefore the case must be reopened. A careful reading of the record convinces us that item has to do with the Estate of Ella Feraut, and not the Estate of Julien Feraut, deceased.

The order from which the appeal is taken must be affirmed. It is so ordered.

We concur: THOMPSON, J.; TUTTLE, J.

In re HANSEN'S ESTATE.

Civ. 6202.

District Court of Appeal, Third District, California.

Jan. 31, 1940.

Rehearing Granted March 1, 1940.

Subsequent Opinion 100 P.2d 776.

1. Wills 🔑55(1), 166(1)

In will contest, evidence *held* sufficient to support jury's finding that testator was of unsound mind and lacked testamentary capacity and that will was procured by sole devisee's fraud and undue influence.

2. Wills 🔑324(2)

In will contest, whether testator was capable of rationally considering and understanding nature and importance of act of making will, identity, location and character of his property affected thereby, and persons related to him by ties of blood, affinity or friendship, who were normally entitled to his bounty, together with manner and portions of his property which he desired to bequeath or devise to each individual, are fact questions to be determined by jury from evidence adduced.

3. Wills 🔑55(3)

Proof of testator's hallucinations or delusions is insufficient to set aside will for testamentary incapacity, unless it further appears that they bore directly on testamentary act, but should be considered in connection with physician's testimony that testator was suffering from senile dementia at time of executing will.

4. Wills 🔑324(2)

In will contest, testimony of attorney who drew will and became witness thereto that testator appeared to be of sound mind and memory is entitled to serious consideration, but is not conclusive when other witnesses testify to contrary, as such evidence creates only a conflict, and jury must finally determine weight and sufficiency of evidence.

5. Appeal and error 🔑1001(1)

A jury's finding, supported by substantial evidence, on any material issue, will be upheld on appeal.

6. Wills 🔑166(2)

In will contest, evidence of confidential relationship between testator and proponent and activity on proponent's part establishes prima facie case of undue influence, which

invalidates will, in absence of contrary evidence.

7. Wills ⟹384

In will contest, error, if any, in instruction that presumption of undue influence or fraud controls and will is invalid, if beneficiary fails to show absence of such influence by preponderance of evidence, does not warrant reversal of judgment denying probate of will in accordance with jury's finding that it was procured by proponent's fraud and undue influence and void for testator's lack of testamentary capacity, in view of instruction that burden of proof on each of such grounds of contest rested on contestant.

* * *

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

Proceeding by Charles Hansen for probate of the will of Peter Hansen, deceased, contested by Carl Thomsen. From a judgment denying probate, proponent appeals. Affirmed.

George R. Freeman and Elmer Laine, both of Willows, for appellant.

Ware & Ware, of Chico, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

Charles Hansen offered for probate the alleged last will of his brother Peter Hansen, deceased, dated November 26, 1936, by the terms of which the proponent was made sole devisee and executor of the estate. The will was contested by Carl Thomsen, an intimate friend and benefactor of the deceased, with whom he had lived for twenty years. Thomsen held a ten-year lease on the ranch which was the chief subject of litigation. He was also named as devisee of a portion of that ranch in a former will which was executed a few months prior to the making of the instrument which is involved in this suit. A jury found that the last will was procured by fraud and undue influence of Charles Hansen, and that it was void for lack of testamentary capacity of the maker thereof. A judgment refusing to admit the will to probate was accordingly rendered. From that judgment this appeal was perfected.

It is contended the special findings and judgment are not sustained by the evidence, and that the court erred in instructing the jury with respect to the presumption of fraud and undue influence which follows from proof of a confidential relationship between the maker of a will and a beneficiary who is active in its preparation.

[1] In spite of a conflict of evidence upon the essential issues of this case, the following statement of facts satisfactorily appears from the record:

Peter Hansen was born in Denmark in 1866. He had five brothers, of whom Charles was his junior by six years. Peter moved to America and settled in Butte county, California, in 1888. Charles left Denmark and joined his brother Peter at Chico in 1889. For nearly ten years these two brothers were engaged as partners in farming and in the business of freighting over the mountains. Differences arose between them and their partnership was dissolved. Thereafter they rarely associated or even met each other. They lived on separate farms forty miles apart. Peter bought a small ranch in Butte county where he lived alone for several years. He was never married. Peter was always a frugal and industrious man. He lived modestly, paid his debts and saved some money. He was naturally active, intelligent, good humored and friendly. He was orderly, cleanly and neat in his personal appearance and habits. He was a constant reader of newspapers and kept himself well informed on subjects of common interest. He gained a large circle of friends and acquaintances who held him in high esteem. He was honest, just and reliable.

After the dissolution of their partnership, Charles prospered for a time, accumulating a large amount of real and personal property. In 1919 he was estimated to be worth approximately $150,000. He drove a Cadillac automobile, and was fond of display. Peter had the impression that Charles had become arrogant and proud, and that he considered he was superior. Peter said they got along amicably while they were poor, but as soon as Charles became rich he began to "high-hat" him. They became estranged, and for over twenty years, until just before the execution of the will in question, they did not visit or associate with each other. Carl Thomsen, with whom Peter had resided for nearly that length of time, said that he had never seen Charles until seven years after he met Peter. Charles was married and lived near Red Bluff, while Peter resided at Vina Station in Tehama county. The other four brothers never left Denmark. No correspondence was carried on with any of them for several years.

In his prosperity during good times, Charles became extravagant and careless. During the depression which began with the crash in 1929, he lost his property. By 1932 he was impoverished and frequently borrowed small sums of money from Peter. Peter was disgusted with his brother and often criticised him, complaining that he was always trying to borrow money from him. Peter lost confidence in him and refused to engage in the sheep business with him. On the contrary, Peter was frugal, conservative and careful. He gradually accumulated property of considerable value in spite of the hard times and depression which ruined so many farmers.

Carl Thomsen was a countryman of the Hansens. He was twenty-five years younger than Peter. He moved from Denmark in 1910 and located in Butte county, working for several years as a farm hand. He was an industrious and capable farmer. He was honest and reliable. He soon married an attractive, worthy woman. Almost immediately after their marriage Peter met and acquired a great friendship for both Mr. and Mrs. Thomsen which lasted without impairment until a brief time before his death. Peter lived in their home for several years, contributing liberally to the cost of their maintenance.

Peter Hansen sold his farm in 1919 for $14,000 and bought a 210-acre fruit ranch at Vina Station in Tehama county for $30,100. He paid $10,000 cash, and secured the balance of the purchase price with a trust deed. The southerly sixty-eight acres of that farm was separated from the remaining portion by a double row of trees extending along either side of a roadway. The northern part of the place, above the lane, contained the most valuable, tillable soil. The improvements consisted of a dwelling house and other farm buildings. Upon acquiring this farm Peter immediately invited Mr. and Mrs. Thomsen to live with him and to help take care of the premises. It thereafter became their home until the time of Peter's death. They lived together happily. The Thomsens respected and looked after Peter's interests faithfully as long as he lived just as they would have treated their own father. Until the last few weeks of his life Peter appreciated their service and care for him and he was as fond of them as though they were his children. The Thomsens had two adopted children. Peter was attached to them as deeply as though they were his own grandchildren. He was furnished a comfortable room in the dwelling house and a place of honor at the table. For the first few years Carl was paid no regular wages, but Peter contributed liberally to their maintenance. The respective parties were contented and satisfied with the arrangements. Thomsen worked with Peter on the farm and helped him to construct several buildings. They lived as one family in perfect harmony.

As Peter Hansen grew older he sought to avoid the responsibility of operating his farm. In 1923, by mutual agreement, he leased the farm to Carl Thomsen for a term of ten years for a cash rental of $3,000 per year. Thomsen purchased and furnished the farm equipment, including a tractor and other machinery. He also owned an automobile. Peter continued to remain with the Thomsens as a member of their household exactly as he had previously lived, without being required to pay board or rent, although he made substantial contributions to their maintenance. It was agreed that Peter should pay the cost of irrigating the farm. Thomsen's farming enterprise prospered for several years and he paid his rent promptly. Peter reduced his mortgage of $20,000 to the sum of $6,200. Thomsen built a hog pen, fences and other improvements at his own expense in the sum of about $1,500. The depression arrived. Farming became more difficult. Products were hard to market at a profit. Many farmers became bankrupt. Thomsen was industrious and frugal, but he was then unable to clear a profit sufficient to enable him to fully pay his stipulated rent. Peter never complained. He told Thomsen to "Go ahead and pay whatever you can." During the last years of his first lease Thomsen was in arrears in payment of his rent to the extent of several thousand dollars. During those latter years, by common consent, the taxes, interest on the mortgage, and operating expenses of the farm were first paid and the balance of the net proceeds from the farm were divided equally between Thomsen and Peter. In 1935, Peter suggested that Thomsen should pay him in lieu of the agreed rent of $3,000 per year, one-third of the gross receipts from the farm, which was done. The relationship between Peter and the Thomsen family continued to remain pleasant and agreeable. Peter never complained of Thomsen's treatment of him until a few weeks before the last will was executed.

Upon one corner of his ranch, Peter constructed a gas station, called the "Owl Service Station". For several years it was rented and operated by A. L. Wood, a friend of his. Later it was rented and operated by Mr. James D. Armstrong. Peter often visited and lounged about that station. He was well acquainted with both renters. When hard times came and the farming enterprise became discouraging, Peter often told Carl Thomsen that if he and his family would remain with him on the farm while he lived, he would give him a portion of the ranch. Peter had become very dependent upon Thomsen and his wife. Although he often criticised his brother Charles, Peter always told Thomsen he intended to leave his brother the southerly sixty-eight acres of the farm. He explained that he was going to do that "just because he is my brother". The relationship between Peter and the Thomsens was always so kindly and considerate that some of the neighbors got the impression Peter was the father of Mrs. Thomsen. Peter rode with them in their automobile. They almost always took him with them on their pleasure excursions.

In the summer of 1936, Peter began to talk to Thomsen of renewing his ten-year lease of the farm. It expired that fall. Peter had then become quite deaf. He had acquired some ailments. He did not always feel well. He was then seventy years of age. He anticipated that he might not live for many years more. Still he was clear-minded, comparatively alert, and continued to follow the same cleanly and orderly habits with which he was accustomed to live.

In July, 1936, Thomsen took Peter to Black Point in Marin county for the benefit of his health. After remaining there for a few days, and receiving no benefit, they returned July 28th, by way of Orland, where Peter consulted his physician, Doctor H. H. Beck, who told him he had high blood pressure and that he was in great danger of receiving a paralytic stroke. The doctor then advised him that if he had any unsettled business he had better attend to it.

Before going to Black Point Peter called at the office of the law firm of Ware & Ware in Chico. They had previously acted as his attorneys. He asked Mr. Phil Ware whether a ten-year lease of his farm would remain in force during the entire term, in case he renewed it, even though he should die in the meantime. He was told that it would remain valid during the entire term whether he lived or died. He told Mr. Ware that was exactly what he wanted to do. Mr. Ware then wrote on a slip of paper a memorandum explaining the effect of a renewal of the lease for a further term of ten years, which was found among the papers of Peter after his death. Peter left the attorney's office saying he would return later and have that renewal of the lease drawn.

The day after Peter's return from Black Point he told Thomsen he wanted to go to Chico and get the lease and a will drawn. He was anxious to renew the lease before he died. He was reminded that the doctor advised him he should not travel in his physical condition. He was then feeling badly. Peter instructed Thomsen to telephone to his attorneys and ask one of them to drive out to the farm and draw those instruments for him. Thomsen promptly called Mr. Allison Ware, who drove out to Vina Station that evening in response to the message and fully discussed the terms of the proposed renewal of the ten-year lease in the presence of both Carl Thomsen and Peter. Mr. Ware was well acquainted with Peter Hansen. He had known him for eighteen years and had occasionally represented him in a number of legal transactions. Peter said that the reason he wanted to make another ten-year lease to Thomsen was that he was perfectly satisfied with his fulfillment of the last one, and that, while he intended to leave his brother Charles the southerly sixty-eight acres of the farm, he wanted to keep the entire ranch intact for that period of time, thinking that if his brother was hard up and needed money Mr. Thomsen might buy the sixty-eight acre tract from Charles and pay cash for it. Peter took from his private box the original ten-year lease and exhibited it to Mr. Ware. He told the attorney he wanted to renew that lease. He also inquired from Mr. Ware, as he had previously asked his brother Phil, whether the proposed ten-year lease would be valid for the entire term in case he should die in the meantime. Mr. Allison Ware assured him that it would remain valid. He told the attorney he wanted to be sure of that fact. That was his purpose in renewing the lease even before the term of the original lease expired. Mr. Ware inquired of Peter regarding the details of the proposed lease, and carefully made notes from which to draw the lease. Peter Hansen knew exactly how he wanted the lease drawn. He directed the attorney with respect to all of its essential terms. Peter then talked with Mr. Ware about preparing a will for him. He told the attorney the reason he wanted to give the northerly portion of his ranch to his friend Carl Thomsen, subject to his payment of the balance of the mortgage remaining against the property which amounted to $6,200, was to reward him for his kindness and service. He also wanted Thomsen to have the remaining personal property, and to be appointed executor of the will. In accordance with his frequently-expressed desire, he wanted Mr. Ware to provide that his brother Charles should be given the southerly sixty-eight acre tract, free from the mortgage, subject, however, to the proposed ten-year lease. During the time the terms of that will were being discussed, Mr. Thomsen was absent from the room. Having obtained the required information, the attorney returned to Chico and procured the typing of both the lease and the will on the following day. By agreement, he returned that evening with the two documents, accompanied by Colonel Thompson, who was requested to act as a witness to the will. The lease was carefully read and its terms were explained in the presence of both Peter and Mr. Thomsen. It was then formally executed by them. The lease was impartially drawn in substantially the same terms contained in the former ten-year lease, and in the exact manner directed by the lessor. It contained the usual formal covenants fully protecting the interests of Peter Hansen according to his instructions.

After the lease was executed, Mr. Thomsen left the room, and the will was read to Peter Hansen and carefully explained in every detail by Allison Ware. Colonel Thompson was then called into the room, and the terms of the will were again read and explained in his presence. Peter expressed his entire approval of the terms of the will, and formally executed it in the presence of those gentlemen, requesting them to sign it as witnesses, which they did in the manner required by law. A carbon copy of the will was left with Mr. Hansen by the attorney. The original will was handed to Mr. Ware with the request that he should keep it for the testator, which he did. It is an admitted fact that Peter Hansen was of sound mind when that will and lease were executed. The lease was subsequently acknowledged before Mr. H. M. Hersey, a notary public of Tehama county, and recorded by him at the request of Peter Hansen.

After July, 1936, Peter Hansen's physical and mental ailments developed very rapidly. His cleanly and orderly habits changed. He refused to bathe. He frequently soiled his clothing and the bed. He did not realize the filthy condition in which he often appeared at the table and in the presence of other persons. He made no attempt to avail himself of the facilities to relieve the demands of nature. He lost his sense of propriety and abandoned the customary rules of behavior in his association with other individuals. He went about the house and on the public streets with his clothes unbuttoned and his shoes unlaced. He ceased to read or talk to his friends. His mind wandered. He wept. Without reasonable cause, he lost his love and attachment for Mr. and Mrs. Thomsen and their children, of whom he had previously been very fond. He became suspicious and extremely critical of them. He frequently visited the Owl Service Station and talked with Mr. Armstrong about them. Armstrong was unfriendly with Mr. Thomsen and appears to have prejudiced Peter against him. Without just cause, Peter acquired the fixed delusion that Thomsen was taking advantage of him, and that he had in some way procured the execution of the first will in his own favor. He asked him how his name came to be placed in the will. He charged Thomsen with obtaining unjust and detrimental terms to be included in the ten-year lease. There is no substantial evidence of the truth of those accusations. The record satisfactorily shows that both instruments were not only fair and reasonable in their terms, but that they were prepared in the exact manner and form directed by Peter Hansen. He was confused and irrational regarding the specific terms of the instruments of which he complained, except that he seemed to be impressed with the conviction that the ten-year term of the lease was too long a period of time and that it was so drawn contrary to his wishes. That was not true. Regarding that feature of the lease, there appears to be no doubt the long term of ten years was precisely what he always wanted to provide for.

Immediately before the last will was executed it appears that Charles Hansen was arranging for and secretly meeting his brother Peter and Armstrong at the Owl Service Station, which gave them the opportunity to exercise undue influence upon Peter. It seems probable, as the jury found, that they did prejudice and control the mind of Peter so as to persuade him to execute that last will in the interest of Charles. The evidence satisfactorily shows that until a few days before that will was executed there had been no association between the brothers for several years. Armstrong was the man who arranged for these secret meetings. Peter charged Thomsen with recording the lease without his consent. The evidence shows that it was acknowledged and recorded by H. M. Hersey, the notary public, at the request of Peter Hansen.

On Sunday evening preceding Thanksgiving Day in 1936, Charles Hansen took a copy of the last lease to his attorney at Willows and consulted him about the prospect of breaking the lease. That lawyer had been Charles' regular attorney for many years, although he had never met his brother Peter. By previous arrangement, without notice to the Thomsens, Charles called at the gas station early on Thanksgiving morning, and secretly took Peter in his automobile to Willows to interview his attorney. Peter then had in his pocket copies of the lease and of his first will. Upon inquiry, Peter told the lawyer, regarding the lease, that "He didn't know what he was signing when he made it, that under it he didn't have any rights at all". The attorney examined the lease and told Peter he had "a tough job ahead of him to break that lease". In fact, the lease seems to be fair and impartial. It appears to adequately protect the rights of the lessor. It is couched in the usual terms, and contains the customary covenants of a carefully prepared lease of that nature. It was fairly drawn in every respect in the exact manner and terms directed by Peter. Finally Peter drew from his pocket the carbon copy of his first will and handed it to the attorney, who said, "Well, apparently you have made a will?" To this inquiry Peter replied, "No, he didn't make a will." In spite of the fact that he brought with him the carbon copy of the will, he had no recollection of having made that instrument. The attorney then testified that when he told Peter Hansen there was no reasonable chance of breaking the lease, Peter said, "If I can't do anything with that, if you say I made a will, I can fix that. I will make another will." The last will, which is involved in this suit, was then drawn. By its terms Charles Hansen was given the entire estate, including both real and personal property. His other living brothers are not mentioned in the will. Charles was named as executor without bonds. The will was witnessed by the attorney and a friend by the name of Speier, who was called in for that purpose. The will was left in the custody of the attorney, who instructed Peter to obtain his first will from Mr. Ware and destroy it. The first will was delivered to Peter, but he did not destroy it. After the execution of the second will, Charles took his brother back to Vina Station, arriving just in time for him to keep a previous engagement and go with Mr. and Mrs. Thomsen to attend a Thanksgiving dinner at the home of a friend. Peter appeared at the dinner in a dirty and disorderly condition. He was morose, silent and refused to eat. He wept and wanted to be taken home. He seemed dazed and demented. When the Thomsens inquired where Peter had been, Charles said they had gone to Willows to see a real estate man. That was not true. The last will was procured by the influence and activity of Charles. The transaction was conducted in secret.

About the time of the execution of the last will, Peter's physical and mental condition rapidly grew worse. He was nervous and despondent. He wandered about aimlessly. He carelessly walked along the highway and the railroad track without regard to traffic or trains, apparently failing to realize his great danger. He avoided association with former friends. He refused to speak to them. He sat in his own room for hours just gazing at the wall. He frequently wept for no apparent cause. He talked disconnectedly and illogically. He related hallucinations which he had that strange men crept into his bed at night and sapped his strength and manhood. He repeated that story to his physician. He bought a revolver at Red Bluff for no explained reason. When he was asked by Mr. Hersey what he wanted a pistol for, he said, "Things were bothering him. He had to tend to something." He had never before owned or used a revolver. He offered no rational explanation for purchasing the revolver. When the package containing the weapon reached their home, Thomsen saw it and asked Peter what he was going to do with a gun. Peter cried and said that he didn't know what he wanted it for. Thomsen, as a precautionary measure, said, "I think, Pete, you better let me do the shooting around here." Peter promptly handed him the revolver and said, "I think you better, Charley."

The record is replete with incidents indicating that when the last will was executed, Peter Hansen was afflicted with senile dementia which was developing rapidly. His conduct, conversation and appearance convinced two physicians and many intimate friends and neighbors that he was insane. Dr. Faulkner, whom Peter visited and consulted professionally several times at Red Bluff in the month of October, 1936, testified to the insane delusion related by Peter regarding the strange men who slept in his bed and sapped his strength and vitality. The doctor said Peter really believed it. The doctor was so impressed with the existence of that fixed delusion that he asked Mrs. Thomsen if Peter did not act abnormally about the home. Doctor Beck, who attended Mr. Petersen, the father of Mrs. Thomsen, almost daily in September and October, 1936, during his last illness, frequently observed Peter about the house during that period of time. He had known Peter for several years. He said that Peter had changed mentally very rapidly; that he no longer knew what was going on about him; that he sat and wept for no apparent cause, and stared at the wall; that he was unclean; exhibited no mentality; that he was of "unsound mind" and that he was afflicted with senile dementia. Certainly he had the symptoms of that incurable malady.

Nearly a dozen intimate friends and neighbors testified to acts, conduct and conversations on the part of the testator about the time the will was drawn from which they concluded that he was "mentally deranged", "irrational", of "unsound mind", or "crazy". The testimony of Mr. Allison Ware, regarding his attempt to converse with Peter when he called to inquire about the lease a few days before he executed the second will at Willows, leaves very little doubt that his mental faculties were sadly shattered, and that he did not comprehend or understand the transaction he was engaged in. Senile dementia is a progressive, incurable form of insanity. The delusions and hallucinations which he possessed are common symptoms of that disease. The evidence is very convincing that he had reached a state of mind by Thanksgiving Day, when he executed the second will, that warranted the jury in finding he was then of unsound mind to the extent that he lacked testamentary capacity.

The fact that the testator deeded to Mr. Armstrong the lot upon which the Owl Service Station was located about the same time that the last will was executed, does not necessarily prove that he was then of sound mind. That transaction, of course, is entitled to serious consideration. But it may have been construed by the jury as an illustration of the effect of the alleged undue influence and that the transfer was procured as a reward for the grantee's participation in helping Charles to obtain the execution of that will in his favor.

The last unfortunate act of the testator's life indicates mental incapacity and a lack of understanding. He did not even exercise ordinary precaution for his own safety. He was extremely deaf, yet he carelessly walked along the railroad track heedless of his danger. A freight train overtook and killed him. The engineer saw him walking along the track, but assumed that he would step from the track when the train approached. He said that Peter seemed to be absolutely unconcerned until it was too late for him to stop the train.

The record contains an abundance of evidence to support the findings of the jury to the effect that the testator was of unsound mind, that he lacked testamentary capacity, and that the will was procured by the fraud and undue influence of Charles Hansen.

[2] It would be a useless task to attempt to analyze the numerous authorities cited by respective counsel on various phases of this case. Very little difference exists regarding the law which applies to the principles of unsound mind and undue influence affecting the validity of a will. Apparently the chief controversy involves only a correct application of those well-established rules to the particular facts of this case. It is conceded testamentary capacity may be presumed when it appears that the maker of a will is capable of rationally considering and understanding the

nature and importance of the act of making his will, the identity, location and character of his property to be affected thereby, and the persons related by ties of blood, affinity or friendship who are normally entitled to his bounty, together with the manner and portions of his property which he desires to bequeath or devise to each individual. Estate of Russell, 189 Cal. 759, 770, 210 P. 249; Estate of Ehle, 115 Cal. App. 656, 660, 2 P.2d 398; 26 Cal.Jur. 638, § 12. These are facts to be determined by the jury from the evidence adduced.

In his contention that the findings of the jury are not sustained by the evidence in this case, the appellant relies chiefly on the Estate of McDonough, 200 Cal. 57, 251 P. 916, and Estate of McGuirk, 50 Cal.App. 352, 195 P. 279. These cases are readily distinguishable on the facts from the present proceeding. In the McDonough case, a judgment based on a finding of a jury that the testator was of unsound mind, was reversed for lack of evidence to support it. The Supreme Court said that the acts relied on to show unsound mind were all reasonably attributable to mere infirmities of old age, caprices and idiosyncrasies, and that no witness was willing to testify that he was afflicted with settled insanity. The court said in that regard [200 Cal. 57, 251 P. 918]: "No substantial evidence, however, tending to establish settled insanity or dementia or insane delusions or hallucinations on the part of the testator, was adduced."

In the present case there is definite evidence of hallucinations, delusions and settled insanity, in addition to many circumstances occurring about the time of the execution of the will in question, affecting a radical change in the personal appearance, conduct, conversation and attitude of the testator toward old friends and benefactors, which may be accounted for only by the existence of an unsound mind. His hallucination regarding the unknown men who slept with him and sapped his vitality and manhood; his unwarranted animosity toward his best friend and his fixed delusion that Thomsen had wrongfully procured the lease and will to be drawn in his own interest; the purchase of a revolver for some unexplained purpose and his total ignorance of having previously made a will, strongly tend to show a deteriorated mind in absolute conflict with the existence of testamentary capacity. Doctor H. H. Beck, who had repeatedly attended him professionally, and who had seen him frequently about the time of the execution of the last will, after detailing his reasons for so concluding, testified that "I would say that he was mentally unsound, * * * an indication of senile dementia in a man that age".

The facts of the McGuirk case may likewise be distinguished from those of the present proceeding. In that case a motion for nonsuit was affirmed. The testator was sixty-two years old. He had suffered a stroke of paralysis. No witness testified that he was afflicted with settled insanity. No physician testified to his mental condition. Those witnesses who said that he was of "unsound mind", based their conclusions on general statements covering a period of twenty years, such as the assertions that he had said "his neighbors were trying to rob him"; the alleged error in judgment regarding a real estate transaction and other similar incidents reasonably attributable to an irascible old man. These incidents did not occur near the time of the making of the will. The court says that "No attempt was apparently made to show the time to which in their testimony the witnesses referred with relation to the time of making the will." The testator drew the will in his own handwriting from a copy furnished to him by an attorney. In that case the court was certainly warranted in affirming the order of the trial court. The facts of this case are much stronger than those of the McGuirk case in support of the finding of testamentary incapacity on the part of the testator.

[3] It is true that proof of hallucinations or delusions is not sufficient in itself to set aside a will unless it further appears that they bear directly on the testamentary act. Estate of McDonough, supra. One may possess fixed delusions regarding certain things which have no relation to the faculties necessary to be exercised in the drawing of a will. A paranoiac, for instance, may possess insane delusions regarding a particular subject, and yet he may be perfectly sound and sensible on other matters and mentally capable of transacting business which does not involve that defect of mind. Paranoia, in its earlier stages, does not constitute total insanity and therefore may not deprive one of testamentary capacity. The presence of hallucinations or delusions, how-

ever, are ordinarily symptoms of insanity. They exist in unsound minds of various types.

In the present case we should consider the evidence of fixed hallucinations and delusions in connection with the doctor's testimony that the testator, about the time of the execution of the will in question, was suffering from senile dementia which is a progressive, incurable form of fixed insanity resulting in a total collapse of the mental faculties and, in its final state, necessarily deprives one of testamentary capacity. With that particular malady the victim is robbed of his power to think, reason or act sanely.

In the Estate of Hartley, 137 Cal.App. 630, 31 P.2d 240, it is said that radical changes in a man's habits of thought, conversation, conduct and appearance which affect his ability to understand and appreciate the nature and identity of his property and the individuals who would ordinarily be entitled to his bounty, particularly when he is afflicted with senile dementia, are competent and persuasive evidence of a lack of testamentary capacity.

[4, 5] The testimony of an attorney who draws a will and who also becomes a witness to the instrument, to the effect that the testator appeared to be of sound mind and memory, is entitled to serious consideration. It has been said his evidence may be entitled to more consideration than that of a mere relative, friend or acquaintance. But it is not conclusive when other witnesses have testified to the contrary. Such evidence creates only a conflict. The jury must finally determine the weight and sufficiency of the evidence. Estate of Nelson, 134 Cal.App. 561, 25 P.2d 871; Estate of McDonald, 191 Cal. 161, 215 P. 545. Where there is substantial evidence to support the finding of a jury on any material issue, its determination of that issue will be upheld.

[6, 7] The appellant insists that the court erred in giving to the jury instruction number 35 to the effect that when a confidential relationship is shown to exist, coupled with activity on the part of a beneficiary in procuring the execution of a will, a presumption of undue influence is thereby raised, and the burden is then cast upon the proponent to show that the will was not procured by undue influence or fraud. That instruction contains the following statement: "If that burden has not been met, that is, if such person has failed to show by a preponderance of the evidence, an absence of undue influence, then the presumption of undue influence or fraud controls and such will will be invalidated."

It is true the authorities hold that the establishment of a presumption does not have the effect of shifting the burden of proof from the party upon whom the affirmative of an issue rests. Scarborough v. Urgo, 191 Cal. 341, 216 P. 584; Valente v. Sierra Railway Co., 151 Cal. 534, 91 P. 481; Estate of Eakle, 33 Cal.App.2d 379, 91 P.2d 954; 10 Cal.Jur. 783, § 88; 68 Cal.Jur. 755, § 449. But when a presumption of undue influence is raised by showing the existence of a confidential relationship, coupled with activity on the part of the proponent of a will, a prima facie showing of undue influence is thereby established which, in the absence of evidence to the contrary, necessarily has the effect of invalidating the will because it is then not the result of the free will or volition of the testator. It logically follows that the presumption necessarily results in invalidating the will on that account. Under such circumstances, the presumption becomes controlling. To overcome that prima facie showing it becomes necessary for the proponent to rebut the presumption by evidence which, at least, will have the effect of balancing the prima facie showing, or the will must be denied probate. Technically speaking, it may be true that the language of the challenged instruction goes too far in saying that the proponent must "show by a preponderance of the evidence an absence of undue influence". However, it is not necessary for us to determine that question, for undue influence is not the only issue upon which the judgment is predicated. The jury separately found that the will is void because the testator was of unsound mind at the time it was executed. In instruction number 20 the jury was clearly and correctly charged that upon each ground of contest the burden of proof rested upon the contestant. The challenged instruction had no bearing on the issue of unsound mind. Instruction number 20 reads: "The burden of proof in this case is on the contestant, Carl Thomsen, to prove that the instrument offered here for probate by the proponent, Charles Hansen, was executed by Peter Hansen, deceased, while he was of unsound mind or that it was procured to be made by Charles Hansen by the use of undue influence or fraud and he must prove one of such grounds by a preponderance of the evidence. There is no burden on the proponent to disprove any of the allegations of contestant's opposition to the probate of the will involved, and in this case if you find that the weight of the evidence bearing upon the whole case is in favor of the proponent, or that it is evenly balanced, then your verdict must be for the proponent."

In view of the preceding correct statement of the law with respect to the burden of proof, which is specifically made applicable to the issue of unsound mind, the jury could not have been misled regarding that issue. Even though we may believe that the finding of undue influence is ineffectual and void, and that it would require a reversal of the case if that were the only ground upon which the will was found to be invalid, still the separate finding that the testator was of unsound mind and that he lacked testamentary capacity on that account, is sufficient ground upon which to support the judgment in this case.

The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

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37 Cal.App.2d 110

PEOPLE v. AGGIE.

Cr. 3275.

District Court of Appeal, Second District, Division 2, California.

Feb. 1, 1940.

Hearing Denied Feb. 29, 1940.

1. Gaming 🔑98(1)

Evidence that defendant, owner of cigar store, which sold sheets containing racing information, accepted money to be bet on result of a horse race sustained conviction of defendant for receiving money to be wagered on result of a horse race. Pen.Code, § 337a, subd. 3.

2. Gaming 🔑98(1)

In prosecution for accepting money to be wagered on result of a horse race, trial court was justified in basing conviction of defendant on reasonable inferences to be drawn from evidence. Pen.Code, § 337a, subd. 3.

3. Criminal law 🔑1144(5)

In prosecution in Los Angeles county for receiving money to be wagered on the result of a horse race, where offense was shown to have been committed in city in which court was sitting, referred to by witnesses as "this city," reviewing court would conclude in view of presumption that official duty has been regularly performed, that court had jurisdiction of the offense charged, where court was without jurisdiction to conduct trial in any city located outside the county of Los Angeles. Pen.Code, § 337a, subd. 3.

4. Criminal law 🔑564(1)

It is not necessary that venue be proved by direct evidence, but it may be established by inferences from evidence.

5. Criminal law 🔑1166½(1)

Action of trial court in adjudging defendant guilty, immediately after defendant had rested, without allowing defendant's counsel to argue, did not constitute reversible error as resulting in a "miscarriage of justice" where counsel failed to request permission to argue, and where counsel made argument to court on motion for new trial.

[Ed. Note.—For other definitions of "Miscarriage of Justice," see Words & Phrases.]

McCOMB, J., dissenting.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Alexander Joseph Aggie was convicted of receiving a sum of money to be wagered on the result of a horse race, and he appeals.

Affirmed and appeal from order denying motion in arrest of judgment dismissed.

Leland E. Zeman, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for respondent.

WOOD, Justice.

Defendant was charged in an information containing two counts with the crimes of violating subdivisions 2 and 3 of section 337a of the Penal Code. Count 1, based on the alleged violation of subdivision 2 of the section, was dismissed, and defendant was convicted by the court sitting without a jury on count 2, in which it was charged that defendant received the sum of $1 to be wagered on the result of a horse race.

[1, 2] Defendant contends that the evidence is insufficient to sustain the judgment of conviction. Only two witnesses were presented by the prosecution, police officers McCoy and McDearmon. The defense presented no evidence. Officer McCoy testified that he is a police officer of "this city", attached to the central vice division; that on May 4, 1939, he accompanied one Morris Israel from a hat shop conducted by Israel which was about 25 feet from defendant's place of business and after giving Israel a one dollar bill "to win on Mr. Finn 869", went to defendant's place of business where defendant accepted the money from Israel and put it in his pocket. Thereupon Morris and the witness returned to the hat shop. The witness further testified that on a later occasion he went "back there" again and "gave Morris a one dollar bill to bet on a horse". On motion of defendant the trial court struck out the words "to bet on a horse". The witness further testified: "Then I gave him a one dollar bill to bet on Laddie Stone, No. 37, the horse * * *." Israel then went "into the defendant's place, where the defendant was". The witness described defendant's place of business: "It was a cigar store, cigar counter on the west side of the room, three marble machines in the back, a telephone directly behind the marble machines." The witness further testified: "When Mr. Morris handed the defendant the money did the defendant take the money? A. He did.

"Q. Is that what you mean by the word 'accepted'? A. Yes.

"Q. Then what did the defendant do or say? A. He repeated 'Mr. Finn, number 869, to win'.

"Q. And what else? A. That was all.

"Q. Did you see him do any writing? A. No, sir.

"Q. Did he hold the money up in his hand? What did he do with it? A. He put it in his pocket * * *. We didn't arrest the defendant until the 9th of May".

Officer McDearmon testified: "Q. Did you go into a place in this city where the defendant was on or about May 4th of this year? A. No, sir, I did not.

"Q. Were you near there? A. Yes, I was when the other arrest was made. When Israel was arrested I was in there then.

"Q. When was that? A. That was, I believe, the 4th or 5th.

"Q. Who did you go in there with on that occasion? A. Officers Howard and McCoy and myself, I believe it was.

"Q. And did you see the defendant? A. No, I did not.

"Q. Didn't see the defendant? A. No, sir.

"Q. Did you look for him? A. Yes, I did.

"Q. Then on the 9th of May you went in there again? A. Yes, sir.

"Q. Were those the only two occasions you had ever been in there? A. Yes.

"Q. And what is that establishment? What is in there; what is the equipment? A. There is a cigar counter, and they sell magazines in front; they sell racing information; have marble machines in the back and a telephone. It is a small room * * *.

"Q. When you went in the place where the defendant was on the 9th of May, or any other time about the 8th, did you find any of that kind of equipment? A. We found that they sold it there but we didn't find anything laying around like that.

"Q. Had it up on the counter for sale? A. Yes. On the outside of the counter they had sheets up there." ("Scratch" sheets or "tip" sheets giving information on races.)

The testimony of the two officers stands uncontradicted. The trial court was justified in basing the conviction of defendant on reasonable inferences to be drawn from the evidence. The court could readily infer from the testimony that defendant received from officer McCoy a one dollar bill to be wagered on a horse race.

[3, 4] Defendant makes the further contention that the prosecution failed to prove the jurisdiction of the court. It will be noted that both officers were referring in their testimony to the same establishment, the place of business of defendant which was located in "this city". Although the court in which defendant was convicted is authorized to conduct trials in a number of cities in Los Angeles county, the court is without jurisdiction to conduct a trial in any city located outside of the

county of Los Angeles. The prosecution properly relies upon the presumption that official duty has been regularly performed. People v. Wright, 79 Cal.App. 523, 250 P. 204. Since the offense was shown to have been committed in a city in which the court was sitting, referred to by the witnesses as "this city", it must be concluded, in view of the above mentioned presumption, that the court had jurisdiction of the offense with which defendant was charged. Direct evidence is not necessary to prove venue, which may be established by inferences from the evidence. Fletcher v. State, 34 Okl.Cr. 305, 246 P. 485; State v. Hurlbert, 153 Wash. 60, 279 P. 123.

[5] Defendant complains that he was not permitted to argue the question of the guilt or innocence of defendant. The record discloses the following proceedings:

"Mr. Johnson: That is all. The People rest.

"Mr. Zeman: Move to dismiss, Your Honor, for lack of evidence.

"The Court: Which count?

"Mr. Zeman: Both counts, Your Honor.

"The Court: Motion granted as to count one. Denied as to count two.

"Mr. Zeman: I am just thinking, Your Honor. May I have one minute to think.

"The Court: All right, go ahead and think.

"Mr. Zeman: We rest.

"The Court: The defendant is adjudged guilty on count two. Waive time for sentence?

"Mr. Zeman: No, Your Honor, I would like to have sentence go over until Friday."

The haste with which the court passed upon the issue to be decided is not to be commended. The error, however, does not call for a reversal of the judgment. Counsel for defendant failed to request the court for permission to argue at the close of the trial. The record reveals that when a motion for a new trial was presented to the court at a later date defendant's counsel did in fact make an argument to the court. Thus it appears that defendant was not deprived of the right to argue. The irregularity as to the time of argument did not result in a miscarriage of justice.

The judgment and the order denying a new trial are affirmed. The appeal from the order denying the motion in arrest of judgment is dismissed.

I concur: MOORE, P. J.

McCOMB, Justice.

I dissent.

From a judgment of guilty of violating subsection 3 of section 337a of the Penal Code of the State of California and from an order denying his motion for a new trial, after trial before the court without a jury, defendant appeals.

Defendant relies for reversal of the judgment on the ground that *the respondent failed to offer any evidence to prove venue of the crime of which defendant was convicted.*

This proposition is tenable. The law is established in California that in order to sustain a conviction evidence must be received to prove the venue of the crime charged and that, where there is no evidence that a felony was committed in the county over which the superior court had jurisdiction, a conviction will be reversed. People v. Pollock, 26 Cal.App.2d 602, 604, 80 P.2d 106; In re Huber, 103 Cal.App. 315, 316, 284 P. 509.

In the instant case the information charged that the offense was committed in the county of Los Angeles. The only evidence upon this issue was that of a police officer A. C. McCoy, who testified that he was a police officer of "this city" and that he visited the defendant's place of business, and of the witness McDearmon who testified as follows:

"Q. Did you go into a place in this city where the defendant was on or about May 4th of this year? A. No, sir, I did not.

"Q. Were you near there? A. On May the 9th I went with Officer McCoy.

"Q. You weren't in there before May 9th? A. Yes, I was when the other arrest was made. When Israel was arrested I was in there then.

"Q. When was that? A. That was, I believe, the 4th or 5th.

"Q. Who did you go in there with on that occasion? A. Officers Howard and McCoy and myself, I believe it was.

* * * * * *

"Q. Then on the 9th of May you went in there again? A. Yes, sir.

"Q. Were those the only two occasions you had ever been in there? A. Yes."

The foregoing testimony, it is obvious, was wholly inadequate to support an inference that the crime was committed in the county of Los Angeles. The testimony states that the witness McCoy was a police officer of *this city*. However, there is no testimony as to what city *this city* was. Likewise there is no testimony as to the city where the defendant was at the time of the alleged crime or where his place of business was located. In People v. Bringhurst, 192 Cal. 748, 221 P. 897, and People v. Wright, 79 Cal.App. 523, 250 P. 204, there was direct testimony as to the place where the offenses charged were committed.

In the present case there was gross and inexcusable carelessness upon the part of the prosecution in failing to make direct proof that the offense was committed in the county of Los Angeles.

For the foregoing reasons, in my opinion, the judgment and order should be reversed and a new trial ordered.

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37 Cal.App.2d 1

PASSARELLI et al. v. SOUZA.

Civ. 6260.

District Court of Appeal, Third District, California.

Jan. 29, 1940.

1. Automobiles 🔑246(4)
Trial 🔑191(7)

In action for pedestrians' injuries resulting from collision between truck and automobile at street intersection, instruction that truck driver in absence of evidence to contrary had right to assume that automobile driver would exercise ordinary care and would yield right of way to truck driver was erroneous as informing jury that truck driver had such right irrespective of whether he himself was negligent, and as practically assuming that truck driver had right to be where he was without taking additional precautions.

2. Trial 🔑296(3)

In action for pedestrians' injuries resulting from collision between truck and automobile at street intersection, error in instructing in effect that truck driver had right to assume that automobile driver would yield right of way irrespective of whether truck driver was negligent was not prejudicial where four instructions were given on question of joint negligence, one of which informed jury to find against truck driver and automobile driver if one contributed 99 per cent. and other only one per cent. to proximate cause of injuries, and court also fully instructed on general law of negligence. Const. art. 6, § 4½.

3. Trial 🔑296(3)

In action for pedestrians' injuries resulting from collision between truck and automobile at street intersection, instruction that if automobile driver was negligent, which negligence was proximate cause of collision, verdict must be against automobile driver and not against truck driver was not prejudicially erroneous, notwithstanding instruction should have been modified to permit recovery only if such negligence was the sole proximate cause of collision, where at least four instructions were given to effect that truck driver should be held liable if his negligence contributed in any degree to the collision. Const. art. 6, § 4½.

4. Trial 🔑296(7)

In action for pedestrians' injuries resulting from collision between truck and automobile at street intersection, instruction that pedestrians were required to prove that negligence of truck driver was proximate cause of injuries was not prejudicially erroneous where jury could not have been misled into believing that they could not bring in a verdict against truck driver if negligence was joint, in view of instructions to effect that truck driver should be held liable if his negligence contributed in any degree to collision. Const. art. 6, § 4½.

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Appeal from Superior Court, Merced County; James D. Garibaldi, Judge.

Action by Andrew Passarelli and another against Manuel M. Souza, Marjorie Van Dusen and another for injuries sustained as the result of a collision of an automobile and truck wherein last named defendant filed a cross-complaint against first named defendant. From a judgment in favor of first named defendant, plaintiff appeals.

Affirmed.

F. M. Ostrander, of Merced, and D. Oliver Germino, of Los Banos, for appellants.

C. Ray Robinson, Willard B. Treadwell, and W. Eugene Craven, all of Merced, for respondent.

Mr. Justice TUTTLE delivered the opinion of the court.

On the night of July 16, 1938, and at about the hour of 11 o'clock p. m., plaintiff Andrew Passarelli, carrying his eight months' old baby boy, and holding the hand of his three-year-old daughter, plaintiff Louisa Passarelli, who was on his right, was walking south on the sidewalk on the westerly side of Sixth street, in the city of Los Banos, and at a point about 118 feet north of the northerly curb of J street, and in front of the J. C. Penney Company store, the front of which was being altered, and in front of which, due to the alterations, had been built a wooden barricade. At about the time when plaintiffs had reached this point, a collision occurred at the intersection of Sixth and J streets in said city of Los Banos, between an automobile truck owned and operated by defendant Manuel M. Souza, and an automobile owned by defendant Charles Swift, and being driven and operated by defendant Marjorie Van Dusen. There is a conflict in the evidence in respect to which automobile first entered the intersection. Immediately after the collision between the automobile truck and the automobile, the automobile being driven by Marjorie Van Dusen careened across the sidewalk and hit the barricade in front of the store where plaintiffs were walking, with the result that the barricade fell upon and injured plaintiffs.

Plaintiffs brought an action for personal injuries, alleging joint and concurrent negligence upon the part of the defendant drivers, Manuel M. Souza and Marjorie Van Dusen. The defendant Van Dusen answered, denying negligence upon her part, and filed a cross-complaint against defendant Souza for personal injuries sustained by her. Defendant Souza answered denying negligence on his part and alleging that the accident and the resulting injuries were proximately caused by the negligence of defendant Marjorie Van Dusen. The case was tried before a jury on February 7 to 9, 1939, and the jury returned a verdict in favor of plaintiff Andrew Passarelli in the sum of $12,500, and in favor of Louisa Passarelli in the sum of $5, and against defendants Marjorie Van Dusen and Charles Swift and in favor of defendant Manuel M. Souza. A judgment was entered upon this verdict. Thereafter, plaintiffs moved for a new trial, which motion was denied, and thereafter perfected the appeal to this court.

The main contention of appellants is that the trial court erred in giving the following instruction: "I instruct you that the defendant Manuel Souza, in the absence of evidence to the contrary, had a right to assume that the defendant operating the other car involved in this accident would exercise ordinary care and would yield the right of way to said defendant in the manner provided for by law. I further instruct you that the defendant Manuel Souza had the right to assume that the operator of the said vehicle was in a sober condition and maintaining a proper lookout for other vehicles upon said highway, and that his failure to anticipate or to assume, in the absence of evidence to the contrary, that said driver of said vehicle would not so act, cannot be the basis of negligence on the part of the defendant Manuel Souza."

He states his position as follows:

"The above instruction is subject to many objections. In the first place, neither paragraph is qualified by any words that made it necessary for Manuel Souza, before he had the right to assume an obeyance of the law on the part of the co-defendant, to himself be in the exercise of ordinary care."

"Secondly, in the first paragraph of the instruction quoted, the court instructs the jury that the defendant Souza had the right of way, for it tells the jury that he had the right to assume that the co-defendant would yield the right of way to him as provided by law.

"The entire issue of negligence on the part of the defendant Souza was taken away from the plaintiff by this instruction.

"The court will see by a perusal of the evidence in this case, that there was a sharp conflict as to which defendant entered the intersection first, each having claimed to have done so, and the question as to who had the right of way was one for the jury's determination."

Appellants rely upon the case of White v. Davis, 103 Cal.App. 531, 284 P. 1086, 1092, where the following instruction was given: "I instruct you that every person has a right to presume that every other person will perform his duty and obey the law, and in the absence of reasonable ground to think otherwise, it is not negligence to assume that he is not exposed to danger which comes to him only from violation of law or duty by such other person."

In holding such instruction erroneous, the court there said: "The effect of this instruction was to tell the jury that in this case the plaintiff had a right to rely upon the rule stated, irrespective of whether or not he himself was negligent, and that he had a right to assume that he was not exposed to danger, even though he might know he was in a perilous position."

Reliance is also placed by appellants upon the case of Roller v. Daleys, Inc., 219 Cal. 542, 28 P.2d 345, 347, where the court held a similar instruction to be prejudicially erroneous. In the latter case it was held: "The effect of this instruction was to tell the jury that in this case the plaintiff had a right to rely upon the rule stated, irrespective of whether or not he himself was negligent, and that he had a right to assume that he was not exposed to danger, even though he might know he was in a perilous position. The negligence of the defendant and the contributory negligence of the plaintiff were questions which should have been left to the jury, and this instruction should not have been given, without qualification."

[1] In the instant case the question of contributory negligence was not before the jury. There is no valid reason, however, for making any distinction from the foregoing cases upon that ground. Here, the question arose as to which of the defendants was guilty of negligence, or whether the collision was the result of the joint negligence of the defendants. The jury found that defendant Souza, who was driving the truck, was free from negligence, and found that the proximate cause of the injury was the negligence of the other defendants. (Defendant Swift was the owner of the automobile, but it was driven by defendant Van Dusen at the time of the accident.) The instruction, under the cases cited above, was therefore erroneous, in that it told the jury that defendant Souza had the right to rely upon the rule, irrespective of whether or not he himself was negligent. The vice of the instruction, according to the foregoing authorities, is that it practically assumes that Souza had a right to be where he was without taking additional precautions, and the jury might understand that if he relied upon the assumption that defendant Van Dusen was obeying the law, he was not guilty of negligence. This, it appears, is the line of reasoning adopted by the courts in the cases cited.

[2] The next question is whether or not the giving of the foregoing instruction was prejudicial error, within the meaning of article VI, section 4½ of the Constitution. An examination of the record shows that four instructions were given the jury upon the question of the joint negligence of the defendants. One of these told the jury, in part that: "it is your duty to find against both defendants, even if you find that one defendant contributed ninety-nine per cent, and the other only one per cent to the proximate cause of the injuries to plaintiff". The court fully instructed the jury on the general law of negligence pertaining to the case. Considering the instructions as a whole, we do not believe that the jury could have understood that they should find defendant Souza free from negligence, merely because they were told that he had the right to assume that defendant Van Dusen would exercise ordinary care and yield the right of way to him in the manner provided by law. We therefore hold that the error was not prejudicial, and that the constitutional provision mentioned is applicable. The following excerpt from the case of Angel v. Los Angeles Gas & Electric Corp., 5 Cal.App.2d 270-277, 42 P.2d 690, 693, where a similar instruction was before the court, not only distinguishes the cases here relied upon by appellant, but also points out the lack of prejudice where full instructions are given upon the question of negligence:

"Appellant relies strongly upon the case of McPherson v. Walling, 58 Cal.App. 563, 209 P. 209, 210, and upon White v. Davis, 103 Cal.App. 531, 284 P. 1086, and Roller v. Daleys Incorporated, 219 Cal. 542, 28 P.2d 345. These were all cases in which instructions similar to the one under consideration were given; they either ignored or insufficiently stated the contributory negligence doctrine. In McPherson v. Walling [supra], it is said to be improper to give an instruction as to the right of one person to rely upon the exercise of care by another in any case in which the lawfulness of the former's acts is in question. The decision of the case, however, was not based upon that broad ground, but upon the proposition that 'the instruction before us does not leave it to the jury to decide from all the facts and circumstances in evidence whether or not the plaintiff had a right as a reasonable man to expect that the defendant would perform his legal duty. It forecloses it from deciding the question for itself.' It is to be observed that merely charging plaintiff with affirmative acts of negligence does not establish his guilt, nor should it deprive him of the benefit of the legal principle that he had a right to rely upon the defendant's observing the law, so long as he himself did not carry, that assumption beyond the limits of prudence and caution. It is proof of negligence, not merely its assertion, that destroys his right to rely upon the exercise of care by other persons.

"In the McPherson Case there was no general or special instructions on contributory negligence. In White v. Davis, and Roller v. Daleys Incorporated, supra, the court considered specific instructions and held that they were insufficient under the particular facts involved, and should have been amplified so as to fully incorporate therein the elements of the contributory negligence doctrine, without which they would be misleading to the jury. In neither of these cases was the jury instructed in that doctrine as it was in the instant case. An authority much more in point is Forrest v. Pickwick Stages System, 101 Cal.App. 426, 281 P. 723, in which the jury had been instructed that plaintiff had a right to presume that another motor vehicle operating on the highway would be lawfully propelled in accordance with the California Vehicle Act. The court there considered numerous instructions on contributory negligence and reached the conclusion that it did not seem possible that the jury could have understood that the plaintiff was not obliged to use every reasonable and ordinary precaution for his own safety, even though the stage displayed no headlights. The case in hand falls within the doctrine of this authority, which is supported by DeLannoy v. Grammatikos, 126 Cal.App. 79, 14 P.2d 542, and Hoy v. Tornich, 199 Cal. 545, 250 P. 565. In these cases similar instructions were considered, and it was held that the instructions on contributory negligence must be presumed to have removed any prejudicial effect of the instructions of which complaint was made."

[3, 4] In a portion of another instruction the jury were told that: "If you find from the evidence that Marjorie Van Dusen did not so act, she was guilty of negligence, and if such negligence was a proximate cause of the collision, your verdict must be against her, and not against the defendant Manuel Souza."

It is contended by appellants that this took away from the jury the right to bring in a verdict based upon joint negligence. While this instruction should properly have been modified to permit such recovery only in the event that such negligence was the sole proximate cause of the collision, we cannot see how the jury was misled into believing that they could not bring in a verdict against Souza if the negligence was joint. As we have pointed out, at least four instructions were given to the effect that Souza should be held liable if his negligence contributed in any degree to the collision. We find no prejudicial error in this respect. Another instruction of similar import is also questioned, where the jury was told that plaintiff must prove that the negligence of Souza was the proximate cause of the injuries. What we have said with reference to the preceding instruction is equally applicable to this one. We therefore hold that it was not prejudicially erroneous.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

37 Cal.App.2d 16

WITT'S DAIRY et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 11211.

District Court of Appeal, First District, Division 1, California.

Jan. 30, 1940.

1. Workmen's compensation 🔑1375

Where employer's insurance carrier, at end of 66 weeks, discontinued compensation for temporary total disability on ground that such disability had terminated, and employee filed application with Industrial Commission claiming that temporary total disability had not terminated, that carrier, acting upon its physician's advice, had discontinued its payments, and employee filed application for further consideration of claimed temporary total disability, cast burden upon employee to prove that he still labored under temporary total disability. St.1937, p. 299, § 5705.

2. Workmen's compensation 🔑1419

A finding of Industrial Accident Commission, upon employee's application claiming that his temporary total disability had not terminated when employer's insurance carrier discontinued compensation for such disability at end of 66 weeks, that employee was still temporarily totally disabled could not be sustained, where employee, due to fact that his job had been taken by another worker and lack of employment, could not sustain burden of proving that he was still temporarily totally disabled and carrier's physician was of opinion that employee could return to work at end of the 66 weeks. St. 1937, p. 299, § 5705.

3. Workmen's compensation 🔑1419

Where record in proceeding by employer and insurance carrier to review award of Industrial Accident Commission holding that employee was still temporarily totally disabled, after carrier had suspended compensation payments at end of 66 weeks, contained no conflict in evidence, and employee was unable to sustain burden of proving that he was still temporarily, totally disabled, an uncontradicted opinion by carrier's physician that employee was able to return to work when payment of compensation was suspended was conclusive. St.1937, p. 299, § 5705.

◆

Proceeding by Witt's Dairy, a copartnership, and another, against the Industrial Accident Commission of the State of California, and another, to review an award of the commission in favor of Fred Corwin.

Award annulled.

Keith & Creede, of San Francisco, for petitioners.

Everett A. Corten, Atty., Industrial Accident Commission, and Eldon B. Spofford, Asst. Atty., Industrial Accident Commission, both of San Francisco, for respondents.

GOODELL, Justice pro tem.

On February 5, 1938, respondent Fred Corwin, while in the employ of petitioner Witt's Dairy as an ice cream maker, sustained an injury to his right knee. Petitioner Massachusetts Bonding & Insurance Company, the insurance carrier for the employer, without a hearing before the commission, voluntarily accepted liability, and medical treatment was furnished and compensation as provided by law was paid to Corwin for sixty-six weeks at the rate of $21.61 per week. At the expiration of this period these payments were discontinued by the insurance carrier on the ground that as of May 20, 1939, Corwin's temporary disability had terminated and that he was then able to perform the work he had been engaged in prior to his injury. On May 29, 1939, Corwin filed with the commission an application claiming that his temporary total disability had not terminated. A hearing was held at which the only issue was whether Corwin's temporary disability continued after May 20, 1939. It was, and is, conceded by the employer, and by the insurance carrier, that Corwin might, in the future, have some residual permanent disability, but it is claimed that this could not be determined until he had worked for a period of six months or more. The existence and extent of such possible permanent disability was not an issue at the hearing. The commission held that the employee was still suffering a temporary total disability, and accordingly ordered the resumption or continuance of the payment of indemnity at the rate of $21.61 per week. A petition for rehearing was denied and this petition for review was filed.

The sole contention of the employer and its insurance carrier is that there is no evidence in the record before the commission to sustain its findings and award that the temporary total disability continued after the sixty-six week period had expired.

[1] The fact that the insurance carrier, acting upon its doctor's advice, had discontinued its payments, and that the employee filed his application for a further consideration of his claimed temporary total disability, cast the burden upon him to prove that he still labored under such temporary total disability. Labor Code, § 5705 (St. 1937, p. 299); Berzin v. Industrial Acc. Comm., 125 Cal.App. 522, 525, 14 P.2d 97; Carlson v. F. H. DeAtley & Co., 55 Idaho 713, 46 P.2d 1089. Schneider, in his Workmen's Compensation Law, (2d ed.) volume II, page 1871, section 537, says: "Where an employee contends that his temporary total disability continued after his physician had pronounced him fit to return to

work, the burden of proving that his disability did continue thereafter rests with the claimant."

On May 20, 1939, Dr. Frederick G. Linde wrote to the insurance carrier as follows: "Mr. Corwin has recently completed the extended physiotherapeutic treatments recommended by Dr. King and, I believe, has attained a maximum improvement, sufficient to warrant his attempt to return to work. I have discontinued physiotherapeutic treatments and have instructed the patient to return to work as of May 22, 1939. His knee now flexes to 110 degrees without pain. Extension is normal. He has adjusted his shoe to accommodate for some of the preexisting shortening of the leg. I believe that he can carry out his usual work without handicap. If he continues to work uninterruptedly, I should like to examine him in four to six weeks to note progress." In addition to Dr. Linde's letter, there was also in evidence a letter from Dr. Donald King to Dr. Linde, dated April 12, 1939, in which Dr. King, to whom the employee had been sent for a "check up", reported respecting the case, and in which he said: "I believe that this patient is actually anxious to return to work in spite of his fourteen months lay off. I note a definite improvement in the past three months, and feel that he should be given another four weeks of active treatment before sending him back to work." Neither of these doctors was called to give oral testimony at the hearing. The only testimony was that of the employee. He described how the accident happened and then testified that he had not been back to work since (an interval of almost seventeen months). He was then asked by the referee: "Q. And the reason for that is lack of employment, or condition of the knee? A. Lack of employment. I have no position to go back and try to see whether I could do it or not, and they took the knee cap out." During the past three months, he testified, he thought his condition had improved. He was then asked: "Do you feel that you are back in the shape you were before the injury * * *?" to which he replied: "Well, of course, I don't know. * * * I haven't had a job to find out whether I could or not, but, of course, the knee is not as strong as it was before, because it bothers me at times through the joint, especially when carrying anything." He testified that he experienced at such times a sensation both of weakness and of pain and that when he did too much walking, especially going up hill, he became tired. When asked whether he went back to work on May 22d, he answered that he "didn't have any job to go to". The substance of his testimony was that his employer had broken in another employee in his place "and he didn't feel like he should let him go". It was conceded by counsel for the petitioners that there would be some limitation of motion in the knee, and that the doctor could not tell how much permanent disability there would be for approximately six months; further, that the employee would be entitled to come back when the knee condition became stationary and have the permanent disability rating fixed and determined. The referee then observed that "the difficulty is the Doctor ordered him back to work and they won't take him so he can't get a work test". Corwin was then asked: "And on about May 20th he [Dr. Linde] told you to return—you were able to work at that time?" and answered: "On May 19th, yes, sir." When asked whether he had tried to get employment elsewhere the witness answered that he had not "because as long as I had to have the hearing, I figured if I try to go to work for somebody they couldn't very well let me off to run down here. * * * I haven't tried, and I don't know whether I could have got a job or not." In conclusion when asked: "But, Mr. Corwin, if you could have gone back to your old job on May 19th, you would have taken it?" he replied: "I would have tried it, yes, sir. I am always willing to do what is fair."

[2] This testimony of the employee when read in connection with the letters of Drs. Linde and King shows a situation simply as follows: The doctor immediately in touch with the case advises that in his opinion the patient "can carry out his usual work without handicap". The employee, who apparently had been cooperative throughout, applies promptly and with the best of intentions to his former employer for his old position, but the position has been filled, and the employer does not feel justified in discharging the new man. As the referee observed, the doctor ordered him back to work, but, because the job has been filled, he "can't get a work test". The situation, to say the least, is an unsatisfactory one for there is, in the nature of things, no starting point. The sixty-six week period of disability expired; the burden of proving that the temporary total

disability had not ended but should be extended, thereupon shifted to the employee; and the very experiment which would prove or disprove his case cannot be made, not because of any fault of his but simply because there is no opening. We are constrained to the conclusion that there is no evidence in the record, in these unusual circumstances, to support the finding and award that the temporary total disability continued. In other words, the employee's burden of proof was not sustained.

In the last analysis the case presents the bald question whether this employee was physically able, on May 22, 1939, to return to the same kind of work he had performed before he was injured. It does not present the question sometimes encountered—and discussed in respondents' brief—whether an injured employee has recovered to such an extent that he can do other work, less onerous than that which formerly he was able to do, and actually locates himself in such other job. There seems to be a rule covering such cases (see Schneider, supra, pp. 1344, 1345), but these facts do not call it into play. If, in the instant case, the employee was, in fact, physically able to resume his former job, then his temporary total disability would have ended, physically and legally, and in such case there would be no legal justification for holding—contrary to the fact—that it had not ended. The unfortunate circumstance that the job was not open certainly would not prove that he was not physically able to fill it, but simply that there was no job to be filled.

[3] There is no conflicting evidence in the record now under review, and the opinion expressed by Dr. Linde, already referred to, would seem to be binding and conclusive. William Simpson Const. Co. v. Ind. Acc. Comm., 74 Cal.App. 239, 243, 240 P. 58; Southern Cal. Edison Co. v. Indus. Acc. Comm., 75 Cal.App. 709, 714, 715, 243 P. 455; General Accident, Fire & Life Assurance Corp. v. Industrial Acc. Comm., 106 Cal.App. 39, 288 P. 692. There is nothing in the record in the nature of a contradiction of Dr. Linde's opinion, by any other medical expert witness, and certainly no attempt at controverting it by the employee himself, who was the only lay witness in the case.

In short, there is no evidence in the record to the effect that on May 20th or May 22, 1939, the employee was laboring under temporary total disability, while on the other hand there is this medical evidence that he was not.

The problem presented by this case presents a legislative, and not a judicial question. Here we find an employee who admittedly was temporarily totally disabled for sixty-six weeks. He had reached a point of recovery where his case was a border line case—he may have or may not have been able to go back to work. The employer, for reasons already mentioned, gives him no work test. The insurance carrier stops his compensation, thus requiring the employee to file a petition. Under section 5705 of the Labor Code, and the other authorities cited, supra, the burden of proof is thus thrown on the employee. The doctors, who are employed by the carrier, express the opinion that he can go back to work, and so recommend. The employee is doubtful, but is willing to try, and cannot get work to make the test. In this case, if the employee had testified that he thought he could not work, the award would probably have to be affirmed, but he was very fair, and testified he would like to try and work. Under such circumstances where the insurance carrier has assumed liability and paid compensation until the time when the case has become a border line case, it would seem that, from a standpoint of fairness, the burden should be on the insurance carrier to prove that the temporary disability has in fact ended.

If the carrier had denied liability at the outset the employee would have received an award entitling him to temporary disability payment until further order of the commission. To terminate this liability, the carrier would have had to file a petition, thus assuming the burden of showing that the temporary disability had terminated. There would seem to be no reasonable ground for distinguishing the two situations. However, under the present state of the statutes, the burden is on the employee. Not having sustained the burden, he must fail. This problem, in our opinion, should be called to the attention of the legislature for its consideration.

For the foregoing reasons, and upon the authorities cited, the award should be, and it is, annulled.

We concur: PETERS, P. J.; WARD, J.

37 Cal.App.2d 133

MARTIN v. MIQUEU et al.

Civ. 11208.

District Court of Appeal, First District, Division 2, California.

Feb. 2, 1940.

Rehearing Denied March 2, 1940.

1. Trial ⚿145

Where there existed uncertainty in the record in action arising out of automobile accident as to whether defendant made an unqualified judicial admission of liability, or merely an offer to stipulate and as to whether admission extended to issue of agency or extent of plaintiff's injuries, refusal of defendants' request to limit issues to damages was not error.

2. Appeal and error ⚿1050(1)

In action arising out of automobile accident wherein defendants sought to file an admission of liability which did not include issue of extent of plaintiff's injuries or issue as to whether driver of automobile was agent of one of the defendants, refusal to exclude plaintiff's evidence as to manner in which accident happened, as to intoxication of defendant, and as to nature of plaintiff's back injury, did not constitute prejudicial error where such evidence was properly admitted on issues of agency and extent of plaintiff's injuries.

3. Trial ⚿145

Trial court did not commit error in refusing to instruct that defendants had admitted liability and in submitting issue as an open one where nature and extent of defendants' admissions was uncertain.

4. Automobiles ⚿245(28), 246(42)

In action arising out of automobile accident, evidence that a defendant corporation allowed its local manager to drive automobile of corporation home at night in order that he could make calls for the corporation in the morning and that at time of accident manager was on his way home and within four blocks thereof presented jury question as to whether manager was driving automobile as agent for corporation and hence justified instructions on agency.

5. Damages ⚿130(3)

$5,000 awarded to 42 year old woman school teacher for a low back sprain with concussion of the spine, causing pain which continued for many months and necessitating hospitalization, was not excessive where special damages amounted to $1,789.53.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Pearl W. Martin against Albert Miqueu and Atlas Heating & Ventilating Company to recover for injuries suffered in automobile accident. From a judgment for the plaintiff, defendants appeal.

Affirmed.

Weinmann, Quayle & Berry, of Oakland, for appellants.

Brown & Rosson, of Oakland, for respondent.

SPENCE, Justice.

Plaintiff sought damages for personal injuries sustained when an automobile, driven by defendant Miqueu and owned by defendant Atlas Heating and Ventilating Company, collided with an automobile driven by plaintiff. Upon a trial by jury plaintiff recovered judgment against said defendants in the sum of $5,000, from which judgment said defendants appeal.

The complaint alleged that on December 1, 1938, plaintiff was driving her automobile in a westerly direction on Excelsior avenue near the intersection of Spruce street in the city of Oakland and that defendant Miqueu so negligently drove an automobile in an easterly direction along said Excelsior avenue as to cause it to violently collide with plaintiff's automobile, thereby causing plaintiff various injuries. Said complaint further alleged that the defendant company was the owner of said automobile and that defendant Miqueu was driving it with the consent of the defendant company and within the scope of his employment as an employee of said company. The joint answer of defendants denied the allegations relating to negligence, injuries, damage, and scope of employment. It admitted that the defendant company owned the automobile and that defendant Miqueu was driving said automobile with the consent of the defendant company.

After the jury was impaneled and before the opening statement, counsel for defendants asked "leave to file in the record defendant's admission of liability on behalf of the defendant Miqueu in a fair and reasonable sum to be determined by the Court or jury". He further stated that the "same written stipulation admits liability" on behalf of the defendant company "subject to the limitations imposed by section 402 of the Vehicle Code", and that he at that time offered "to broaden the latter part of that written stipulation * * and waive any question on the issue of agency and make an unqualified admission of liability" on behalf of the defendant company without any limitation such as that imposed by section 402 of the Vehicle Code, St.1935, p. 153, as amended St.1937, p. 2353. He ended his statement as follows: "If those stipulations are not accepted by my adversaries then each and every one of them is withdrawn."

There is confusion in the record as to whether counsel for defendants was making an unqualified judicial admission or was merely making what he termed "my offer to stipulate" which was to be withdrawn if not accepted. He states in his brief that the written stipulation had been filed before he made the above statement. Counsel for plaintiff stated on the trial that they knew of nothing which required them to stipulate, and we find no acceptance of the stipulation in the record. Counsel for defendants requested the court "to limit the issues in accordance with my offer to stipulate". After some discussion, in which the situation was not clarified and in which counsel for defendants said, "It is an offer, it is not in evidence, it is simply filed," the trial court denied defendants' request to limit the issues. Counsel for defendants then introduced in evidence the document theretofore filed entitled "Stipulation as to Defendants' Liability". Thereafter counsel for defendants objected to the portions of the opening statement relating to the circumstances surrounding the happening of the accident and also to the portions of the testimony relating to such circumstances. Said objections were overruled and counsel for plaintiff proceeded to present the plaintiff's case.

Some further confusion crept into the record concerning the nature and extent of the alleged admissions of the defendants. In their brief defendants state that "before any evidence was introduced, defendants admitted negligence and liability". The confusion arises at least with respect to the attitude of defendants on the issue of agency. At one point in the record, counsel for plaintiff asked, "Are you now without qualification admitting the liability of your client?" Counsel for defendants replied, "I am admitting negligence on behalf of both clients. I think there is no question as to agency involved, Mr. Rosson * * * I have admitted negligence and I have admitted all that the law will permit you to prove, but you don't choose to accept my stipulation * * * but if you want to go ahead, why, go ahead, but I still think it is irrelevant, incompetent and immaterial and you are wasting time." Shortly thereafter counsel for defendants stated, "I have not waived the issue of agency. I deny that any agency relationship existed at that time between Mr. Miqueu and the Atlas Heating and Ventilating Company."

[1, 2] We have set forth these statements in some detail as the main contention of defendants on this appeal is that "The judgment should be reversed because defendants were denied a fair trial by the erroneous refusal of the trial court to limit the issue to damages." This contention is stressed by defendants as plaintiff introduced evidence showing the manner of the happening of the accident including evidence showing that defendant Miqueu was intoxicated at the time. Defendants contend that the trial court erred in refusing to limit the issues and in admitting this evidence, but in our opinion this contention cannot be sustained. In reaching our conclusion on this point we need not determine whether it may ever be error to permit a party to prove facts admitted by the pleadings or by judicial admissions. See, discussion in Martin v. Pacific G. & E. Co., 203 Cal. 291, 264 P. 246. It is only necessary to point out that the record here is in such a state of confusion as to the nature and extent of defendants' admissions, if any, that there could be no error in denying defendants' request to limit the issues to that of damages alone. But furthermore, even if there was error in the refusal of the trial court to order some limitation of the issues, such error could not have been prejudicial. It appears to us from a reading of the record as well as from defendants' claims on this appeal, that they never intended to make any unqualified admission on the issue of agency or on the issue of the extent of plaintiff's injuries. If the testimony which defendants sought to exclude was properly admitted on these last

mentioned issues, there could be no prejudicial error in the trial court's order refusing to limit the issues. We may therefore briefly discuss these issues and the relevancy of said testimony to said issues.

On the issue of the extent of the injuries, plaintiff claimed a severe back injury and introduced evidence for this purpose. Defendants' theory was that such back injury was slight. It was therefore proper for plaintiff to introduce and she did introduce evidence concerning the manner of the happening of the accident in order to show the force with which defendant Miqueu struck the automobile of plaintiff.

On the issue of agency, plaintiff introduced evidence to show that the automobile belonged to the defendant company; that the name of the defendant company was painted on both doors thereof; that defendant Miqueu was employed as the local manager of the defendant company and had the general use of the company's automobile; that it was his practice to drive said automobile home at night and to start out and make calls for the company before going to the company's plant in the morning; that on the night of the accident said defendant left the plant of the defendant company in said automobile at about 10 p. m. and was on his way home and within four blocks thereof at the time the accident occurred. On this issue it was defendants' theory that at the time of the accident defendant Miqueu had embarked, or was about to embark, on a personal mission unrelated to his employment. Defendant Miqueu testified to the effect that he was over on the left side of the street and to the left of the white line thereon for the reason that he had decided to go back to the company's plant to get two or three personal bills which had been sent to him there; that he "was edging over for Barbara Road" with the intention of turning on Barbara road and returning to get said bills. It was therefore proper for plaintiff to introduce, and she did introduce testimony to show that said defendant was intoxicated and had weaved back and forth from one side of the street to the other for some distance as he pursued his course up Excelsior avenue. This testimony tended to show that said defendant's driving on the wrong side of the street was due solely to intoxication and not to any intention on his part to embark on a personal mission. It therefore appears that the testimony concerning the manner of the happening of the accident, all of which testimony defendants sought to exclude, was properly admitted upon one or the other of the issues as to which defendants had made no admissions.

[3, 4] Defendants further contend that "the judgment should be reversed because the jury was misdirected to the prejudice of defendants". It is apparently conceded that the instructions given by the trial court correctly stated the law. It is contended however that the court erred in refusing to instruct the jury "that defendants had admitted liability" and in "submitting the issue as an open one". It is further contended that the giving of the instructions on agency was error "because there was no evidence to justify submission of the question of agency to the jury". We do not believe that these contentions require discussion in the light of what has already been said. We conclude that the giving and refusing of said instructions relating to negligence was not error, and in any event was not prejudicial to defendants under the circumstances. We further conclude that it was not error to instruct the jury on the issue of agency as the above-mentioned evidence was ample to justify the submission of that issue to the jury.

[5] The final contention of defendants is that "The damage award of $5,000 is excessive as a matter of law." The special damages amounted to $1,789.53, leaving an award of approximately $3,200 for general damages. It would serve no useful purpose to set forth in detail the testimony as to the nature of the treatment given to plaintiff for her injuries or the testimony as to the amount and intensity of pain suffered by plaintiff. Suffice it to state that while plaintiff suffered no broken bones, the testimony showed that the injuries to her knee and to her back, and particularly the latter, required hospitalization and treatment over a long period of time and caused extreme and almost continuous pain. The accident occurred on December 1, 1938. She was ordered to the hospital on the following day and remained there until December 5. She was then suffering pain but she attempted to return to her work as a music teacher in the public schools. She did return to work on a restricted basis for four days but then returned to the hospital and was confined there until January 31, 1939. At that time her physician sent her to St. Helena

Sanitarium. She remained there under treatment until April 5, 1939, when she returned to Oakland. The cause was tried in May, 1939, and at that time she was still required to have heavy boards under the mattress of her bed, and she had great difficulty in sleeping. She was still wearing a steel corset. She had difficulty in sitting and in walking. She testified that she had not had a single day free from pain since receiving her injuries. She was a woman of the nervous type, was 42 years of age, and she had suffered nervous collapses from the pain which she suffered. She returned to her work on April 24, 1939, but was only able to work about half time.

Three doctors who had treated plaintiff for her injuries testified with respect to her condition. The injury to her back was stated to be "low back sprain with concussion of the spine", and the doctor felt that "she had injured some of the ligaments deep in about the lumbosacral and sacroiliac joints". This resulted in a very definite muscle spasm of the back. This muscle spasm increased for a time, and her back tightened up so much that it would not bend at all. The doctors testified that she had not recovered at the time of the trial; that she was then required to continue to wear a steel corset and to sleep on boards; and that the injury was of the type which was apt to return in the future if she did any heavy lifting or slept in a sagging bed.

The record before us does not present a case involving a simple injury followed by a complete recovery within a short period of time. The back injury was a very painful one causing disability over many months, and the time when a complete recovery might be anticipated was a matter of conjecture. At the time of trial the doctor called by defendants would not attempt to put a limit on the length of time that plaintiff's nervous system would be affected as a result of the injury. He testified that plaintiff "seemed to me to be exaggerating", but even assuming some exaggeration, we cannot declare as a matter of law that the award was excessive under the settled rules which govern the action of appellate courts on such questions. Ware v. McPherson, 213 Cal. 120, 1 P.2d 433; Bisinger v. Sacramento Lodge, 187 Cal. 578, 203 P. 768; Hale v. San Bernardino Co., 156 Cal. 713, 106 P. 83; Eldridge v. Clark & Henery Const. Co., 75 Cal.App. 516, 243 P. 43.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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37 Cal.App.2d 91

PACIFIC GAS & ELECTRIC CO. v. MOORE et al.

Civ. 6218.

District Court of Appeal, Third District, California.

Jan. 31, 1940.

As Modified on Denial of Rehearing Feb. 29, 1940.

Hearing Denied March 30, 1940.

1. Constitutional law 🔑48

Where validity of a statute is assailed and there are two possible interpretations, by one of which the statute would be unconstitutional and by the other valid, court should adopt construction which will uphold statute.

2. Constitutional law 🔑48

Courts are bound to adopt a construction of a statute that will bring it into harmony with Constitution if its language will permit, and duty of courts to construe a statute as to save its constitutionality when it is reasonably susceptible of two constructions includes duty of adopting a construction that will not subject statute to a succession of doubts as to its constitutionality.

3. Constitutional law 🔑48

A statute must be construed, if possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubt upon that score, and, if proper construction of a statute is doubtful, doubts must be resolved in favor of statute.

4. Constitutional law 🔑208(1)

A law is not "special legislation" merely because it does not apply to all persons.

[Ed. Note.—For other definitions of "Local Law" and "Special Law," see Words & Phrases.]

5. Constitutional law 🔑208(1)

The Legislature may classify for purpose of meeting different conditions, naturally requiring different legislation, in order that legislation may be adapted to needs of people, and, if a law is to bear equally upon all persons, Legislature must classify whenever there exists a reason which may rationally be held to justify a diversity of legislation.

6. Constitutional law 🔑208(1)

A legislative classification for purpose of meeting different conditions must not be arbitrarily made for mere purpose of classification but must be based upon some distinction, natural, intrinsic, or constitutional which suggests a reason for and justifies the particular legislation, and not only must the class itself be germane to purpose of law, but individual components of class must be characterized by some substantial qualities or attributes which suggest the need for and propriety of legislation.

7. Statutes 🔑71

Subject to certain limitations, a statute is a "general statute" despite fact that it operates only upon a class of individuals or things, if it applies equally to all persons or things within class to which it is addressed.

[Ed. Note.—For other definitions of "General Law," see Words & Phrases.]

8. Constitutional law 🔑208(1)

Legislative power to classify carries with it a wide discretion in exercise thereof.

9. Constitutional law 🔑70(1)

The authority and duty to ascertain facts which will justify classified legislation rests with Legislature, in first instance, and decision of Legislature is ordinarily conclusive upon courts.

10. Constitutional law 🔑48, 208(1)

Every presumption is in favor of validity of a legislative act, and legislative classification will not be disturbed unless it is palpably arbitrary in its nature and neither founded upon nor supported by reason.

11. Constitutional law 🔑208(3)
Fish 🔑9

The statute placing persons, firms, or private corporations engaged in producing, generating, transporting, delivering, or furnishing electricity for lights, heat, or power in a class where they must bear entire cost of installing fish screens, while others are placed in a class where they must pay only one-half of such cost, is not unconstitutional as containing arbitrary classification, and statute is a proper exercise of police power directed toward preservation of fish. St. 1933, pp. 444, 445, §§ 535–536.6, 536.9; Const. art. 1, §§ 11, 21.

12. Evidence 🔑20(1)

It is common knowledge that, when fish once enter the penstock to a power house, it is absolutely impossible for such fish to ever thereafter return to water from which they were originally diverted.

13. Evidence 🔑23(1)

The District Court of Appeal could take judicial knowledge of fact that sole source of funds expended by the Fish and Game Commission is money received from sale of licenses to take fish and game.

14. Constitutional law 🔑208(1)

The question as to whether classification of character contained in statute respecting payment of costs for installing fish screens was arbitrary, or reasonably related to inherent purpose of statute, was to be determined from circumstances surrounding the enactment and its subject matter, bearing in mind that constitutionality of an enactment will be presumed and any doubt respecting its constitutionality resolved in its favor. St.1933, pp. 444, 445, §§ 535–536.6, 536.9.

◆

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Suit by the Pacific Gas & Electric Company against E. C. Moore and others, as the Fish and Game Commission of the Division of Fish and Game, Department of Natural Resources of the State of California, and another, to enjoin defendants from enforcing the installation of a fish screen without first paying plaintiff one-half of the estimated cost thereof. From a decree granting an injunction, defendants appeal.

Reversed with directions.

Earl Warren, Atty. Gen., and J. Walter French, Deputy Atty. Gen., for appellants.

Thomas J. Straub and John C. Wood, both of San Francisco, for respondent.

PER CURIAM.

This action was brought by respondent to enjoin appellants from proceeding in any manner to enforce the installation of a fish screen without first paying respondent one-half of the estimated cost thereof. A decree was entered granting the injunction, and defendants have appealed.

The respondent is a private domestic corporation engaged in producing, generating, transmitting, delivering, or furnishing electricity for light, heat or power. For this purpose it owns a reservoir known as Fuller lake used for the temporary storage of waters which are thereafter released into a canal or conduit extending from Fuller lake to the forebay and penstock of respondent's Spaulding No. 3 Power House. These waters are then used in this and other power houses for the generation of electricity for light, heat or power purposes.

On or about October 22, 1936, the appellants ordered the respondent to construct and install a fish screen in Fuller lake in front of the outlet or gate through which the water flows from Fuller lake to the forebay and penstock of Spaulding No. 3 Power House.

The appellants furnished the respondent with drawings and specifications showing the kind and nature of the fish screen ordered to be installed, and the estimated cost of constructing the same. The respondent was ordered to construct and install this fish screen completely at its own expense and the appellants did not tender nor pay to the respondent one-half of the estimated cost thereof.

The action and conduct of the appellants as aforesaid was governed by, pursuant to, and in compliance with the statutory provisions of this State as set forth in the following sections of the Fish and Game Code of the State of California, St.1933, pp. 444, 445, to-wit:

"535. The commission shall examine all conduits and order the owners to install, * * * and it is the duty of the owners of a conduit to install * * * a screen on any conduit when, in the opinion of the commission, such a screen is necessary to prevent fish from passing into the conduit. Except as provided in sections 536.9, 537 and 538, one-half of the expense of constructing or installing a screen shall be paid by the owner of a conduit, and one-half by the commission."

"536. The order to install a screen must be in writing, and specify the type, size, mesh, material and location of the screen, the time within which the screen must be installed, and must include an estimate of the expense of installing the screen."

"536.5. When an order is made to install a screen the commission must pay the owner upon whom the order is served one-half of the estimated expense of the construction or installation of the screen."

"536.6. If the expense of constructing or installing a screen exceeds the estimated expense the commission must, upon written notification by the owner of the conduit, inspect the screen, and pay to the owner one-half of the amount estimated to be necessary to complete the construction or installation of the screen."

"536.9. The commission shall not pay one-half of the expense of the construction and installation of the screen as provided in sections 535, 536.5, and 536.6 to any person, firm or private corporation engaged in producing, generating, transmitting, delivering, or furnishing electricity for light, heat or power. If this section is for any reason held to be unconstitutional such decision shall not affect the validity of sections 535, 536.5 or 536.6, and the Legislature hereby declares that the persons, firms or private corporations mentioned in this section shall be subject to the provisions of sections 535, 536.5 and 536.6."

The trial court held that the foregoing section (536.9) of the Fish and Game Code was unconstitutional. Appellants seek to uphold the foregoing enactment upon the following grounds: (1) It operates uniformly upon all persons, firms and corporations engaged in the business of generating, transmitting and delivering electricity for light, heat and power; and (2) That the legislature has the right to make classifications and apply different rules to different classifications. The constitutional provisions alleged to have been violated by such enactment are as follows:

"All laws of a general nature shall have a uniform operation." Constitution of California, art. I, sec. 11.

"Nor shall any citizen, or class of citizens be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." Constitution of California, art. I, sec. 21.

The whole matter revolves around the right of the legislature to place "any person, firm or private corporation engaged in producing, generating, transmitting, delivering or furnishing electricity for light, heat or power" in a class where they must bear the entire cost of installing fish screens, while all others are placed in a class where they must pay only one-half of such cost.

[1-3] The general rule governing the interpretation of statutes is thus expressed in 11 American Jurisprudence, page 725, section 97: "It is an elementary principle that where the validity of a statute is assailed and there are two possible interpretations, by one of which the statute would be unconstitutional and by the other it would be valid, the court should adopt the construction which would uphold it. It is the duty of courts to adopt a construction of a statute that will bring it into harmony with the Constitution, if its language will permit. The duty of the courts so to construe a statute as to save its constitutionality when it is reasonably susceptible of two constructions includes the duty of adopting a construction that will not subject it to a succession of doubts as to its constitutionality, for it is well settled that a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubt upon that score. Thus, if the proper construction of a statute is doubtful, the doubt must be resolved in favor of the law."

[4-10] The right of the legislature to classify and the approach which the courts should take in considering an attack upon the constitutionality of a statute, is well stated in the case of Martin v. Superior Court, 194 Cal. 93-100, 101, 227 P. 762, 765:

"A law is not special legislation merely because it does not apply to all persons. It is a settled principle of constitutional law that the Legislature may classify for the purpose of meeting different conditions, naturally requiring different legislation, in order that legislation may be adapted to the needs of the people. If the law is to bear equally upon all persons, the Legislature must classify whenever there exists a reason which may rationally be held to justify a diversity of legislation. In other words, different persons, different localities, and different governmental organizations and agencies may justly be found by the Legislature to stand in different relations to the law, and if the same law were, in such a situation, to be applied to all alike, it would not bear equally upon each of them. Darcy v. Mayor, etc., of the City of San Jose, 104 Cal. 642, 38 P. 500; In re Sumida, 177 Cal. 388, 170 P. 823.

"The classification, however, must not be arbitrarily made for the mere purpose of classification, but must be based upon some distinction, natural, intrinsic, or constitutional, which suggests a reason for and justifies the particular legislation. That is to say, not only must the class itself be germane to the purpose of the law, but the individual components of the class must be characterized by some substantial qualities or attributes which suggest the need for and the propriety of the legislation. Subject to these limitations a law is general despite the fact that it operates only upon a class of individuals or things, if it applies equally to all persons or things within the class to which it is addressed. * * *

"The power to thus classify necessarily carries with it a wide discretion in the exercise thereof. The authority and the duty to ascertain the facts which will justify classified legislation must of necessity rest with the Legislature, in the first instance, to whom has been given the power to legislate, and not to the courts, and the decision of the Legislature in that behalf is ordinarily conclusive upon the courts. Every presumption is in favor of the validity of the legislative act, and the legislative classification will not therefore be disturbed unless it is palpably arbitrary in its nature and neither founded upon nor supported by reason."

The power of the state to generally enact such legislation is set forth in 11 Ruling Case Law, page 1041, section 28: "The State has the power to regulate fisheries in public and private streams, and to adopt appropriate means for the preservation of edible fish for the benefit of the people; and it is not only the right of the State, but it is also its duty, to preserve for the benefit of the general public the fish in its waters, in their migrations and in their breeding places, from destruction or undue reduction in numbers through the caprice, improvidence or greed of the riparian proprietors as well as of trespassers. The State may permit or prohibit the catching of fish within its waters; and if it allows the catching it may regulate this by the imposition of such conditions, restriction and limitations as it deems needful or proper. The power of the State is based upon the circumstance that the fish in the waters of the State as well as the game in its forests belong to the people in their sovereign capacity, and are not the subject of private ownership except in so far as the people may elect that they shall be."

[11, 12] Is the classification thus made "based upon some distinction, natural or intrinsic, or constitutional, which suggests a reason for, and justifies this legislation", bearing in mind that "unless such classification is palpably arbitrary in its nature, and neither founded upon or supported by reason" it must be upheld? We believe that the enactment is not vulnerable to the attack made. The legislature was justified in placing a greater burden upon respondent than upon other water-diverters. It is a matter of common knowledge that when fish once enter the penstock to a powerhouse it is absolutely impossible for such fish to ever thereafter return to the water from which they were originally diverted. Furthermore, after entering the penstock the fish are either immediately killed by the pressure or they are killed by the machinery through which the water flows in the power-plant itself; whereas, on the other hand, when fish once enter the conduit diverting water for natural uses it is possible for such fish to thereafter return to the water from which they were originally diverted. Furthermore, after entering such a conduit the fish are neither killed by any pressure nor are they affected in any way by the natural purposes for which the water is thereafter used.

[13] It appears from the reports of the State Fish and Game Commission that this state annually expends many thousands of dollars in the propagation of fish and the planting of such fish in its waters. We can take judicial knowledge of the fact that the sole source of funds expended by the commission is money received from the sale of licenses to take fish and game. The funds, if the commission were required to meet one-half of the costs of the proposed screen, would not be paid out of the general fund of the state, but would be paid from the funds of the commission. A screen of this character would prevent fish, which were planted by the state, from being destroyed.

It is not unreasonable to require those diverters who destroy the greater amount of fish (including many planted by the state), to contribute more than others to the installation of a device which will eliminate such destruction. Neither is it unreasonable to assume that the legislature was motivated by such considerations when it passed this statute. Recognizing the wide discretion entrusted to the legislature in such matters, we cannot say that the classification made bears no relation to the inherent purpose of the law—to conserve and protect the fish life of this state for the common good of its citizens. It was a proper exercise of police power, directed toward the preservation not only of fish naturally in the streams and lakes, but also of fish propagated and planted by the state.

[14] We have examined the authorities cited by both parties, but do not deem it necessary to discuss them in detail. The legal principles involved are not in dispute. They are fairly stated in the Martin case, supra. Other decisions mentioned in the briefs present various classifications made by the legislature of this and other states, and of the Congress of the United States. None of them deals with the particular classification here made. The question as to whether a classification of this character is arbitrary, or whether it is reasonably related to the inherent purpose of the law, must be determined from the facts and circumstances surrounding the enactment and its subject matter, always bearing in mind "that the constitutionality of a legislative enactment will be presumed and any doubt respecting its constitutionality will be resolved in its favor." Rainey v. Michel, 6 Cal.2d 259-272, 57 P.2d 932, 938, 105 A.L.R. 148.

The decree is reversed, and the trial court directed to enter findings and judgment in accordance with this opinion.

37 Cal.App.2d 74

FIRST BOND & MORTGAGE CO. OF GLENDALE v. MALOUF.

Civ. 12410.

District Court of Appeal, Second District, Division 2, California.

Jan. 31, 1940.

Hearing Denied March 30, 1940.

1. Evidence ⚷397(1), 429, 433(6), 448

Where terms of agreement have been reduced to writing by the parties, writing is considered as containing all terms of agreement, and there can be, between the parties and their representatives or successors in interest, no other evidence of the terms of the agreement than the contents of the writing, except if a mistake or imperfection in the writing is put in issue by the pleadings, or if the validity of the agreement is the fact in dispute, or if an ambiguity in the agreement is to be explained. Code Civ.Proc. § 1856; Civ.Code, § 1625.

2. Evidence ⚷458

A contract may be explained by reference to circumstances under which it was made and matter to which it relates, where language used is ambiguous, but only if doubt appears on contract's face. Code Civ. Proc. § 1856; Civ.Code, § 1625.

3. Evidence ⚷448

Where language of contract is clear and explicit, intention of the parties is to be ascertained from the writing alone. Code Civ. Proc. § 1856; Civ.Code, § 1625.

4. Evidence ⚷448

Where contract provided that defendant was to pay plaintiff $34,500, which was to be credited on plaintiff's books as the return of a like sum which was withdrawn from plaintiff's possession and paid to the defendant, extraneous evidence that defendant paid the $34,500 to plaintiff for 345 shares of its capital stock was inadmissible, where contract contained no ambiguity with reference to payment of the $34,500. Code Civ.Proc. § 1856; Civ.Code, § 1625.

◆

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action by the First Bond & Mortgage Company of Glendale, California, against B. I. Malouf to recover damages for breach of a written contract. From a judgment in favor of the defendant, the plaintiff appeals.

Judgment reversed.

Arthur L. Syvertson and Lyle C. Newcomer Jr., both of Los Angeles, for appellant.

Nichols & Mattoon, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant after trial before the court without a jury in an action to recover damages for breach of a written contract plaintiff appeals.

These are the essential facts:

Plaintiff was a mortgage and discount company. Defendant owned and controlled the Standard Discount Corporation, a corporation engaged in a business similar to that of plaintiff. In September, 1933, defendant purchased a controlling interest in plaintiff corporation and elected himself and two employees of the Standard Discount Corporation as the board of directors of plaintiff. At the time defendant purchased a controlling interest in plaintiff, plaintiff had an agreement with W. H. Andrews to sell him 500 shares of its stock for $50,000. Mr. Andrews had paid $38,000 on the purchase price, leaving a balance of $12,000. When defendant became interested in plaintiff corporation, Mr. Andrews threatened to rescind his agreement and negotiations commenced between the defendant and Mr. Andrews, resulting in a settlement by the terms of which Mr. Andrews agreed to accept 345 shares of plaintiff's stock and plaintiff agreed to cancel its contract with him under which he owed plaintiff $12,000. This settlement was consummated by defendant's depositing his certificate No. 517 for 587 shares of stock with plaintiff and receiving back certificate No. 526 for 242 shares of plaintiff's stock. Certificates 522 to 525 for the total number of 345 shares of plaintiff's stock were issued to Mr. Andrews. Shortly thereafter defendant caused to be issued to the Standard Discount Corporation two checks in the total sum of $34,500.

Subsequently other stockholders of plaintiff organized a committee of preferred shareholders who had an audit made of plaintiff's books and threatened to commence suit against defendant. This controversy was settled by an agreement dated January 23, 1934, between defendant as first party, the shareholders committee as second parties, and plaintiff as third party. The agreement, after reciting in a preamble the dispute between the parties, contained among others the following provisions:

"First: First party [Malouf] will forthwith return to the account and possession of third party [the corporation] 104 shares of the preferred stock and 47½ shares of the common stock of third party, and third party agrees, upon receipt of said stock, to deliver to first party its certified check in the sum of $520.00 in payment and satisfaction of any lien which first party may claim thereon."

"Second: First party [Malouf] contemporaneously with the execution of this agreement, shall forthwith deliver to third party [the corporation] his certified check payable to the order of third party in the sum of $34,500.00, which said sum shall be credited on the books of third party as the return of a like sum which was withdrawn from the possession of third party and paid to first party through the Standard Discount Corporation, a corporation operating within the State of California."

"Third: First party [Malouf] will forthwith deliver to third party a certified check payable to the order of third party in the sum of $15,642.43, plus interest at the rate of eight per cent (8%) per annum, from January 1, 1934, to the date of delivery, which said payment shall be in full satisfaction of a loan in that amount heretofore made by said third party to the Standard Discount Corporation."

"Fifth: First party [Malouf] will forthwith deposit in escrow with L. J. Styskal, Esq., attorney at law, Los Angeles, California, 587 shares of Preferred stock and 2253 shares of Common stock of First Bond & Mortgage Company of Glendale, the third party herein, endorsed in blank, said L. J. Styskal to act as, and he is herein and hereby named as escrow holder for all of the parties hereto in connection with said stock and other properties and transactions hereinafter enumerated."

"Eleventh: First party [Malouf] represents to second parties that the current financial condition of third party is as set forth in the financial statement of third party for December 31, 1933, which is attached hereto and marked Exhibit 'B', save and except wherein properties have been exchanged or converted into cash in accordance with the usual and ordinary business transactions of third party had since that date, and excepting such expenditures made in the regular routine of business of third party, including maintenance, repair and upkeep of real and personal property, and all of the parties hereto understand that this agreement is being entered into on that basis."

Exhibit "B" referred to in the foregoing paragraph read as follows:

"'Exhibit B'

First Bond and Mortgage
Company of Glendale
California

Financial Statement
December 31, 1933

Assets		
Cash on Hand and in Bank...		$ 10,935.36
Cash in Bank First National of Glendale (Impounded)..		8,004.76
Accounts Receivable		6,874.63
Contracts Receivable		130,859.75
Notes Receivable		41,663.28
Commercial Paper		1,738.82
Furniture & Fixtures—Less Depreciation		593.51
Trust Deeds		33,607.85
Real Estate Owned (Improved-Unimproved)		112,247.67
Stocks and Bonds...........		21.71
Total Assets		$346,547.34
Liabilities		
Accounts Payable		$ 641.36
Trust Deeds & Mortgages Payable		2,450.00
Deferred Discount—Automobile		13,303.97
Unearned Discount—Trust Deeds		13,108.94
Customers' Contingent Reserve		1,492.46
Reserve for Losses		57,000.00
		$87,996.73
Capital & Surplus		
Outstanding	$363,400.00	
Surplus—Deficit..	104,849.39	258,550.61
Total Liabilities, Capital & Surplus		$346,547.34"

Shortly before defendant executed the agreement of January 23, 1934, above mentioned, he caused his secretary to take from the stock certificate book of plaintiff corporation certificate No. 517 for 587 shares of the preferred stock of plaintiff which he had theretofore surrendered and which had been marked cancelled and to remove with ink eradicator the cancellation marks on the stub of the stock certificate book opposite certificate No. 517.

He surrendered certificate No. 526 for 242 shares and a notation was made indicating that said last mentioned stock certificate had been cancelled on November 23, 1933, the date it was issued.

The result of this was to increase the amount of plaintiff's preferred shares outstanding by 345 shares (a par value of $34,500) with the result that the capital stock liability was raised from $363,400 (the amount shown on "Exhibit B") to $397,900 and the deficit of the corporation was increased from $104,849.39 to $139,349.39. At the time of executing the agreement above mentioned defendant delivered certificate No. 517 for 587 shares of the preferred stock of plaintiff to L. J. Styskal as performance of defendant's obligation under paragraph five of the above agreement.

The trial court permitted defendant to introduce extraneous evidence to support his claim that the $34,500 which defendant paid to plaintiff under paragraph two of the above agreement was so paid in accordance with an agreement between the parties that defendant should be entitled to receive from plaintiff 345 shares of preferred stock which he had surrendered when the settlement was effected with Mr. Andrews in November of 1933. Upon this evidence the trial court predicated among others a finding reading thus: "* * * it was agreed by and between the plaintiff and the defendant that on repayment by defendant to the plaintiff of said sum of $34,500 the plaintiff would reissue to defendant the same number of shares as it had issued to said Andrews out of the certificate delivered by defendant to the plaintiff, namely 345 shares of its preferred capital stock; * * *"

This is the sole question necessary for us to determine:

Did the trial court commit prejudicial error in receiving extraneous evidence to show the reason defendant paid plaintiff $34,500 under the second paragraph of the above mentioned agreement?

[1] This question must be answered in the affirmative. The law is established that when the terms of an agreement have been reduced to writing by the parties it is to be considered as containing all the terms of the agreement and there can be, between the parties and their representatives or successors in interest, no other evidence of the terms of the agreement than the contents of the writing except (1) where a mistake or imperfection in the writing is put in issue by the pleadings, (2) where the validity of the agreement is the fact in dispute, or (3) to explain an ambiguity in the agreement. (Sec. 1856, Code Civ. Proc.; sec. 1625, Civ.Code; United Iron Works v. Outer Harbor, etc., Co., 168 Cal. 81, 84, 141 P. 917; Barnhart Aircraft, Inc., v. Preston, 212 Cal. 19, 22, 297 P. 20.)

[2, 3] It is likewise settled that a contract may be explained by reference to circumstances under which it was made and the matter to which it relates, where the language used is doubtful, uncertain, or ambiguous, but that this exception to the general rule is applicable only where the doubt appears on the face of the contract. Where the language is clear and explicit in the written agreement the intention of the parties is to be ascertained from the writing alone. Courtright v. Dimmick, 22 Cal.App.2d 68, 70, 70 P.2d 269.

[4] The present case, it is conceded, does not fall under either the first or second exceptions to the general rule noted above. From an examination of the second paragraph of the agreement it is clear that said paragraph was free from ambiguity, the parties having stated in the simplest language that defendant agreed to pay to plaintiff $34,500 on account of a like sum that defendant had withdrawn from plaintiff through the Standard Discount Corporation, a corporation owned and controlled by defendant. Therefore, since there was no ambiguity in this clause of the agreement, the trial court committed prejudicial error in permitting extraneous evidence to be introduced for the purpose of explaining its meaning and in basing a finding of fact as set forth supra upon such extraneous evidence.

For the foregoing reasons the judgment is reversed.

We concur: MOORE, P. J.; WOOD, J.

37 Cal.App.2d 50

LIMITED MUT. COMPENSATION INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 11180.

District Court of Appeal, First District, Division 1, California.

Jan. 31, 1940.

Hearing Denied March 30, 1940.

1. Workmen's compensation ⚷1074

If disability results from occupational injury or disease extending over a number of years, liability is apportioned among the insurance carriers.

2. Workmen's compensation ⚷1939

If there is any evidence to sustain finding of Industrial Accident Commission that injury occurred on specific date, appellate courts cannot disturb the award, since it is function of the commission as trier of facts to determine the proximate cause of injury.

3. Workmen's compensation ⚷554

The mere existence of pre-existing nondisabling condition does not necessarily preclude Industrial Accident Commission from finding that disabling injury occurred on a specific date and awarding compensation based on that injury, since industry takes employee as he is at time of employment, and for subsequent injuries lighting up or aggravating that condition, rendering it disabling, employee is entitled to compensation.

4. Workmen's compensation ⚷1542

Evidence sustained Industrial Accident Commission's finding that knee injury sustained by carpet and linoleum mechanic on certain date was proximate cause of disability as against contention that there should have been apportionment between several carriers on ground that disability resulted from chronic diseased condition extending over a long period of time.

5. Workmen's compensation ⚷1939

The appellate court cannot review, compare and weigh medical testimony in workmen's compensation proceeding.

6. Workmen's compensation ⚷1939

An employee's failure to specify a certain date as date of injury in application for workmen's compensation was a matter of argument to be addressed to Industrial Accident Commission as trier of facts.

7. Workmen's compensation ⚷1762

The affirmative findings of Industrial Accident Commission imply negative findings on all other issues.

◆

Petition by the Limited Mutual Compensation Insurance Company to review an order of the Industrial Accident Commission of the State of California which made an award in favor of Melvin T. Vold, an employee.

Award affirmed.

Keith & Creede, of San Francisco, for petitioner.

Everett A. Corten and Eldon B. Spofford, both of San Francisco, for respondents.

Burbank & Laumeister, of San Francisco, amici curiae for California Casualty Indemnity Exchange.

GOODELL, Justice pro tem.

There were two hearings before the respondent commission in this matter. The first resulted in findings and an award, dated June 21, 1938, in favor of the employee, but apportioning liability between petitioner and the California Casualty Indemnity Exchange, a prior carrier of the employer. Thereafter, both carriers petitioned for a rehearing, which petitions were granted. The second hearing resulted in the findings and award now under review. On the latter hearing it was found that the respondent Melvin T. Vold was, on September 3, 1937, employed by the firm of Malott & Petersen as a carpet and linoleum mechanic, in San Francisco, and on that day, while so employed, he "sustained injury occurring in the course of and arising out of his employment consisting of a blow to the left knee." The petitioner, it is found, was the employer's insurance carrier on that date. Temporary total disability continuing indefinitely from September 28, 1937, was found entitling Vold to $25 a week. It was found that Vold required further medical, hospital and nursing treatment, which was to be furnished by the insurance carrier. An award was made in accordance with these findings. After denial of its petition for rehearing, petitioner instituted this proceeding to review the award.

It is the contention of petitioner "that there is no evidence whatever in the record that the disability which was the subject of the proceedings here and which caused the man's operation was attributable to an incident on September 3, 1937".

From 1922 to 1937, Vold was employed almost continuously as a linoleum layer, and most of that time he worked for Malott & Petersen. In 1925 he fell and injured his left knee so seriously that an operation was necessary, and thenceforth, from time to time, he had trouble with it. On September 3, 1937, he and a fellow employee were moving furniture and he bumped his left knee against a table. There were several holidays ensuing, and he gave himself home treatment and rest during these holidays, and in about a week returned to work without having received medical treatment. On September 20, 1937, he knelt upon the handle of a knife, and had to immediately quit work. He consulted a doctor that day or the next, and an operation was performed on the knee on September 24th, followed by two other operations shortly thereafter. A tumor was removed, and considerable pus was drained from the knee.

No question is raised herein as to Vold's right to compensation, as to the amount of his disability payments, or as to the duration of his disability. The question that is presented is whether there should not have been an apportionment between several carriers, the contention being that the injury sustained on September 3, 1937, was not the proximate cause of the disability, but that the condition which the operations were designed to relieve had been a chronic diseased condition extending over a long period of time. During part of the time Vold worked for Malott & Petersen, the California Casualty Indemnity Exchange had been the employer's carrier, and the first award apportioned the liability 50 per cent to the exchange and 50 per cent to the petitioner, Limited Mutual Compensation Insurance Company. As has been said, both carriers were dissatisfied with this award and applied for a rehearing. That rehearing resulted in the petitioner being held for the entire liability.

[1, 2] The type of injury presented in the present case presents troublesome problems. The disability involved could have been held by the commission to have been an occupational injury or disease received over a number of years, in which event liability would have been apportioned. Blanchard v. Industrial Acc. Comm., 68 Cal. App. 65, 228 P. 359; Associated Indem. Corp. v. Industrial Acc. Comm., 124 Cal. App. 378, 12 P.2d 1075. On the other hand, if there is any evidence to sustain the finding that the injury occurred on a specific date, the appellate courts have no power to disturb the award. It is the function of the commission, as the trier of the facts, to determine, as a fact, the proximate cause of the injury. Its finding in this regard, if supported by any evidence, cannot be disturbed by this court. Massachusetts Bonding & Ins. Co. v. Industrial Acc. Comm., Cal.App., 96 P.2d 1009; Head Drilling Co. v. Industrial Acc. Comm., 177 Cal. 194, 170 P. 157; United States F. & G. Co. v. Industrial Acc. Comm., 95 Cal.App. 186, 272 P. 589.

Applying this test to the record before us, it is clear the award must be affirmed. There was a large volume of medical evidence submitted in the form of reports of five doctors and the testimony, as well, of one of them. Counsel for petitioner have devoted a good deal of space in their briefs to an analysis of this medical evidence with a view to showing that the acute condition of September, 1937, on which Vold's disability ensued, was not the result of the injury received on September 3, 1937, but was merely the culmination of a long-standing growth on the knee. There is no doubt an abundance of medical evidence to support such a conclusion. But the commission—the trier of the facts—did not reach such conclusion. It found, on the other hand, that the proximate cause of Vold's disability was the injury which he sustained on September 3, 1937, and there is evidence in the record to support such finding. The employee testified that he received the injury from which he was suffering on September 3d, and his fellow employee who was with him at the time corroborated him. The only oral testimony given by a doctor at the hearing was that of Dr. William W. Washburn, who was called by the petitioner. The other medical testimony was in the form of written reports. Dr. Washburn testified in answer to questions by Vold's counsel, that, on the 20th of September, when Vold knelt on the knife handle, he "had a pretty 'hot' knee"; further, "if the doctor got pus out of that knee he had a knee that wasn't fit to kneel on at all that day, the day before"; and, further, "He had pus in that knee and that pus could not possibly have come there as a result of that injury of September 20th, and if there was pus there there certainly was something prior to the 20th, and pus in a knee must come out." When asked whether he thought the contact between the knife handle and the injured portion of the knee was or was not a factor in "hastening the acute situation" the doctor replied: "I feel the acute situation had possibly existed for a few days or weeks and the impact called his attention forcibly to the knee, to a sensitive tender knee."

It is true that Dr. Washburn also gave it as his opinion that the injury was occupational. The commission, however, found that the injury was on the 3d of September, which was seventeen days before the 20th ("a few days or weeks"). Dr. Washburn's testimony clearly was sufficient to rule out the incident of September 20th as the proximate cause of the accident, and to sustain the finding that the injury of September 3d was the proximate cause.

There is other medical testimony in the record from which the commission could find that, although the employee's occupation requiring him to be constantly on his knees was the primary cause of the condition found to exist in September of 1937, the immediate efficient proximate cause was the injury of September 3, 1937. There was ample medical testimony that, had the employee not received the bump on September 3, 1937, he would have been able to continue his work indefinitely.

The employee testified that, from May, 1937, to August, 1937, he was engaged in his own business, but was unsuccessful; that in August, 1937, he returned to work for Malott & Petersen; that, although his knee had been sore in July, 1937, in August of 1937 his knee was in fine condition.

[3, 4] Under this state of the record the commission was justified in finding that the actual disabling injury occurred on September 3d. The mere existence of the pre-existing nondisabling condition, which was admitted, does not necessarily preclude the commission from finding that the disabling injury occurred on a specific date, and awarding compensation based on that injury. Industry takes the employee as he is at the time of his employment. For subsequent injuries lighting up or aggravating that condition, rendering it disabling, he is entitled to compensation. Hendrickson v. Industrial Acc. Comm., 215 Cal. 82, 8 P.2d 833; Thoreau v. Industrial Acc. Comm., 120 Cal.App. 67, 7 P.2d 767.

[5] It is not only unnecessary, but it would be improper for this court to review, compare and weigh all the medical testimony in the record. As already stated, if there is any evidence—any substantial evidence—to support the finding it cannot be disturbed.

[6] The point is made that when Vold filed his first application he did not even mention the injury of September 3d, but only that of September 20th. To an amendment to his application he attached a rider in which, for the first time, the injury of the 3d was mentioned. This failure to specify the 3d in his application, of course, was a matter of argument to be addressed to the trier of the facts. It might have discredited or weakened his case, but it was for the commission to say whether it did or not. Apparently it did not, for the decision opens by granting leave to amend the application to show the correct date as September 3d.

[7] Complaint is made that the commission omitted to find on all the issues. The affirmative findings which were made imply negative findings on all the other issues. Wickstrom v. Industrial Acc. Comm., 3 Cal. App.2d 135, 39 P.2d 887; County of Los Angeles v. Industrial Acc. Comm., 14 Cal. App.2d 134, 57 P.2d 1341.

For the foregoing reasons the award should be, and it is, affirmed.

We concur: PETERS, P. J.; WARD, J.

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37 Cal.App.2d Supp. 766

STATE BONDED AUDIT BUREAU, Inc., v. POMONA MUT. BUILDING & LOAN ASS'N.

Civ. A 4489.

Appellate Department, Superior Court, Los Angeles County, California.

Jan. 30, 1940.

Rehearing Denied Feb. 9, 1940.

1. Building and loan associations 🔑2

The statute reducing interest paid on deposits of building and loan associations from six to four per cent., which declared existence of emergency, recited sufficient facts to constitute emergency, and gave building and loan commissioner power to terminate emergency legally at any time on occurrence of a factual termination was not unreasonable in absence of evidence that commissioner abused his discretion in not terminating the emergency or in further reducing interest rate. Gen.Laws Supp.1933, Act 986, § 8.09; St.1933, pp. 317, 318, §§ 10–12.

2. Appeal and error 🔑909(6)

Under the statute giving building and loan commissioner power to reduce interest rate on building and loan association deposits, temporarily during period of emergency, reviewing court must presume in absence of contrary evidence that facts existed justifying commissioner's order reducing interest rates to two per cent. Gen.Laws Supp.1933, Act 986, § 8.09; St.1933, pp. 317, 318, §§ 10–12.

3. Appeal and error 🔑909(6)

In absence of evidence establishing that the legislative-required reduction in interest rates on deposits of building and loan associations, from six per cent. to four per cent. during emergency period was not reasonable, reviewing court must presume existence of facts warranting that action. Gen. Laws Supp.1933, Act 986, § 8.09; St.1933, pp. 317, 318, §§ 10–12.

4. Building and loan associations 🔑2
Constitutional law 🔑158

If the statute reducing from six per cent. to four per cent. the interest payable on deposits of building and loan associations was based on substantial and extraordinary facts and was, with respect to those facts, reasonably calculated and necessary to protect public welfare, it is not unconstitutional because it alters that which was a definite obligation of contract in absence of such extraordinary facts. Gen.Laws Supp.1933, Act 986, § 8.09; St.1933, pp. 317, 318, §§ 10–12.

5. Constitutional law 🔑113
Contracts 🔑167

Existing laws are read into contracts in order to fix obligations as between parties, and reservation of essential attributes of sovereign power is also read into contracts as a postulate of legal order.

6. Constitutional law 🔑117

The economic interests of the state may justify exercise of its continuing and dominant protective power notwithstanding interference with contracts.

7. Constitutional law 🔑113

In determining whether a statute "impairs obligation of contract," question is not whether legislative action affects contract incidentally, or directly or indirectly, but whether legislation is addressed to a legitimate end and measures taken are reasonable and appropriate to that end.

[Ed. Note.—For other definitions of "Impairing Obligation of Contract," see Words & Phrases.]

8. Building and loan associations 🔑2
Constitutional law 🔑158

Fact that legislation reducing interest rate on deposits of building and loan associations, although operating only on dividends accruing during a temporary period, was permanent in its effect on those dividends did not make legislation unconstitutional as unreasonable "impairment of obligation of contract." Gen.Laws Supp.1933, Act 986, § 8.09; St.1933, pp. 317, 318, §§ 10–12.

9. Constitutional law 🔑117

The right of private contract must yield to the exigencies of the public welfare when determined in an appropriate manner by authority of the state.

Appeal from Municipal Court of City of Los Angeles; James H. Pope, Judge.

Action by the State Bonded Audit Bureau, Inc., a corporation, against the Pomona Mutual Building & Loan Association to recover interest allegedly due on deposits. From a judgment for the defendant, plaintiff appeals.

Affirmed.

Franz R. Sachse and John C. Campbell, both of Los Angeles, for appellant.

Allard, Whyte & Brownsberger, of Pomona, for respondent.

SCHAUER, Judge.

This is an appeal by plaintiff from a judgment for defendant in an action by the assignee of a depositor in a building and loan association to recover from the association a sum equal to the difference between interest on his deposits at the rate called for by his certificates and the interest actually paid him at a lesser rate pursuant to a statute enacted during a period of national emergency. The certificates involved herein were all issued prior to March

10, 1933 and each declares that the "principal sum shall bear dividends from the date of issue hereof, at the rate of Six Per Cent (6%) per annum, payable Quarterly."

On March 10, 1933, there became effective the provisions of section 8.09 of the Building and Loan Association Act, Act 986, Deering's Gen.Laws, 1933 Supp. By the terms of that section "Notwithstanding anything to the contrary contained in this act or in any investment certificate or certificate evidencing shares or in any agreement or elsewhere, no association shall hereafter at any time pay, credit, declare or allow any interest or dividends in excess of the rate of four per cent per year in respect of interest or dividends which shall accrue or be earned during the emergency period (but only during such period) as hereinafter in this section 8.09 defined, upon investment certificates or shares, whether heretofore or hereafter issued * * *. The commissioner is hereby authorized, however, during such emergency period, in the case of any or all associations, to increase such rate to a rate not in excess of five per cent per year, or to decrease such rate or to postpone the time for the payment of such interest or dividends, or any part thereof, or to decrease such rate and to postpone such time of payment, if he shall determine that such increase is reasonably justified in the interest of the certificate holders or shareholders, or is in the public interest, or that such decrease or postponement, or decrease and postponement, is reasonably necessary for the protection of the investment in such association of its certificate holders or shareholders, or is in the public interest." The term "emergency period" as used in the section is defined as the period commencing with the effective date of such section (March 10, 1933) and ending September 1, 1935, unless sooner terminated by order of the commissioner as provided for therein. The amendatory act of March 10, 1933, St.1933, pp. 315 et seq., also declared (sec. 10) the intention of the legislature to enact each portion of such act regardless of the constitutionality of any other portion thereof, that it was acting (sec. 11) under "the police powers of this State in view of the existing emergency," declared the act to be (sec. 12) an urgency measure and stated various "facts constituting such necessity." The facts so stated are ample, prima facie, to constitute a basis for emergency exercise of police powers. In 1935, prior to September 1, another declaration of public emergency and necessity was made and the period of the emergency was extended to February 1, 1937 (likewise as the former subject to sooner legal termination by the building and loan commissioner). Said section 8.09 requires the giving of a five days' notice of any change of interest or dividend rate and contains other provisions which are immaterial to our decision.

Obediently to the directions of the statute defendant building and loan association subsequent to March 10, 1933, and up to January 26, 1937, when the principal of the certificates was retired by payment in full, paid interest at the reduced rate of 4 per cent per year, except for the period between April 2, 1934 and January 2, 1935, when the rate by order of the commissioner, validly and regularly made if the statute is valid, was 2 per cent per year. It is to recover the difference between the interest so paid and that which would have accrued at 6 per cent per year that this action is brought. The judgment for defendant must be affirmed.

Appellant frankly and commendably concedes that respondent "aptly and succinctly" stated the latter's position in its brief as follows: "The major premise is that, notwithstanding the constitutional provisions against laws impairing the obligation of contracts, the states, through their legislative bodies may, in the exercise of the police power, pass laws reasonably regulating businesses 'affected with the public interest'. The minor premise is that the business of a building and loan association is a business 'affected with the public interest'. The conclusion follows that section 8.09, if reasonable under the police power, is valid and constitutional." Appellant, however, says, "Granted that the States may in the exercise of their police power reasonably regulate businesses affected with the public interest; granted that a building and loan association is such a business; it still does not follow that the statute in question is constitutional." It is not constitutional, appellant argues, because it is not reasonable.

[1-4] In our view of the case, the major and minor premises above stated being conceded, properly so we believe, we are bound to affirm the judgment because, on the record before us, we cannot say that the regulation is unreasonable. The reduction in interest rate was not permanent during any part of the time involved. The reduc-

tion to 4 per cent, required by the statute, was for the period of the emergency only; an emergency was declared to exist; sufficient facts were recited to constitute an emergency; the commissioner had power to terminate it legally at any time on the occurrence of a factual termination; there is no showing or suggestion that the commissioner abused his discretion in not terminating the emergency as a matter of law or in reducing the interest rate temporarily to 2 per cent. We must presume, in the absence of evidence establishing the contrary, that facts existed justifying the commissioner's order; likewise, since there is no suggestion of evidence showing that the legislative-required reduction in interest rate from 6 per cent to 4 per cent during the emergency period was not reasonable we must presume that facts existed which warranted that action. If it was based on substantial and extraordinary facts and was, with respect to those facts, reasonably calculated and necessary to protect the public welfare, it is not unconstitutional merely because it alters that which was a definite obligation of the contract in the absence of such extraordinary facts.

[5-7] In Home Building & Loan Ass'n v. Blaisdell, 1933, 290 U.S. 398, 428, 54 S. Ct. 231, at page 236, 78 L.Ed. 413, 423, at pages 426, 427, 428, 429, 88 A.L.R. 1481, Chief Justice Hughes, speaking for the Supreme Court, said, "To ascertain the scope of the constitutional prohibition, we examine the course of judicial decisions in its application. These put it beyond question that the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula. * * * Not only is the constitutional provision qualified by the measure of control which the state retains over remedial processes, but the state also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.' Stephenson v. Binford, 287 U.S. 251, 276, 53 S.Ct. 181, 189, 77 L.Ed. 288 [301], [87 A.L.R. 721]. Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. * * * The economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts. * * * The question is not whether the legislative action affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end."

[8, 9] While it may be urged that the Minnesota statute involved in the Blaisdell case left to the creditor a possibility that he might ultimately recover the face value of his contract while our statute, although operating only on dividends accruing during a temporary period is permanent in its effect on those dividends, we find nothing in that factual difference (if inherently it be such) which alters the controlling legal principle. That principle is that, as expressed in one of the public utility rate cases cited in the Blaisdell case 290 S.Ct. 398, 54 S.Ct. 231, at page 429 of 78 L.Ed., 88 A.L.R. 1481; Union Dry Goods Co. v. Georgia Pub. Serv. Corp., 1919, 248 U.S. 372, 39 S.Ct. 117, at page 119, 63 L.Ed. 309, at page 312, 9 A.L.R. 1420, P.U.R.1919C, 60, "the right of private contract must yield to the exigencies of the public welfare when determined in an appropriate manner by the authority of the state." The case most factually similar to ours, so far as our research has led us, is that of Holland v. Nakdimen, 1928, 177 Ark. 920, 9 S.W.2d 307, 62 A.L.R. 484, wherein the court held that a subsequently enacted statute fixing the maximum rate of interest to be paid by banks on savings accounts was valid and effective on obligations previously contracted. That court said (177 Ark. 920, 9 S.W. 2d page 309, 62 A.L.R. pages 488, 489): "Finally, it is insisted that the act under consideration went into effect March 7, 1927, and that in so far as the plaintiff, Mrs. C. C. Scott, is concerned, it would violate a contract which the bank had previously made with her to pay her 4½ per cent. on time deposits until June 30, 1927. When Mrs. Scott and the bank made this contract, they knew that the regulation and control of banks came under the internal police power of the state, and that this contract must be subject to all laws then in force or which might thereafter be passed." The business of a building and loan association has the same inherent qualities and characteristics in relationship to the public which bring a bank within the regulatory scope of the police power of a state.

North American Building & Loan Ass'n v. Richardson, 1936, 6 Cal.2d 90, 101, 56 P.2d 1221.

The ably presented argument of appellant is not unlike the strong, but unavailing dissent of Mr. Justice Sutherland in the Blaisdell case, Home Building & Loan Ass'n v. Blaisdell, 1933, 290 U.S. 398, 54 S. Ct. 231, 78 L.Ed. 413, 88 A.L.R. 1481. At page 470 of 290 U.S., at page 252 of 54 S. Ct., at page 446 of 78 L.Ed., 88 A.L.R. 1481, with respect to the case of Edwards v. Kearzey, 96 U.S. 595, 24 L.Ed. 793, relative to a provision of the North Carolina constitution of 1868 increasing the exemptions to which a debtor was entitled, Justice Sutherland said: "This court * * * reviewed the history of the adoption of the contract impairment clause and held the state constitutional provision invalid. '"Policy and humanity,"' it said, 'are dangerous guides in the discussion of a legal proposition. He who follows them far is apt to bring back the means of error and delusion. The prohibition contains no qualification, and we have no judicial authority to interpolate any.'" The accuracy of the cold logic of Justice Sutherland need not be questioned but it has yielded, at least in matters such as that now before us, to "policy and humanity" as exemplified in the less stern and more modern rule enunciated by the majority through Chief Justice Hughes.

The case of Treigle v. Acme Homestead Ass'n, 1936, 297 U.S. 189, 56 S.Ct. 408, 80 L.Ed. 575, 101 A.L.R. 1284, so strongly relied on by appellant as "almost identical" with the case at bar is actually not in point. At pages 195, 196 of 297 U.S., at pages 410, 411 of 56 S.Ct., at pages 579 and 580 of 80 L.Ed., 101 A.L.R. 1284, the court says of the Louisiana statute there under discussion: "It does not purport to deal with any existing emergency and the provisions respecting the rights of withdrawing members are neither temporary nor conditional. * * * The provision is comparable to a statute declaring that whereas preferred stockholders heretofore have enjoyed a priority in the distribution of assets, in that respect they shall hereafter stand pari passu with common stockholders. * * * The statute merely attempts, for no discernible public purpose, the abrogation of contracts between members and the association lawful when made."

Appellant asserts, "No single authority cited by respondent purports to legalize the permanent, arbitrary, cancellation of property rights dependent on a legal contract made before the statute went into effect." That statement may be fully conceded; but it is inappropriate because in the case at bar, as hereinbefore made apparent, the alteration of the contract right was neither permanent, in the sense of continuing its effect on contract rights accruing after the period of emergency, nor (presumptively) arbitrary.

It would serve no useful purpose to discuss the many other authorities cited by counsel for the respective parties. None of them add measurably to the propositions of law declared in Home Building & Loan Ass'n v. Blaisdell, supra, and the authorities therein cited or hereinabove discussed, upon which we rest our conclusions, and none of them overcome those propositions or hold them inapplicable to a situation such as that to which we apply them.

The judgment is affirmed, respondent to recover its costs of appeal.

We concur: SHAW, P. J.; BISHOP, J.

On Petition for Rehearing.

PER CURIAM.

The petition of appellant for a rehearing after judgment of this court on appeal, in the above entitled case, having been filed and having been duly considered, said petition is now hereby denied.

We concur: SHAW, P. J.; BISHOP, J.; SCHAUER, J.

36 Cal.App.2d 644

PEOPLE v. BOLJAT.

Cr. 2083.

Supreme Court of California.

Feb. 15, 1940.

In Bank.

Appeal from Superior Court, Contra Costa County; Thomas D. Johnson, Judge.

On petition for hearing.

Prior opinion, 98 P.2d 513.

Lyle E. Cook, of Berkeley, for appellant.

Earl Warren, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for respondent.

PER CURIAM.

In denying a hearing in this case we do not construe the opinion of the District Court of Appeal as holding that section 4½ of Article VI of the Constitution of California, has the effect of curing an uncertainty or defect in a statute or that said constitutional provision has any bearing upon the construction or interpretation of statutes.

The petition for a hearing in this court is denied.

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36 Cal.App.2d 147

MATHEWS v. CITY OF ALBANY et al.

Civ. 10904.

Supreme Court of California.

Feb. 15, 1940.

Dissenting Opinion Feb. 17, 1940.

In Bank.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Prior opinion, 97 P.2d 266.

Leo A. Sullivan, A. K. Whitton and C. H. Frost, Jr., all of Oakland, for appellant.

Crosby & Crosby and Joseph J. Yovino-Young, City Atty., all of Oakland, for respondent City of Albany.

J. T. Blalock, of San Francisco, for respondent Arthur Kirkpatrick, Superintendent of Recreation, City of Albany.

On Petition for Hearing.

Hearing denied.

CARTER, Justice (dissenting opinion).

I am of the opinion that a hearing should be granted in this case and the cause transferred to this court for hearing and decision, notwithstanding the statement of facts contained in the opinion of the District Court of Appeal, 97 P.2d 266, might be considered sufficient to support the conclusion reached by that court that plaintiff was guilty of contributory negligence as a matter of law, and also notwithstanding the procedural policy announced by this court in the case of People v. Davis, 147 Cal. 346, 81 P. 718 and in denying a hearing by this court in the case of Burke v. Maze, 10 Cal. App. 206, 101 P. 438, 440, to the effect that in considering a petition for a hearing of a cause within the appellate jurisdiction of the District Court of Appeal after a decision rendered by such court, this court should not go beyond the statement of facts contained in the opinion of the District Court of Appeal, and if such opinion contains a correct statement of the law based upon the facts contained therein, a hearing should be denied by this court. The above-mentioned procedural policy was adopted by this court under the assumption that the District Courts of Appeal would set forth a correct statement of the facts in their opinions for the guidance of this court in considering petitions for a hearing of causes decided by said courts. Under this assumption, the procedural policy announced in said cases would have the effect of facilitating the work of this court and aiding in the administration of justice.

Since the adoption of the above-mentioned procedural policy, grave doubt has arisen in the minds of many members of the legal profession, and I dare say of some of the members of this court, as to whether such policy has not been the means of grave injustice being done to litigants in numerous cases because of the failure of some District Courts of Appeal to furnish a correct statement of facts in their opinions which come before this court for review.

In my opinion, such a situation is presented in the case at bar, and this court should, notwithstanding the procedural policy above-mentioned grant a hearing in this case. The facts as disclosed by the undisputed evidence in this case which I have obtained from a reading of the record, are as follows:

On the night of July 4, 1936, the City of Albany, in Alameda County, California, held a fireworks display as a part of the 4th of July celebration, jointly with the American Legion and its Auxiliary. This fireworks display was held at the University Playground in the City of Albany, which was operated as a park and playground by said City, and which was at all times under the direction of its recreation department. Plaintiff, then a boy approximately eleven years and eleven months of age, who lived with his parents near said University Playground, visited said playground on said occasion and witnessed said display. In accordance with the customary practice at such displays, the crowds were kept a safe distance from the place where the fireworks were being discharged. After the display, plaintiff returned to his home and did not return to the playground until about 4 o'clock the following afternoon, at which time he found on the playground where the fireworks had been discharged, an egg shaped object about three inches in diameter and about five inches in length, which proved to be one of the bombs brought there for use in the display. He had never seen such an object before. He also found on said playground a cylinder-like container into which he poured the contents of the bomb and carried same to the back yard of his home nearby. The bomb contained about a cup of silver colored material having the appearance of sand, which plaintiff thought was powder. He then touched a lighted match to such material, which exploded into plaintiff's face, resulting in the loss of his right eye and serious burns. Plaintiff was evidently rendered unconscious by the explosion as he testified that the next thing he remembered after lighting the match was that he was in an automobile going to a hospital.

Plaintiff was a boy of average intelligence. He was not a brilliant student in school and received just passing grades. He had had some experience with fireworks and fire crackers, such as a normal boy of his age would have had. He testified that on two previous fourth's of July, he had lit small fire crackers and sparklers and made "cats and dogs" out of small fire crackers; that he understood that powder would explode when it was sealed up or enclosed, but that powder ignited otherwise than in a sealed container would merely flare up and would not explode. He thought the material which he removed from the bomb was powder, and he touched a lighted match to it to see it flare up, thinking it would not explode while in the open container in which he had placed it.

It is readily observed that the factual situation above depicted, which appears from the undisputed evidence in the record is, in many essential particulars, directly contrary to that stated in the opinion of the District Court of Appeal, upon which that court held that the plaintiff was guilty of contributory negligence as a matter of law. In view of the statement of facts above narrated, there can be no question that the issue of contributory negligence was a question of fact and not a question of law in this case. Lambert v. Western Pacific Railway Co., 135 Cal.App. 81, 26 P.2d 824.

The appeal in this case was from an order of the trial court granting a nonsuit in favor of all of the defendants. A perusal of the record discloses that the basis of the order granting the nonsuit was the insufficiency of the evidence to fasten the liability for plaintiff's injuries upon said defendants and said order was not based upon a holding by the trial court that plaintiff was guilty of contributory negligence as a matter of law.

The uniform rule which an Appellate Court should follow in disposing of an appeal from a judgment of nonsuit is that the court must view the evidence in the light most favorable to the appellant, must disregard all inconsistencies and draw only those inferences from the evidence which can reasonably be drawn which are favorable to the appellant. Union Construction Company v. Western Union Telegraph Company, 163 Cal. 298, 125 P. 242; Gregg v. Western Pacific Railway Company, 193 Cal. 212, 223 P. 553; Ezmirlian v. Otto, 139 Cal.App. 486, 34 P.2d 774.

After the decision of the District Court of Appeal was rendered, appellant petitioned for a rehearing in that court challenging the statement of facts in said opinion, but such petition was denied. Under such circumstances, to apply the doctrine announced in the cases of People v. Davis, supra, and Burke v. Maze, supra, to this case is, in my opinion, a deprivation of justice and will tend to frustrate rather than promote the administration of justice.

15 Cal.2d 130

HAMILTON v. CARPENTER et al.

L. A. 17053.

Supreme Court of California.

Feb. 5, 1940.

Rehearing Denied March 5, 1940.

1. Judgment 🔑597

If a final adjudication of issue of vendor's fraud was had in earlier action by purchasers who sought to recover damages for alleged fraud, such adjudication was "res judicata" of issue of fraud in subsequent action by vendor to foreclose trust deed executed by purchasers, notwithstanding a few additional alleged misrepresentations were subsequently set forth, since a litigant cannot split his cause of action.

[Ed. Note.—For other definitions of "Res Judicata," see Words & Phrases.]

2. Appeal and error 🔑109, 1176(1)

In 1936 the statute did not affect right of appeal from order denying motion for judgment notwithstanding verdict, even though motion for new trial had been granted and no appeal had been taken by opposing party from order granting new trial, and on appeal from the adverse judgment, and from order denying motion for judgment notwithstanding verdict, appellate court had jurisdiction to direct a judgment for the appellant. Code Civ.Proc. § 629.

3. Judgment 🔑714(1)

Generally, a final judgment on the merits in prior action is conclusive between same parties in a subsequent action involving the same subject matter.

4. Judgment 🔑720

Where, in purchasers' action to recover damages from vendor for fraud, an order denying vendor's motion for judgment notwithstanding verdict for purchasers was reversed by appellate court, and pursuant to mandate trial court thereafter entered a judgment for vendor, such judgment was "res judicata" of question of fraud in subsequent action by vendor against purchasers to foreclose trust deed executed by purchasers. Code Civ.Proc. § 629.

5. Equity 🔑65(1)

The maxim that he who comes into equity must come with clean hands was not applicable in vendor's action against purchasers to foreclose trust deed, on ground that vendor had made fraudulent misrepresentations, where issue of fraud had been adjudicated favorably to vendor in prior action.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Archibald J. Hamilton against Margaret B. Carpenter and another to foreclose a trust deed. From a decree for plaintiff, defendants appeal.

Affirmed.

Robert R. Ashton and Cameron B. Aikens, both of Los Angeles, for appellants.

Meserve, Mumper & Hughes and Robertson, Meserve, Mumper & Hughes, and Roy L. Herndon, all of Los Angeles, for respondent.

SHENK, Justice.

The defendants appeal from a decree foreclosing a trust deed executed by them to secure their promissory note in the amount of $7,500, payable to plaintiff and representing the unpaid balance of the purchase price of certain improved real property.

There is ample evidence in the record to establish the default of the defendants in the performance of their obligations under the instruments, and the trial court accordingly so found and entered the decree of foreclosure from which this appeal is prosecuted. The defendants' principal contention has to do with the asserted error of the trial court in rejecting certain proffered evidence addressed to their third and fourth affirmative defenses. In their third defense it was alleged, in detail, that plaintiff, without the knowledge of the defendants, had falsely represented the condition of the premises and that the defendants relying thereon to their detriment had entered into the transaction. It was further alleged that the reasonable value of repairs necessary to put the premises in the condition represented by plaintiff was $5,045.88, for which the defendants prayed an offset and credit as against the balance due on the purchase price. In the fourth affirmative defense the allegations of fraud were incorporated by reference and it was prayed that an offset and credit be allowed in the above amount against the unpaid balance because of alleged failure of consideration.

[1] The trial court refused to permit the defendants to introduce any evidence

addressed to these allegations of fraud upon the theory that there had been a final adjudication of the fraud issue against the defendants in a prior action between the parties. The prior action which the trial court herein held to be res judicata of the fraud issue was commenced by the defendants herein more than two years before the filing of the present action. Much of the record in the earlier action was placed in evidence here. It appears therefrom that the defendants here, plaintiffs there, sought to recover damages from plaintiff here, defendant there, for alleged fraud in his representations as to the condition of the property. Examination of the allegations in the complaint for damages for fraud in the earlier action, and of those relied on by the defendants here in their third and fourth affirmative defenses, discloses that they are substantially identical, and we have no hesitancy in declaring that if a final adjudication thereof was had in the earlier action it is res judicata, and this, even though a few additional alleged misrepresentations are here set forth, for, obviously, a litigant may not split his cause of action, advancing a portion at a time to the harassment of his adversary.

The record in the earlier action, placed in evidence here by plaintiff in support of his contention that it was res judicata, discloses the following chronological facts: Trial was had in the prior fraud action on October 28, 1935, and the jury brought in a verdict for the plaintiffs, defendants here, on November 1, 1935. Thereafter and on November 8, 1935, defendant therein, plaintiff here, moved for judgment notwithstanding the verdict. This motion was denied on December 12, 1935, on which date judgment was accordingly entered on the verdict. Defendant therein, plaintiff here, thereupon moved for a new trial on December 20, 1935, which was granted the same day. After the granting of his motion for new trial, and on January 6, 1936, defendant noticed appeals from the prior order denying his motion for judgment notwithstanding the verdict and from the judgment. On December 6, 1936, the District Court of Appeal of the Second Appellate District, Division One, reversed the order denying the motion for judgment notwithstanding the verdict and directed entry of judgment thereon for defendant, plaintiff here. It dismissed the appeal from the judgment entered by the trial court upon the ground that the same "was vacated when a new trial was granted as to all of the issues." Carpenter v. Hamilton, 18 Cal.App.2d 69, 62 P.2d 1397, 1402. Subsequently, and on March 2, 1937, pursuant to the direction and mandate of the appellate court, the trial court entered judgment in the fraud action for defendant, plaintiff here. No appeal was taken from that judgment. It has long since become final and is relied on by plaintiff herein as a prior adjudication of the defendants' claim for a set-off based on the same alleged fraud.

On the question of res judicata the trial court found and decided that all of the charges of fraud alleged by the defendants had been decided against them by the final judgment entered in the prior action.

[2] Previous to 1937, and at the time here involved, the provisions of section 629 of the Code of Civil Procedure did not affect the right of appeal from an order denying a motion for judgment non obstante veredicto, even though a motion for a new trial had been granted and no appeal had been taken by the opposing party from the order granting the new trial. Barthelmess v. Cavalier, 2 Cal.App.2d 477, 38 P.2d 484; Beckley v. Vezu, 19 Cal.App.2d 124, 64 P.2d 982. Pursuant to the provisions of that section as it then read, on the appeal from the judgment and from the order denying the motion for judgment the appellate court had jurisdiction to direct a judgment for the appellant.

[3, 4] It is the general rule, applicable to the facts of this case, that a final judgment on the merits in a prior action is conclusive between the same parties in a subsequent action involving the same subject matter. Such a judgment was tendered in bar of the present affirmative defenses based on the issues thereby determined. When received in evidence it was conclusive between the parties hereto upon those same matters. 15 Ruling Case Law, pages 950, 951; Price v. Sixth District Agricultural Ass'n, 201 Cal. 502, 258 P. 387; Henderson v. Miglietta, 206 Cal. 125, 273 P. 581; Ernsting v. United Stages, Inc., 206 Cal. 733, 276 P. 103; Edmonds v. Glenn-Colusa Irr. Dist., 217 Cal. 436, 19 P.2d 502; Suisun Lumber Co. v. Fairfield School Dist., 19 Cal.App. 587, 127 P. 349 The issues of fraud very definitely were litigated by these parties in the prior action, both in the trial court and on appeal, and the court properly refused to receive evidence on the same issues alleged in the affirmative defenses of the defendant here-

in. Its finding on the issue of res judicata is supported by the judgment roll in the former action which was introduced in evidence in the present action.

[5] No serious consideration may be accorded the attempted invocation of the maxim that he who comes into equity must come with clean hands. A sufficient answer to the contention in this respect is that the issue of fraud having been adjudicated favorably to the plaintiff herein, there is no place for the application of the maxim.

Likewise the contention that an accord and satisfaction had been shown is without merit. The evidence sufficiently supports the trial court's finding that there had not been payment or satisfaction of the obligation.

The judgment is affirmed.

We concur: WASTE, C. J.; CARTER, J.; CURTIS, J.; GIBSON, J.; EDMONDS, J.

15 Cal.2d 99

TIMES-MIRROR CO. et al., v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY (two cases).

L. A. 16928, 16929.

Supreme Court of California.

Jan. 31, 1940.

Rehearing Denied Feb. 29, 1940.

1. Contempt 🔑9, 40, 50

In proceedings to review orders adjudging petitioners guilty of contempt for publishing newspaper editorials commenting upon verdicts in criminal prosecutions, petitioners' contention, that contempt proceedings were criminal actions and should have been instituted in the name of the people, and that petitioners had the same rights as a defendant in a criminal action and were immune from punishment by virtue of statute concerning contempt with respect to publications reflecting upon a court or officer thereof, could not be sustained. Code Civ.Proc. § 1209, subd. 13; § 1211.

2. Contempt 🔑9

In determining whether the publication of an editorial or article commenting upon a pending action renders the author thereof guilty of contempt, test to be applied is whether the publication had a reasonable tendency to interfere with orderly administration of justice in the action which was the subject of comment and which was then before a court for consideration or decision.

3. Contempt 🔑9

Where newspaper editorials approving verdict finding defendants guilty in criminal cases were published on the day following return of verdict and preceding the day on which judgment was to be pronounced, and defendants had a right, at proper time, to move for new trial and apply for probation, and trial court had wide discretion with respect to pronouncing judgment upon verdict, the criminal proceedings had not reached such point of finality as to form a proper subject of comment, as respects liability for contempt by those responsible for publications. Pen.Code, §§ 19a, 182, 418, 594. Code Civ.Proc. § 1209, subd. 13.

4. Contempt 🔑9

In proceedings to review orders adjudging petitioners guilty of contempt for publishing newspaper editorials approving a verdict finding defendants guilty in a criminal prosecution, where editorials were published on the day following return of verdict and preceding the day on which judgment was to be pronounced, it could not be successfully contended that verdict was a final determination of defendants' fate, as respects liability for contempt by those responsible for publications.

5. Contempt 🔑54(4)

Where affidavit accusing petitioners of contempt in connection with the publication of newspaper editorials expressly alleged that one of the petitioners was managing editor of newspaper and that petitioners, together with publisher and other officers, caused to be printed and published the issue which contained the editorials in question, it could not be contended that affidavit failed to allege that the petitioner who was managing editor personally caused publication of editorial.

6. Contempt 🔑9

If the trial court regards a publication concerning a matter of law pending before it as tending toward an interference with proper administration of justice, the act of publishing the editorial may be punished as a "contempt," although function of jury in

the case has been discharged before editorial in question was published.

[Ed. Note.—For other definitions of "Contempt," see Words & Phrases.]

7. Contempt 🔑9

As respects whether a newspaper editorial approving verdict in criminal prosecution was of such character as to render those responsible for its publication guilty of contempt, where editorial was published on the day following return of verdict and preceding the day on which judgment was to be pronounced, test was not the reasonable tendency of publication to interfere with administration of justice or obstruct or embarrass trial court in decision of pending matters, but was the effect of the publication upon particular judge before whom criminal case was pending.

8. Contempt 🔑9

Where editorial published in influential newspaper on day following the return of verdict, and preceding the day on which judgment was to be pronounced in criminal case, approved the verdict and could be construed as a notice to trial judge that no leniency should be extended to defendants, and under the law, a wide discretion was left to the trial judge with respect to pronouncing judgment, the editorial was of such nature as to interfere with ordinary administration of justice in the criminal case, and rendered those responsible for its publication guilty of "contempt." Pen.Code, §§ 19a, 182, 418, 594. Code Civ.Proc. § 1209, subd. 13.

9. Contempt 🔑9

Where editorial published by influential newspaper after return of verdict finding a prominent person guilty of an offense and after such person had given notice of motion for new trial but before the day fixed for pronouncing of judgment, with respect to which the trial judge had certain discretion, contained a caustic criticism of political activities of person in question, the publication rendered those responsible therefor liable for "contempt," although editorial did not expressly refer to pending criminal case. Pen.Code, § 653f.

10. Contempt 🔑9

Where judgment had not been pronounced against defendants who had been found guilty of an offense by jury when a newspaper editorial was published commenting upon defendants' application for probation, and editorial referred to trial judge by name and charged that he would make a serious mistake if he granted probation, and trial judge had discretion with respect to sentencing defendants, the editorial tended to interfere with proper administration of justice and rendered those responsible for its publication liable for "contempt." Pen.Code, §§ 245, 1203.

11. Contempt 🔑66(7)

In proceeding for contempt by publishing newspaper editorials during pendency of criminal cases arising out of labor difficulties, weight to be given evidence claimed to show that the position of a newspaper with respect to industrial controversies was so well known that judges before whom criminal actions were pending could not have been influenced by publications was solely for trial court.

12. Contempt 🔑66(7)

In proceedings to review judgments finding petitioners guilty of contempt, the sole question before Supreme Court was jurisdiction of trial court to render judgments under review, and in such proceedings review of evidence was limited to determining whether there was any substantial evidence to sustain trial court's jurisdiction.

13. Constitutional law 🔑90

Where editorials published in newspapers before final determination of criminal cases were of such nature as to have a reasonable tendency to influence trial court in proper administration of justice with respect to defendants, orders adjudging those responsible for the publications guilty of contempt did not violate the right of freedom of speech and press guaranteed by State and Federal Constitutions, since liberty of press is not a more sacred right than the right to a fair and impartial trial, and litigants are entitled not only to just decisions, but to decisions free from suspicion of having been coerced.

14. Contempt 🔑8

Newspaper editorials consisting of a defense of the right of freedom of speech and press and a résumé of criminal cases commented upon in previously-published editorials could not form the basis of a charge of contempt, where editorials in question were published after the cases had reached a point of finality and were subject to proper comment by any citizen.

EDMONDS and GIBSON, JJ., dissenting.

In Bank.

Two proceedings by the Times-Mirror Company and another against the Superior Court of the State of California in and for the County of Los Angeles to review two orders adjudging petitioners guilty of contempt for the publication of certain newspaper editorials.

Judgment with respect to the first case affirmed, and judgment with respect to the second case reversed.

Rehearing denied; EDMONDS and GIBSON, JJ., dissenting.

Cosgrove & O'Neil, T. B. Cosgrove, and F. B. Yoakum, Jr., all of Los Angeles, for petitioners Times-Mirror Co., Harry Chandler, and L. D. Hotchkiss.

Elisha Hanson, of Washington, D. C., amicus curiae for American Newspaper Publishers.

Carey McWilliams and Charles J. Katz, both of Los Angeles, amici curiae for Los Angeles Chapter of National Lawyers' Guild.

Francis Biddle, of Philadelphia, Pa., Osmond K. Fraenkel, of New York City, and Gallagher, Wirin & Johnson and A. L. Wirin, all of Los Angeles, amici curiae for American Civil Liberties Union, Southern California Branch.

William C. Ring, of Los Angeles, amicus curiae supporting petitioners for certiorari.

S. S. Hahn, of Los Angeles, amicus curiae for Scripps League of Newspapers.

J. H. O'Connor, Co. Counsel, Douglas De Coster, Chief Deputy Co. Counsel, S. V. O. Prichard, Deputy Co. Counsel and Allen W. Ashburn, Michael G. Luddy, Isaac Pacht, and Arnold Praeger, all of Los Angeles, for respondent.

CURTIS, Justice.

These two proceedings were on the December, 1938, calendar of this court, sitting in bank, with five regular justices and one justice pro tempore present. The cases were then argued by counsel for the respective parties and by one of the amici curiae. Thereafter, and before any decision of either of said causes had been agreed upon, one of said justices died, and another of said justices declared his disqualification to participate in any decision that might be rendered in either of said causes. In this situation, this court found that it was unable to procure the concurrence of the constitutional number of qualified justices, who had heard the argument, in a decision of either of said causes, and basing its order upon that ground, directed that said causes be placed upon a subsequent calendar for argument. This argument has been held, and the same counsel who argued these cases at their first hearing before this court were present and participated in the second argument before us.

The two proceedings present the same legal issues and substantially the same factual situation is present in each case, except as to the contents of the editorials which were the basis of the contempt charges filed against petitioners. The petitioners were adjudged guilty of contempt of court for the publication of certain editorials in the Los Angeles Times, a newspaper of general circulation published in the city of Los Angeles, and these proceedings were instituted to review the two orders of court adjudging them guilty of contempt. Each of the contempt proceedings was instituted by an affidavit presented to the Superior Court of the County of Los Angeles by J. Louis Elkins, secretary of the Los Angeles Bar Association, pursuant to the provisions of section 1211 of the Code of Civil Procedure, and was prosecuted by attorneys from said bar association under the provisions of part III, title V of the Code of Civil Procedure, entitled, "Contempts".

Petitioners contend that these proceedings are "criminal actions" and should be instituted in the name of the people of the state of California and prosecuted like any other criminal action by the district attorney of the county in which the offense was committed, and that the accused were entitled to a jury trial and all other rights and privileges accorded to a defendant in a criminal action. Petitioners further claim that they are immune from punishment by virtue of that portion of subdivision 13 of section 1209 of the Code of Civil Procedure, reading as follows: "But no speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings."

[1] These issues were all before us in the case of Bridges v. Superior Court, recently decided by us and reported in 94 P.2d 983, and the same contentions were made by the petitioner in that case as are now made by the present petitioners. A reference to that decision will show that we held that none of said contentions was

meritorious, and that we sustained the procedure followed in that case which is precisely like that pursued in these proceedings, and furthermore we held that the provisions of subdivision 13 of section 1209 of the Code of Civil Procedure, relied upon by the petitioner Bridges as well as by the petitioners in these proceedings were unconstitutional, and therefore afforded no protection for the publication of the article by the petitioner in that proceeding. It is apparent, therefore, that all the legal questions presented by these two petitions, and stated above, have been decided by us adversely to the contentions of said petitioners. No useful purpose would be gained by reiterating what we said in this former opinion in the decision of these questions. It, therefore, only remains for us to apply the law as settled by our previous decision to the facts in the present proceedings.

The first of these two proceedings was brought to review the order of the trial court adjudging the petitioner, the Times-Mirror Company, publisher of the Los Angeles Times, and L. D. Hotchkiss, managing editor of the Los Angeles Times, guilty of contempt of court upon the charge set forth in count 1 of the affidavit of J. Louis Elkins, and to review said order of said court adjudging the petitioner, the Times-Mirror Company, guilty of contempt of court upon two additional charges of contempt contained in said affidavit, and set forth in counts 3 and 5 respectively of said affidavit.

The second of said two proceedings was instituted to review the order of said court adjudging the petitioners, The Times-Mirror Company, the publisher of the Los Angeles Times, the president of the Times-Mirror Company, and its managing editor, guilty of contempt of court upon the two charges contained in said second affidavit of J. Louis Elkins, presented to said superior court.

[2] In determining whether the publication of an editorial, or article, commenting upon a pending action, renders the author thereof guilty of contempt of court, the test to be applied to such a publication is whether it had a reasonable tendency to interfere with the orderly administration of justice in the action which was the subject of the comment and which was then before the court for its consideration or decision. If the article had that effect, then its publication rendered the person responsible for its publication guilty of contempt of court. This question was before us in the Bridges case, where authorities supporting the statements just expressed, from this court, the Supreme Court of the United States, and other jurisdictions, are cited and may be found on page 995 of our opinion in 94 P.2d.

The first of the several editorials to which we will give consideration is that set forth in count 1 of the accusatory affidavit presented to the court and sworn to by J. Louis Elkins. It is entitled, "Sit-Strikers Convicted", and referred to the case of People v. William Busick, and others, in which action the jury had rendered a verdict finding certain of the defendants guilty of a conspiracy to violate certain sections of the Penal Code. It was as follows:

"The verdict of a jury finding guilty the twenty-two sit-strikers who led the assault on the Douglas plant last February, will have reverberations up and down the Pacific Coast and in points farther east.

"The verdict means that Los Angeles is still Los Angeles, that the city is aroused to the danger of davebeckism, and that no kind of union terrorism will be permitted here.

"The verdict may have a good deal to do with sending Dave Beck back to Seattle. For, while the United Automobile Workers have no connection with Beck, their tactics and his are identical in motive; and if Beck can be convinced that this kind of warfare is not permitted in this area he will necessarily abandon his dreams of conquest.

"Already the united farmers and ranchers have given Beck a severe setback. The Hynes hay market is still free and it has been made plain that interference with milk deliveries to Los Angeles will not be tolerated.

"Dist-Atty. Fitts pledged his best efforts to prevent and punish union terrorism and racketeering in a strong radio address, and followed it up yesterday with a statement congratulating the jury that convicted the sit-downers and the community on one of the 'most far-reaching verdicts in the history of this country'.

"In this he is correct. It is an important verdict. For the first time since the present cycle of labor disturbances began, union lawlessness has been treated as exactly what it is, an offense against the public peace punishable like any other crime.

"The seizure of property by a militant minority which arrogated to itself the right of dictating not only to employers, but to other workers not in sympathy with it, what should be the terms and conditions of working, has proved to be within the control of local peace officers and authorities.

"Nobody ran off to Washington to get this affair handled. It was attended to right here.

"Government may have broken down in other localities; whole States may have yielded to anarchy. But Los Angeles county stands firm; it has officers who can do their duty and courts and juries which can function.

"So long as that is the case, davebeckism cannot and will not get control here; nor johnlewisism either."

The verdict finding said defendants guilty was rendered on December 20, 1937, and the trial judge before whom the case was pending fixed December 22, 1937, as the time for pronouncing judgment upon the defendants. On the 21st of December, 1937, the above-mentioned editorial was published, which date, it will be seen, was one day after the verdict and one day before the time fixed by the court for pronouncing judgment. At the time fixed by the court, provided no motion for a new trial nor application for probation was made, it was the duty of the trial court to pronounce judgment against said defendants. By its verdict, the jury found the defendants guilty of a conspiracy to violate sections 418 and 594 of the Penal Code. While each of the crimes denounced in these sections respectively is made a misdemeanor, by section 182 of the Penal Code a conspiracy to commit a misdemeanor is punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both. By section 19a of the Penal Code, it is provided that in no case shall any person sentenced to confinement in a county jail on conviction of a misdemeanor be committed for a period in excess of one year. Therefore, in sentencing the defendants found guilty by the jury in the case of People v. William Busick et al., it was within the power of the trial court to sentence them to the county jail for one year or less, or to the state penitentiary, where under the indeterminate sentence law they might be imprisoned for a term of two years, or they might be punished by a fine not exceeding five thousand dollars, or by both imprisonment and fine. The defendants in said action had the right to move for a new trial and also to make application for probation.

[3] At the time of the publication of said editorial, it cannot be said that the proceedings in the case of People v. William Busick et al. had reached such a point of finality as to form a proper subject of comment. The defendants found guilty by the verdict of the jury were yet to be sentenced by the court. They had the right in said action, at the proper time in the future, to make a motion for a new trial and an application for probation. Even if they did not make either said motion or application, the case against them was still pending for the purpose of pronouncing judgment. As we have shown, wide discretion was given the court in pronouncing judgment upon the verdict rendered by the jury. The judgment of the court, acting within the discretion with which the judge was by law clothed, might vary from a sentence to the state penitentiary for a possible term of two years, in which case the defendants would be guilty of a felony, or it might be a sentence of confinement in the county jail for a period as short as one day, or to pay a simple fine as low as one dollar. It is obvious that the pronouncing of judgment in a case of this character where such wide discretion is given the trial judge, was a matter of grave concern to the parties to the action, and particularly to the defendants and it was of the utmost importance to them that the trial judge in pronouncing judgment against them should act strictly in accordance with the record before him, and that his judgment should not be hampered nor swayed by any outside influence. These observations apply also to the motion for a new trial and the application for probation. While neither motion nor application had been made at the time of the publication of the editorial, the right of the defendants to pursue said remedies existed at said time and the case in which they might be exercised was pending at the same time.

[4] Furthermore, a motion for a new trial and an application for probation in the event a new trial is denied is in accordance with the ordinary and usual practice followed in criminal cases and is sanctioned by the Penal Code. We can see no force in petitioners' argument that because the editorial was published after the verdict, but prior to the making of said motion or application, the proceedings in the case had reached such a point of finality as to form a proper subject of comment. It cannot be

successfully contended that the verdict was decisive of the case or was a final determination of the fate of the defendants. Even if we disregard the convicted defendants' right to move for a new trial and their right to apply for probation, there still remained, when said editorial was published, the duty of the court to pronounce judgment against said defendants. The case was still pending for that purpose and until judgment was pronounced, any public comment which would have a reasonable tendency to influence the court in pronouncing sentence upon the defendants in said action would not be justified.

[5] In respect to the judgment of the trial court finding both Hotchkiss, the managing editor, as well as the Times-Mirror Company, guilty of contempt of court for the publication of the editorial contained in count 1 and entitled "Sit-Strikers Convicted", it is contended that the accusatory affidavit fails to allege that L. D. Hotchkiss personally caused or permitted the publication of the editorial set forth in count 1, and the case of Otis v. Superior Court, 148 Cal. 129, 82 P. 853, is cited in support of said contention. The allegations in the two affidavits are materially different. In the Otis case, the affidavit alleged that certain individuals were officers of the publishing company, but contained no allegation that they caused or permitted the publication of the offending articles. The affidavit accusing petitioners of being in contempt of court in the present proceeding expressly alleges not only that petitioner, L. D. Hotchkiss, was the managing editor of the Los Angeles Times but that he, together with the publisher and other officers, "caused to be printed and published the issue of the Los Angeles Times which contained the editorial entitled 'Sit-Strikers Convicted'". It would be difficult to couch the affidavit in more direct terms.

[6] We now pass to the consideration of the questions as to whether this editorial entitled, "Sit-Strikers Convicted", was of such a character as to render those responsible for its publication guilty of contempt of court. In our investigation of the various decisions of the several courts of this country, including those rendered by the Supreme Court of the United States, respecting the character of publications which rendered their authors subject to disciplinary action by the courts in contempt proceedings, we are impressed with the statement found in an opinion rendered by Justice Holmes in the case of Patterson v. Colorado, 205 U.S. 454, 27 S.Ct. 556, 558, 51 L.Ed. 879, 10 Ann.Cas. 689. After referring to the effect of the publication of matters pending in a jury case upon the members of a jury before whom the action is being tried, that learned justice further stated, "What is true with reference to a jury is true also with reference to a court. Cases like the present are more likely to arise, no doubt, when there is a jury, and the publication may affect their judgment. Judges generally perhaps are less apprehensive that publications impugning their own reasoning or motives will interfere with their administration of the law. But if a court regards, as it may, a publication concerning a matter of law pending before it, as tending toward such an interference, it may punish it as in the instance put. When a case is finished courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by premature statement, argument, or intimidation hardly can be denied."

This excerpt from the opinion of Justice Holmes was quoted with approval by this court in the two cases of In re Shuler, 210 Cal. 377, 403, 292 P. 481, and in the Bridges case. It may well be considered as a correct statement of the law in this state as the true test to be applied. This question was discussed in greater detail in the Bridges case where additional authorities are cited in support of the "reasonable tendency" rule.

[7] In passing, we might here answer briefly the argument of petitioners that the proper test is not the reasonable tendency of the publication to interfere with the administration of justice or obstruct or embarrass the court in the decision of the pending matters, but is the effect of the publication upon the particular judge before whom the case is pending, or in the words of petitioner, "there must of necessity be a uniform yardstick to measure off or determine the presence or absence of 'reasonable tendency to influence'. This criterion or yardstick, we believe, and accordingly contend, is the mentality, fortitude and integrity of the average judge". Petitioners cite no authority in support of their theory, and it has been expressly repudiated by a recent decision of the Supreme Court of the United States (Sin-

clair v. United States, 279 U.S. 749, 764, 49 S.Ct. 471, 476, 73 L.Ed. 938, 63 A.L.R. 1258), where that court held as follows: "In other words, having regard to the powers conferred, to the protection of society, to the honest and fair administration of justice and to the evil to come from its obstruction, the wrong depends upon the tendency of the acts to accomplish this result without reference to the consideration of how far they may have been without influence in a particular case. The wrongdoer may not be heard to try the power of the judge to resist acts of obstruction and wrongdoing by him committed as a prelude to trial and punishment for his wrongful acts."

[8] The editorial entitled, "Sit-Strikers Convicted" unquestionably approved the jury's verdict. It praises the jury for its rendition, and the court in which the action was pending. It discussed the importance of the verdict and its effect upon the industrial strife then being waged in and beyond the limits of the city of Los Angeles. Its reference to "union terrorism and racketeering" can only be construed as implying that the convicted defendants in the pending action were engaged in such activities. These expressions of approval of the verdict and condemnation of the convicted defendants made by such an influential paper as the Los Angeles Times on the day just preceding the day fixed by the court for pronouncing sentence could not help having an effect upon the trial judge, who, as we have seen, was clothed with a wide discretion in fixing the punishment of the convicted defendants, to say nothing respecting his duties in case a motion for a new trial was made or an application for probation was presented to him. It cannot reasonably be said that they would have no tendency to influence the trial judge in rendering the judgment, or in ruling upon the other matters that in the regular order of the proceedings in criminal matters would come before him in the case then pending. The editorial may not have been intended, but it is capable of being construed, as a notice to the trial judge that no leniency should be extended to the convicted men, and, furthermore, that should the court act contrary to the suggestions contained in the editorial, it might well expect adverse criticism in the columns of The Times. Viewing the editorial in the light of these considerations, we are satisfied that its reasonable tendency was to interfere with the ordinary administration of justice by the court in the action then pending before it.

The next publication, being the editorial set forth in count 3 of said affidavit, was an editorial entitled, "The Fall of an Ex-Queen". It referred to Helen M. Werner, who on the 12th day of April, 1938, had been convicted by a jury on two counts, one charging her with an attempt to commit grand theft, and the other with a violation of section 653f of the Penal Code, respectively. On the same day, she gave notice of motion for a new trial, and the judge before whom the case was pending on the same day fixed April 22, 1938, as the time for hearing said motion and pronouncing judgment. On the 14th day of April, 1938, the alleged contumacious editorial was published.

Practically the same discretion as was given the trial judge in pronouncing judgment in the case against the so-called "Sit-Strikers" was given him in the case against Helen M. Werner. The facts of the case are in principle similar, except that in the Werner case the defendant had actually made a motion for a new trial and said motion was pending at the time of the publication of the editorial in question.

The editorial was as follows:

"Politics as we know it is an essentially selfish business, conducted in the main for personal profit of one kind or another. When it is of the boss type, it is apt to be pretty sordid as well. Success in boss-ship, which is a denial of public rights, necessarily implies a kind of moral obliquity if not an actually illegal one.

"So that it is something of a contradiction of sense if not of terms to express regret that the political talents of Mrs. Helen Werner were not directed to other objectives than those which, in the twilight of her active life, have brought her and her husband to disgrace. If they had been, she would not have been in politics at all and probably would never have been heard of in a public way. Her natural flair was purely political; she would have been miscast in any other sphere of activity.

"Mrs. Werner's primary mistake seems to have been in failing to recognize that her political day was past. For years she enjoyed the unique distinction of being the country's only woman boss—and did she enjoy it! In her heyday she had a finger in every political pie and many were the plums she was able to extract therefrom for those who played ball with her. From small beginnings she utilized every opportunity to extend her influence and to put officeholders and promising political material under obligations to her. She became a power in the backstage councils of city and county affairs and from that place of strategic advantage reached out to pull the strings on State and legislative offices as well.

"Those were the days when Mrs. Werner was 'Queen Helen' and it is only fair to say that to her the power was much more important than the perquisites. When the inevitable turning of the political wheel brought new figures to the front and new bosses to the back, she found her grip slipping and it was hard to take. The several cases which in recent years have brought her before the courts to defend her activities seem all examples of an energetic effort to regain and reassert her one-time influence in high places. That it should ultimately have landed her behind the bars as a convicted bribe-seeker is not illogical. But if there is logic in it, the money meant less to Mrs. Werner than the name of still being a political power, one who could do things with public officials that others could not do. To herself at least she was still Queen Helen."

[9] While the editorial does not refer to the case which was then pending against Helen M. Werner, it is hardly conceivable that those in charge of its publication were ignorant of the pendency of said action. Both Helen M. Werner and her husband had been active and prominent in politics both in the city and in the county of Los Angeles. In fact the editorial so states in so far as the activities of Helen M. Werner were concerned, and further suggests that she "reached out to pull the strings on state and legislative offices as well". With a person of such local prominence, charged with serious offenses, on trial, it must be assumed that the petitioners were cognizant of the action then pending against her, and that it had reached the stage which would require either the pronouncement of judgment, or the granting of a new trial. With this knowledge before them, they prepared and published the editorial which it must be conceded was a scathing denunciation of Mrs. Werner and a caustic criticism of her political activities in recent years. That a publication of this character concerning a person convicted by the verdict of a jury, and who was soon to appear for sentence, would have a disturbing effect upon the judge before whom the case was pending when the time came for pronouncing judgment, we think can neither be questioned nor denied. Such a publication according to the authorities hereinbefore cited comes within those prohibited acts, the commission of which renders those responsible therefor liable to the punitive powers of the court.

The editorial contained in count 5 of said accusatory affidavit is entitled, "Probation for Gorillas?" It was published after two defendants, Shannon and Holmes, had been found guilty by a jury of conspiracy to violate section 245 of the Penal Code (assault with a deadly weapon) and assault with a deadly weapon. They made application for probation, and on the 2d day of May, 1938, the judge who presided at the trial set June 7, 1938, as the time for passing upon their application for probation. On May 5, 1938, the editorial entitled as above was published, and is as follows:

"Two members of Dave Beck's wrecking crew, entertainment committee, goon squad or gorillas, having been convicted in Superior Court of assaulting nonunion truck drivers, have asked for probation. Presumably they will say they are 'first offenders', or plead that they were merely indulging a playful exuberance when, with slingshots, they fired steel missiles at men whose only offense was wishing to work for a living without paying tribute to the erstwhile boss of Seattle.

"Sluggers for pay, like murderers for profit, are in a slightly different category from ordinary criminals. Men who commit mayhem for wages are not merely violators of the peace and dignity of the State; they are also conspirators against it. The man who burgles because his children are hungry may have some claim on public sympathy. He whose crime is one of impulse may be entitled to lenity. But he who hires out his muscles for the creation of disorder and in aid of a racket is a deliberate foe of organized society and should be penalized accordingly.

"It will teach no lesson to other thugs to put these men on good behavior for a limited time. Their 'duty' would simply be taken over by others like them. If Beck's thugs, however, are made to realize that they face San Quentin when they are caught, it will tend to make their disreputable occupation unpopular. Judge A. A.

Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. This community needs the example of their assignment to the jute mill."

But little is said, or can be said, in defense of the publication of this editorial. Among other things, it calls by name the judge before whom the action was pending, and directly charges that the judge will make a serious mistake if he grants probation to the two convicted defendants. The editorial as a whole is a striking example of a "premature statement, argument, and intimidation" respecting the case on trial which the court condemned and held to be contumacious in the case of Patterson v. Colorado, supra.

While petitioner, The Times-Mirror Company, advances no serious defense of its publication of said editorial in so far as the character and nature of the editorial are involved, it does insist that as the matter then before the court was the question of probation the petitioner was privileged to make whatever comment it was thought advisable under all the circumstances of the case. In other words, petitioner contends that a different rule applies to statements made and articles published respecting a case, or the parties thereto, when the sole matter before the court relates to the probation of a defendant than when the court has under consideration the guilt of the defendant or other strictly legal question arising during the trial of a defendant in a criminal action. When the sole matter before the court relates to the probation of a defendant petitioner contends that any person is free to communicate with the court or to express his opinion publicly through the press, or otherwise, respecting the propriety or advisability of the court's granting or denying probation to the applicant. We find ourselves unable to agree with this contention. Section 1203 of the Penal Code prescribes the procedure governing applications for probation and the source from which the court may receive the necessary information to enable it to act in such matters. By this section of the code the court must refer the application to the probation officer whose duty it is after investigation to make a report to the court which report the court must consider in making its final decision in granting or denying probation. We find nothing in said section of the code nor in any other provision of the law which would justify any different approach to the court when matters of probation are before it than when the regular proceedings before and at the trial are under the court's consideration. Mr. Chandler in an affidavit filed with the trial court at the hearing of the contempt proceedings against petitioners stated, "In one recent probation case, The Times was advised by a former presiding superior judge that a criticism of probation published subsequent to the granting should have been made known while the matter was pending instead of afterwards". If this advice could be construed as permitting the publication of an editorial like that entitled, "Probation for Gorillas?" then the same right should be accorded to those newspapers favoring the probation of these same defendants referred to in the editorial. We would then have the deplorable situation of a heated newspaper controversy being carried on in the community while the question of probation was before the court for determination. That such a situation would contribute to the orderly administration of justice, we think no one would contend. We do not mean to hold that a person interested for or against the probation of a defendant may not make known his views as to the propriety of granting or denying probation to the probation officer, so that this officer may investigate the source or grounds of these views and report the result of his investigation to the trial judge. But to approach the judge either directly or indirectly, through the columns of a newspaper, or otherwise, in our opinion is not permissible. The probation of a defendant is a legal act of the court and is governed by the same rules as are applicable to any other legal proceeding before the court.

[10] Possibly by reason of the title of the editorial, and the calling of the trial judge by name, followed by the statement that he would make a mistake if he should grant probation to the defendants, petitioner has considered this editorial as referring only to the application of defendants for probation. But the application for probation was not the only matter in that action that was then pending before the court. Judgment had not yet been pronounced in said action. The same wide discretion was given to the trial judge in sentencing the defendants in the criminal action commented on in this editorial as was given the trial judge in the actions commented on respectively in the two previous editorials. Therefore, what we have said respecting

the effect of each of the two preceding editorials, is applicable to the publication of the editorial entitled "Probation for Gorillas?" It referred to an action which was then pending in court, and the statements contained therein were calculated to and had a reasonable tendency to influence the proceedings in said action, and to interfere with the proper administration of justice by the court in which said action was pending.

In Mr. Chandler's affidavit he sets forth at some length the history of the industrial strife that has been waged in Los Angeles and in other parts of the United States during the past years. In this affidavit, he states, "For approximately fifty years, the Los Angeles Times has been the principal newspaper exponent in the United States of the open shop system of industrial relations". It is further shown in said affidavit that the position of the Los Angeles Times respecting the industrial controversy was well known in the city of Los Angeles and elsewhere throughout the state. The affidavit then goes into some considerable detail as to the part taken by the Los Angeles Times in condemning the "sit-down strikes", and the strike of the teamsters' union to which the two convicted defendants mentioned in the "Probation for Gorillas?" editorial belonged. It was stipulated that the allegations contained in said affidavit were true.

[11, 12] From the facts set forth in said affidavit it is contended that the position of the Los Angeles Times was so well known in the city of Los Angeles both by the citizens generally and the officials of said city and the county of Los Angeles, including the members of the judiciary of said county, that the superior judges before whom the two actions were pending would not be influenced nor would either of the defendants in either of said actions be prejudiced to any extent by the publication of the respective editorials which particularly referred to the action in which they were convicted. The weight to be given to this evidence was solely a matter resting with the trial court. In these proceedings for the review of the judgments of the trial court finding the petitioners guilty of contempt, the sole question before us is one of jurisdiction of the trial court to render the judgment under review, and in such a case the review of the evidence is limited to determining whether there was any substantial evidence to sustain the jurisdiction of the trial court. McFarland v. Superior Court, 194 Cal. 407, 228 P. 1033; Bridges v. Superior Court, Cal.Sup., 94 P.2d 983, and authorities therein cited. The affidavit of Mr. Chandler did no more than cause a conflict in the evidence which the trial court resolved against petitioner.

It is earnestly and seriously contended by petitioners that the order adjudging petitioner guilty of contempt of court violates the right of freedom of speech and of the press guaranteed by the state and federal Constitutions. What we said in the Bridges case respecting the right of free speech applies with equal force to the claim of petitioners herein that they are protected in the publication of said editorial by the constitutional guaranty of freedom of the press. There is no fundamental difference between these two constitutional privileges. The right of free speech and the freedom of the press are guaranteed by the same section of both the federal and state Constitutions. In Re Shuler, 210 Cal. 377, 402, 292 P. 481, 492, we held that, "No difference can be discerned between the rights of the citizen and the proper limitation thereof under his aforesaid constitutional guaranty, whether that citizen be a minister speaking from his pulpit, or a broadcaster through the radio, or an editor through his newspaper, or a curbstone orator * * * or an anarchist * * * the right and the limitation thereof being the same when the matter involved in the utterances of all or any of these affects or manifestly tends to affect the orderly administration of justice in pending causes before judicial tribunals and the judges thereof." And in Re Shortridge, 99 Cal. 526, 535, 34 P. 227, 230, 21 L.R.A. 755, 37 Am. St.Rep. 78, we find this concise language, "As stated before, what may be spoken may be written; and the converse of the proposition is true, that what may not be spoken under such circumstances may not be written."

The constitutional right of freedom of the press and the limitations thereon have been the subject of innumerable decisions of the state and federal courts. We shall cite only a very few of these decisions, and briefly quote from them.

In the case of Toledo Newspaper Co. v. United States, 247 U.S. 402, 38 S.Ct. 560, 62 L.Ed. 1186, there existed a bitter controversy between the city of Toledo and a street railway operated in said city. This controversy led to an action between these parties in which the creditors of the railway company intervened. While this action was pending, a local newspaper, published by the Toledo Newspaper Company, began the publication of articles adverse to the rights asserted against the city by the creditors and the railway company. The publisher and editor of the newspaper were found guilty of contempt of court by reason of the publication of said articles. The matter came before the Supreme Court of the United States and among other contentions was the contention that the publications related to a matter of public concern and were safeguarded from being made the basis of contempt proceedings by "the assuredly secured freedom of the press". In answering this contention the court on page 419 of the opinion in 247 U.S., 38 S.Ct. on page 564, 62 L.Ed. 1186, said: "We might well pass the proposition by because to state it is to answer it, since it involves in its very statement the contention that the freedom of the press is the freedom to do wrong with impunity and implies the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all, including that of the press, depends. The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests and that freedom therefore does not and cannot be held to include the right virtually to destroy such institutions. It suffices to say that however complete is the right of the press to state public things and discuss them, that right as every other right enjoyed in human society is subject to the restraints which separate right from wrongdoing."

In State v. Lovell, 117 Neb. 710, 717, 222 N.W. 625, 627, the supreme court of that state has expressed similar views in the following language: "The freedom of the press vouchsafed by the Constitution implies the publisher's respect for the equal rights of others. One of those rights that the publisher is bound to respect is a litigant's privilege of appearing before an independent, impartial court for judicial redress, uninfluenced or embarrassed by contemptuous publications pending litigation. Under the Constitution this right is as sacred as the freedom of the press. By both state and Federal Constitutions government is composed of distinct legislative, executive and judicial departments of equal rank. The judiciary is an independent tribunal to which the individual may resort whenever his property rights are invaded by private wrongdoers, by public agencies or by the legislative or executive departments. In controversies over rights guaranteed by the Constitution the individual stands before the court on an equality with government itself. The constitutional provision * * * creating an independent judiciary is recognized by historians, philosophers and statesmen as a vast contribution to the science of government. To preserve the purity, impartiality and independence of the court is a solemn duty that cannot be evaded without endangering all constitutional rights, including the freedom of the press." The same court in the case of State v. Bee Publishing Company, 60 Neb. 282, 296, 83 N.W. 204, 206, 50 L.R.A. 195, 83 Am.St. Rep. 531, expressed itself as follows: "Courts are charged with the function of administering justice, and it is their duty not only to give to every suitor his demandable right, but to give him assurance that no banned and hostile influence shall operate against him while his cause is under consideration. A litigant is entitled not only to a just decision, but to a decision altogether free from the suspicion of having been coerced. Nothing else will satisfy him; nothing less can fill the measure of his expectations. He has no standard with which to gauge judicial firmness; and if the court had been exposed to influences calculated, as in the Kennedy Case [State ex rel. Smyth v. Kennedy, 60 Neb. 300, 83 N.W. 87], to tell against him, he will not know whether an adverse decision is the voice of the law or an echo of the mob."

In Tate v. State, 132 Tenn. 131, at page 139, 177 S.W. 69, at page 70, the supreme court of Tennessee states the rule in the following terms: "The liberty of the press is not a more sacred right than the right to a fair and impartial trial, which the Constitution guarantees to all litigants. If the newspapers are permitted at will to comment on pending cases and to bring to the attention of the jurors sensational rumors and matters which cannot properly be considered in the determination of the issues before them, there can be no such trial. That such publications can be made with impunity is not asserted in any jurisdiction, so far as we know. The courts must be empowered to keep jurors from improper influence pending their deliberations."

The United States Circuit Court of Appeals of the Ninth Circuit in Re Independent Publishing Company, 240 F. 849, 862, states the law as follows: "Liberty of the press is subordinate to the independence of the judiciary, and it is not expedient that any class in the community should be privileged to interfere with the rights of litigants or to embarrass or obstruct the administration of justice."

[13] It is useless to further extend the citation of authorities upon this subject. The above are sufficient to show, we think, conclusively that the constitutional right of freedom of the press does not protect petitioners in the publication of the editorials contained in counts 1, 3 and 5 respectively of the affidavit filed in the first of the two proceedings now before us. On the other hand, the law as expressed by the overwhelming weight of authority establishes that petitioners were not justified in the publications of said editorials concerning pending actions and that the order adjudging petitioners guilty of contempt of court as set forth therein should be affirmed.

Our attention has been called to the very recent cases of Schneider v. State of New Jersey, and others, decided, November 22, 1939, and reported in 60 S.Ct. 146, 84 L.Ed. ——. These cases all involve ordinances of certain cities prohibiting the distribution of handbills within the municipality. It was held that these various ordinances were an infringement upon the constitutional guaranty of freedom of speech and the press. We are unable to discern any applicability of these cases to the case now before us. The principal claim in support of the constitutionality of these ordinances was that the circulation of handbills tendered to litter up the streets of the city and render them unsightly and offensive, and the purpose of the ordinances was to keep the streets clean from the litter and refuse resulting from the indiscriminate distribution of the handbills. The court held that there were other methods of preventing such littering of the streets, among which the court suggested was the punishment of those who actually throw papers on the street. Furthermore, the court held that the additional burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution was insufficient to justify the enactment of an ordinance which would infringe upon the constitutional guaranty of freedom of speech. In those cases the only detriment which might result from the distribution of handbills was the possible additional cost to the city in the cleaning of its streets. In the present case the detriment caused by the publication of said editorials was the probable denial of a fair trial to the litigants in the actions then pending before the courts which were the subject of said editorials. It appears to us that the inapplicability of those cases to the instant case is obvious.

[14] The two editorials which formed the basis of the contempt proceedings and the subsequent conviction of certain of the petitioners as set forth in the record of the second of the two proceedings now before us were published on June 5th and 7th respectively in the Los Angeles Times following the institution of the first of these two proceedings on June 3, 1938. The accusatory affidavit in the first of said proceedings was filed in the Superior Court of the county of Los Angeles on the 3rd day of June, 1938, and on the same day said court issued an order requiring the respondents in said proceedings to appear on the 23d day of June, 1938, to show cause why they should not be adjudged guilty of contempt of court. The editorials in question were therefore published while the first of these two proceedings was pending in said court. The editorials are lengthy and for that reason are not set forth herein. The first of the two editorials was mainly devoted to a résumé of the five cases commented upon in the previously published editorials. These five cases at that time had reached a point of finality and were therefore subject to proper comment by any citizens. The second of the editorials consisted largely of a defense of the right of free speech and the freedom of the press. Each editorial referred to the pending contempt proceeding against petitioners and criticized the committee of the bar association for instituting said proceedings. The trial court in referring to the cases of In re Lindsley, 75 Cal.App. 122, 241 P. 934, characterized the editorials involved in that case as "vitriolic and vituperative" and added "while here they cannot be so classed". The editorials were temperate and considerate and were free of any abusive or immoderate language. In fact, the trial court stated that the editorials constituted "an argument that might have been used upon the trial". In view of the authorities hereinbefore cited respecting the character of the publications which subject their authors to pun-

ishment for contempt of court, we are unable to hold that either of the two editorials published on June 5th and June 7th, respectively, came within that class.

It is therefore ordered that the judgment of the trial court in case L. A. No. 16928 be and the same is hereby affirmed, and that the judgment in case L. A. No. 16929 be and the same is hereby reversed.

We concur: WASTE, C. J.; SHENK, J.; CARTER, J.; PULLEN, Justice pro tem.

EDMONDS, Justice (dissenting).

In the case of Bridges v. Superior Court, Cal.Sup., 94 P.2d 983, I stated at length the reasons for my opinion that section 1209 of the Code of Civil Procedure is constitutional and should be upheld. This statute, which was adopted almost fifty years ago and within a few months after a newspaper editor had been found guilty of contempt of court, declares the public policy of the people of this state in regard to publications relating to a judge which are not made in the immediate presence of a court while in session and in such manner as to actually interfere with judicial proceedings.

Whether persons should be allowed to write or speak about a court or judge under the conditions mentioned in the statute, without being subject to prosecution for contempt of court in summary proceedings, is a question upon which there will always be great difference of opinion. But it is not the province of a court to determine the policy which is most conducive to human welfare and governmental stability. That is the legislative function, and the judicial department may only determine whether the determination of the legislature violates a constitutional guarantee.

In my judgment, the opinions of this court in former cases where the statute was in question were written with more concern for upholding the inherent power of courts than for the constitutional guarantees of free speech and a free press. Yet the experience of New York and Pennsylvania, where laws similar to that of California have been in effect for over one hundred years, show that neither the existence of nor respect for courts has been seriously challenged by taking from judicial officers the uncontrolled right to pass upon alleged constructive contempts of court. Judicial necessity based upon the claim of inherent power is neither reason nor authority for setting aside a statute which expresses the policy of the people of this state concerning acts which might otherwise be punishable as constructive contempts.

For these reasons I believe that each of the judgments should be reversed.

GIBSON, Justice (dissenting).

I dissent. The law as laid down in the Bridges case is controlling in this jurisdiction on the power of a court to punish summarily for constructive contempt. But, as I did not participate in the Bridges case, and the question is before me for the first time, it seems appropriate to express my views thereon. I disagree with the conclusion reached in the Bridges case and in the majority opinion herein, and I concur in the views of Justice EDMONDS, dissenting in each case.

The rules laid down in these cases do not give adequate recognition to or protection for the constitutional right of free speech, and press, but instead sacrifice that fundamental right for a need which is fancied rather than real. The integrity and independence of the court is not the only matter to be considered. There is the equally important and equally fundamental need of fearless comment on all activities affecting the public welfare, including the operations of the courts. To preserve one basic right at the expense of another is a doubtful gain. And, as very clearly appears from this and other proceedings, the two rights frequently come into conflict. When this happens, each must give way in some degree in order that a proper balance may be maintained, and both preserved. A court is usually most concerned with the immediate problem of safeguarding itself from outside influences during a pending proceeding; but in invoking drastic measures toward that end, it may do irreparable damage to the other fundamental right.

The assumption that to permit legislative regulation of the asserted inherent power of a court to punish summarily for constructive contempt would ultimately lead to its destruction, is without foundation.

There is doubtless some justification for this fear where direct contempts, those which actually interrupt the court proceedings, are involved; but constructive contempts do not demand the same prompt and summary action. Their effect is indirect and not immediately felt; their punishment can likewise be delayed without injury to the court's prestige or procedure. If the courts should actually be subjected to intimidation or other improper influences by persons immune from any punishment or restraint under the statute law, then the court could doubtless assert its power as an arm of the government in its own behalf. But no such situation has arisen either here or elsewhere, and I doubt whether it ever could arise in normal times. However desirable it might seem from the viewpoint of the court to have this power, it is not in fact necessary to enable it to function and it is both safe and consistent with democratic principles to leave the matter within the control of the legislature.

The experience of those few states which have acquiesced in the legislative regulation of the court's power to punish for constructive contempt is ample proof of the fact that the courts function just as well and safely under such regulation as they do where they are entirely free from it. We have seen no signs and have heard no charges of disrespect or impaired efficiency with regard to the courts of Pennsylvania, Kentucky, New York or South Carolina, where the inherent power doctrine is not followed. In our own state an example of peculiar inconsistency is found in the rule on disqualification of judges. If, as the majority opinion holds, the inherent power of the courts makes them immune from legislative interference, no regulation which limits that power can be valid. But we have upheld legislation which permits the challenge of a judge for bias or other disqualification in proceedings for constructive contempt. See, Briggs v. Superior Court, 211 Cal. 619, 297 P. 3.

There is a growing belief among thoughtful students of this problem that the solution is to eliminate summary punishment and make the offense subject to the usual rules of criminal trial. The court's integrity may be protected in the same manner as other rights of person and property and other institutions of government are protected. This is indeed, as Justice EDMONDS shows, the historically correct position; the venture into summary punishment has been demonstrated to be both bad history and bad law. Today the security of the state and all of its departments, officers, and branches, except the judiciary, is protected from improper influences only by the general statute law enforceable by trial of the offender in the courts before a jury. We would, I am sure, be amazed at the suggestion that any other officer or body of government, executive or legislative, be given this potent power; yet to the intelligent observer who is not a judge of a court, the spectacle of a judicial officer acting as prosecutor and judge, and meting out punishment besides, must seem equally amazing. The same observer might further reflect on the fact that matters having a purely hypothetical tendency to interfere with a judicial proceeding are conceived to require a more drastic system of suppression and punishment than overt acts of treason or rebellion striking at the very foundation of the government. In time we shall, I believe be brought to the conclusion that the normal course of trial is adequate and proper, and that either by a change in judicial viewpoint or by a constitutional amendment the legislative control will be recognized. See, comments, 48 Yale L. J. 54; 7 Geo.Wash.L. Rev. 234, 241.

But this point is for the present settled by the Bridges case, and must be accepted as the basis of decision in the instant case. Conceding the power, therefore, a problem of equal importance and perhaps greater difficulty arises in defining its scope. The test adopted by the majority opinion is the tendency of the publication to influence the proceeding. Under this test the inquiry is not as to what happened, but as to what might have happened. It is the supposed tendency of the publication to affect and not its actual effect which is involved. It is not the trial judge himself, but an hypothetical judge with whom the test is concerned. Denial by the accused of any intention to influence is futile, since the tendency alone is considered. Denial by the judge that he was in fact influenced is likewise no defense, and indeed is not even relevant. It is not material to inquire whether the publication was seen or read by the judge or jury, since this would throw light only upon its actual effect.

This test is so vague and elastic, varying with the viewpoint of the individual judge who cites the offender, that it necessarily places an unreasonable restraint upon free speech and press. In the first place, the establishment of so loose a rule provides a temptation for the judge to invoke the power over contempt as a means of prohibiting political or personal attacks upon him or his views. We are all well aware of the constantly broadening scope of the judiciary as an interpreter of constitutional and statutory policies in the field of government, and there is grave danger in permitting a court to ward off criticisms directed at its policies, under the guise of protecting a particular court proceeding from improper influences. As Mr. Chief Justice Taft said, concurring in Craig v. Hecht, 263 U.S. 255, 279, 44 S.Ct. 103, 107, 68 L.Ed. 293: "* * * the delicacy there is in the judge's deciding whether an attack upon his own judicial action is mere criticism or real obstruction, and the possibility that impulse may incline his view to personal vindication are manifest".

In the second place the test permits the placing of restraints on speech and press as varied as the sensitivities of a particular judge. The present case furnishes us an excellent example of the confusion thus engendered. The Los Angeles Bar Association Committee, the trial judge and this court do not agree on the character of certain of the publications. The necessary result of such differences of opinion is to cause critics and commentators to limit or entirely forego their public function rather than to risk the uncertainties of contempt charges by temperamental judges.

In sharp contrast is the view of a few courts and nearly all of the writers that the publication should not be considered contemptuous unless it actually interferes with the orderly administration of justice. Under this test no remote possibility or tendency toward obstruction is sufficient. Nor is the effect of the publication on a weak judge or a purely hypothetical judge the controlling factor. The judge is assumed to be possessed of a character commensurate with his position, and able to withstand the incidental effects of free public discussion of issues involved in a judicial proceeding. This attitude is well stated in Mr. Justice Holmes' dissenting opinion in Toledo Newspaper Company v. United States, 247 U.S. 402, 38 S.Ct. 560, 62 L.Ed. 1186. And in the leading case of State v. American-News Company, 64 S.D. 385, 266 N.W. 827, 833, the court said: "We believe that any publication, to be punishable as contempt, should be embarrassing or obstructive to the administration of justice in a pending case, and obstructive in fact rather than in theory or by possibility. * * * We think the courts should reserve the use of the weapon of contempt for such publications as can fairly and reasonably be said likely in point of actual fact to intimidate, influence, impede, embarrass, or obstruct the court in the due administration of justice in an actually pending matter. And we entertain the opinion that if error is made in either direction in determining that question, it is better and wiser to err in favor of absolute and unrestricted freedom of speech rather than in the other direction."

It seems to me that if we are to accept the doctrine of summary punishment for constructive contempt, the extraordinary power thus created and applied in defiance of the legislative will should be used sparingly and cautiously. We should not ignore the growing suspicion that courts are prone to place their own security above all other considerations. We should recognize the importance, indeed, the vital necessity of the fullest comment and criticism in matters of public interest, and not seek to exempt the courts from such criticism. The course of reform in the judicial field itself depends in part upon a free and vigorous press which should not hesitate to condemn where it finds the actions of the court subject to condemnation, and the editorial page cannot be confined to abstract academic discussion of non-controversial matters or of issues long dead. In short, we must look frankly at the realities; we must remember that many factors consciously or unconsciously influence judges, and that some are accepted as normal or unavoidable. We should apply the summary power, if at all, only to those publications which appear to ordinary persons intended and calculated to work an unmistakable and unjustifiable influence upon a particular case.

In reading over the editorials adjudged contemptuous in the present proceedings, it is difficult to perceive the manner in which they were found to constitute an improper interference with the administration of justice. Not one of them appeared until the verdict of the jury had been rendered after the conclusion of the trial. It was not proved that they were intended to exercise a prejudicial influence on the judge, nor that he saw or read them. The asserted contempt is derived entirely from the supposed tendency of the language used. We should expect, therefore, to find in them some formidable threat or intimidation, or at least some demands on the judge for specific action, coupled with suggestions of reprisal if the demands go unheeded. But these writings are not of this character.

The first editorial "Sit-Strikers Convicted" commends the conviction of certain persons as a victory for law and order and expresses pride in the functioning of local courts and juries. It refers to a radio address made by the district attorney and quotes a statement made by him congratulating the jury on one of the "most far reaching verdicts in the history of this country". There is certainly nothing in this editorial which should influence any judge in the performance of his duty.

The second editorial "The Fall of an Ex-Queen" is a brief and penetrating commentary on the political activities of Helen M. Werner. The subject of the editorial is used as an object lesson and the principal thought expressed therein is that political bosses rise and fall with changing times. I cannot find anything in this editorial which can be said to have even a remote tendency to obstruct the administration of justice or to influence or embarrass any judge.

The third editorial is entitled "Probation for Gorillas?" It is a denunciation of certain defendants found guilty of deadly assaults in connection with a labor dispute. It abounds with such scathing terms as "wrecking crew", "sluggers for pay" and "thugs"; it urges that an example be made of them, and adds: "Judge A. A. Scott will make a serious mistake if he grants probation" to these men. Now this is strong language, and the statement just quoted was ill advised and unfortunate, but it does not necessarily follow that it was contemptuous. The publisher's affidavit calls attention to the familiar fact that in probation proceedings outside opinions and recommendations are invited. It is further pointed out that a former Presiding Judge of the superior court advised the Times that a criticism of a certain probation order published after it was granted, should have been made while the matter was pending. It appears that the Times has blundered in following the example of a district attorney, and in taking the suggestion of a superior court judge, with reference to the propriety of commenting on judicial proceedings.

Consider, however, the character of the case, and the circumstances surrounding it. This was no everyday affair, but one in which the public interest was aroused, and the events were widely discussed in the community. The views expressed by the Times were those held and freely expressed by many others. The attitude of the Times is made abundantly clear, and its bitter feeling toward certain labor leaders colors its opinions, but what of that? The Times is not on trial for its opinions; its readers will judge those for themselves. The Times is charged with obstructing justice and interfering with a pending judicial proceeding, and there is no evidence whatever of such obstruction or interference. The case had been tried, and verdict rendered; the jury was gone, and matters of sentence and probation were before the judge alone. In deciding these matters the judge has few, if any, definite rules to guide him; he is influenced by countless experiences and observations, as well as by the total sum of impressions received from public and private comment on similar problems throughout his judicial life. In this group of impressions the present editorial, if actually seen and read, could hardly be said to occupy such a dominant place as to be obstructive or embarrassing.

And what if the judge was, in fact, aware of the views expressed in the third editorial; can it be said he was being informed for the first time of the position of the Times in cases of this character? Could there be any possible doubt in the mind of any informed resident of Los Angeles on the attitude of the Times in regard to the use of violence in labor disputes? The position maintained by the Times over many years on these matters is clearly established by the record. Its Los Angeles readers would find nothing unusual in the editorial; a judge who felt that it was obstructive or embarrassing would have to confess ignorance of one of the most familiar facts of the daily life of his community.

If the power over contempt is to be fairly and reasonably applied, two essential limitations on the test of constructive contempt must be recognized. First, it should be applied only to those publications of an unusual and abnormal character, those which to a layman are obviously improper and dangerous, because vindictive, threatening or inciting to violence. It should be inapplicable to comments of the usual, normal and expected type which the ordinary intelligent layman constantly meets with in the public press, the radio and informal discussion. Second, it should be applied only where it clearly appears that the publication was intended to reach the particular judge and was seen and read by him; and then only where it was of such a nature as to influence improperly a judge of ordinary firmness. We should assume that judges specially chosen for their important positions are capable of maintaining an impartiality and independence where others might weaken; we should realize that a judge of ordinary firmness should be a person of exceptional independence and integrity, immune from all but extraordinary influences.

Finally, in determining whether there is a tendency to obstruct justice, we should give due consideration to the stage of the case at which the publication occurs. When a period of relative finality is reached, as by the rendition of a jury's verdict, the dangers of outside influence have been reduced to a minimum, and comment thereafter should be freely permitted. At this stage, the newspapers must fulfil their proper function of criticism, and if they fail to comment when a matter is timely, they will be ignored when their belated observations are eventually made. To say that a case is pending until its final adjudication is to state a legal platitude in place of a practical doctrine. If the case is beyond the reach of discussion even after a jury's verdict, and until the final conclusion of proceedings for probation, new trial and appeal, there can never be anything of value in public discussion of such matters. In truth, both from the point of view of the law and practice, no such theory is followed. There are but few cases which hold that comment after a jury's verdict and before sentence or judgment on appeal is contemptuous. See 48 Yale L.J. 54, 61.

Viewed in retrospect, these contempt charges were a regrettable mistake. No evidence of actual interference with any legal proceeding was produced. Nothing in the editorials was intended or calculated to thwart the rendition of impartial justice in the matters then before the court. No judge seems to have felt the pressure of improper influences. No disturbance of judicial calm occurred until after the accusations were filed.

All this is indicative of the lengths to which imagination may go in building groundless fears and in imputing potent and obstructive purposes foreign to the intent of the writer. I think that by our decision in this and the Bridges case we have sacrificed a substantial part of our cherished freedom of speech and press in order to stamp out an evil that does not exist.

The judgments should be reversed.

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37 Cal.App.2d 215

PEOPLE v. PARCHEN et al.

Cr. 446.

District Court of Appeal, Fourth District. California.

Feb. 7, 1940.

1. Criminal law 🔑558

Where defendant saw fit to remain off witness stand and allowed testimony of state to go unchallenged, jury was justified in giving fullest significance to unchallenged admissions.

2. Criminal law 🔑741(1), 742(1)

All matters going to credibility of witnesses and to weight of their testimony, as well as all questions of conflicting evidence, are to be left to determination of jury.

3. Criminal law 🔑552(3), 560

The law makes no distinction in degree of proof required in either direct or circumstantial evidence, but requires that, regardless of whether evidence is direct or circumstantial or a combination of both, it must be sufficient to establish guilt of defendant beyond reasonable doubt.

4. Criminal law 🔑1159(2, 6)

On appeal, findings of jury on disputable questions of fact, whether supported by direct or circumstantial evidence or both, must be given full faith and credit, and it is only where, as a matter of law, there is no legal evidence supporting the charge, that a reviewing court may disturb the verdict.

5. Criminal law 🔑1144(13)

On appeal, reviewing court must assume in favor of verdict the existence of every fact which jury could reasonably have deduced from evidence, and then determine whether guilt of defendant is deducible therefrom, and, where it is claimed that evidence is insufficient to support verdict and evidence is entirely circumstantial, the question for reviewing court to pass upon is whether there were facts before jury to justify inference of guilt.

6. Abortion 🔑11
Homicide 🔑254

Evidence was sufficient to show that defendant either directly committed abortion on 16-year-old girl which resulted in her death, or aided and abetted in its commission, so as to support conviction of abortion and of murder in second degree. Pen.Code, § 971.

7. Criminal law 🔑806(1)

When jury are fully and fairly instructed upon a subject, it is not error for trial court to refuse defendant's proposed instructions which are mere repetitions.

8. Criminal law 🔑834(2)

A defendant is not entitled to have his own particular phrasing of law adopted by trial court or given to jury, but it is sufficient if substance of law applicable to case is set forth by court correctly in its instructions.

9. Criminal law 🔑806(1)

In prosecution for abortion and for murder in second degree, where trial court properly defined an accessory after the fact and instructed that defendant could not be found guilty if found to be an accessory after the fact, requested instruction dealing with recognized distinction between an accessory before the fact and an accessory after the fact, which elaborately restated rule as defendant would have it apply to him, was properly refused as repetitious.

10. Criminal law 🔑806(1)

In prosecution for abortion and for murder in second degree, where trial court instructed that unless jury found defendant guilty as a principal, as such term had been defined in instruction, it was jury's duty to return verdict of not guilty, requested instruction pertaining to subject of criminal liability of a principal for acts of his agent, was properly refused as repetitious.

◆

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

George H. Parchen and Frank Parchen were convicted of abortion and of murder in the second degree, and George H. Parchen alone appeals.

Affirmed.

Edgar G. Langford, of San Diego, for appellant.

Earl Warren, Atty. Gen., and Alberta Belford, Deputy Atty. Gen. for respondent.

GRIFFIN, Justice.

Defendant and appellant George H. Parchen was charged jointly with his brother Frank Parchen under an indictment returned by the Grand Jury in San Diego county. They were tried before a jury, found guilty and convicted of the crime of abortion under the first count of the indictment, and with the crime of murder in the second degree in the second count of the indictment. From this judgment of conviction and from the order denying a motion for a new trial the defendant George H. Parchen appeals. The evidence against the defendant Frank Parchen was most conclusive and he has taken no appeal.

The main issue presented on this appeal is whether there is sufficient evidence in the record to connect appellant George H. Parchen with the crimes charged. Appellant maintained offices in a residence building on the street floor at No. 819 B street in the city of San Diego. He furnished all the necessary equipment and implements necessary to carry on his business and profession as a chiropractor. Several separate large signs were attached to the front of the building reading "G. H. Parchen, D. C., Chiropractor". The appellant conducted these offices for several months prior to May 1939. "Courtesy cards" were apparently distributed to the public, reading in part: "This card entitles you or any member of your family to a free physical examination and spinal analysis if presented before———. George H. Parchen, Chiropractor, 3870-44th street, or 819 B street."

It appears that Frank M. Parchen, the brother of appellant, lacked about six months having his license to practice chiropractic in the state of California. He was occupying the offices with appellant on May 3, 1939. On that date Martha Wilma Anderson, aged 16, who was the wife of William P. Anderson, but who was pregnant by one William B. Bouldin, accompanied by Mrs. J. R. Scott, Bouldin and C. D. Radcliff, went by automobile to the premises above described. Upon arriving, Martha W. Anderson and Mrs. Scott went into the building. Bouldin and Radcliff remained outside in the automobile. Upon entering the building, Martha asked for Frank Parchen, talked with him about an abortion, which he agreed to perform for her, and paid him $50.00 in bills. It was stipulated by counsel for the prosecution and the defense that George H. Parchen was not present when Martha Anderson conversed with Frank Parchen on May 3, 1939. Mrs. Scott left Martha Anderson and Frank Parchen in a small room and she waited in the reception room for about an hour. After Martha came out of the small room, Frank Parchen handed Mrs. Scott a bottle of medicine, at the same time telling her to give Martha Anderson some of the medicine every two hours and that she would suffer some pain. Frank Parchen gave Mrs. Scott one of the "courtesy cards" above described and told her to call him if Martha "got very sick", and told them that he had administered some medicine that would bring about a miscarriage. Martha Anderson spent the night of May 3rd at Mrs. Scott's home. She suffered pains throughout the night and Frank Parchen came to the home to see her on the evening of May 4th. On May 5th, at about 10 o'clock a. m., Mrs. Scott took Martha to Parchen's office. Martha and Frank Parchen went down the hall and Mrs. Scott remained in the reception room. At 2 o'clock p. m. Martha returned to the reception room, very pale, and she could hardly talk. Blood stains were in evidence on her person. Frank Parchen was called to the reception room. The three returned to a small office in the rear of the building. Martha was hemorrhaging and Frank Parchen attempted to stop the hemorrhage with packing. George H. Parchen, appellant, dressed in a business suit, at this time entered the office to which the three had retired, looked at Martha, and then said to Frank Parchen that "he (Frank) had no * * * business taking a case like that", and asked Frank Parchen what he had done for her. Frank Parchen and George H. Parchen cooperated in giving Martha some treatments and artificial respiration, but she died between 5 and 5:30 o'clock p. m. George H. Parchen removed the packing. Thereafter, the matter of the disposition of her body was discussed by George H. Parchen, Frank Parchen, and Mrs. Scott, Bouldin and Radcliff. Bouldin's people lived in Texas. George H. Parchen said that it would be a good idea if the body could be sent there, and that he would sign the death certificate, in order to keep down as much trouble as possible. Frank Parchen said he was willing to pay $100 toward expenses. George H. Parchen offered to see an undertaker and told Mrs. Scott that if there was any trouble, she should say that Martha Anderson had fallen off a high step and had a miscarriage; that she had gone to Frank Parchen's office two or three times for adjustments to her back and that she had started hemorrhaging at Mrs. Scott's home and had gone down to Frank Parchen's office for him to stop the hemorrhage but he was unable to do so. Mrs. Scott drove with George H. Parchen to Kent's funeral parlor at 44th and University avenue, San Diego. On the way to the funeral parlor George H. Parchen told Mrs. Scott that "if this got out, they would all take a rap and cause a lot of trouble, and if we wouldn't talk, they wouldn't talk, and that he would sign the death certificate and they would take care of * * * he and his brother would take care of the expenses for the casket and tickets". Upon arrival at the undertaking parlor George H. Parchen introduced himself to Mr. Ewing, the undertaker, and talked to him about shipping Martha Anderson's body. George H. Parchen told Mr. Ewing that he had had an accident at the office and that he wanted to see about getting a casket and arranging for the shipment of the body out of the state. The money was furnished by the Parchens and the body was shipped to Texas and buried. On May 5, 1939, George H. Parchen told the undertaker that Martha Anderson "had pneumonia and the flu, and all of a sudden her heart had just went back on her". He (Ewing) asked Parchen if the patient had died suddenly or whether he had been in attendance for any length of time to which George H. Parchen replied that he had been attending her for five days and that he would sign the death certificate for Martha, which he did. The death certificate reflects the following information: "Full name—Martha *Bouldwin.* * * *" "The principal cause of death and related causes of importance in order of onset, were as follows: cardiac failure. Other contributory causes of importance: pneumonia, lobar—May 1st, 1939. Incidental flu May 1st, 1939. Name laboratory test confirming diagnosis —none. Signature H. G. Parchen, D. C. Address 3870 44th Street."

Bouldin testified that on the way to the undertaking parlor George H. Parchen stated, "he said it was just one in a million that happened like that. He said that he had not been doing any operating for the past six months. He said that the Navy doctors had been hot behind him and he had quit and that *Frank had been taking care of it for him*". (Italics ours.) "He further said 'if this gets out, we will go over and I will have to take the rap'."

Mr. Ewing, the undertaker, testified that he did not notice any indication of pneumonia in Martha Anderson's body. Dr. Toomey, who examined the body which had been exhumed in Texas, testified that the death of Martha Anderson was due to severance of the cervical arteries and veins resulting from the performance of an abortion upon her.

The defendant Frank Parchen took the witness stand and testified that he was not present at 819 B street on the afternoon of May 3rd and did not converse with Martha Anderson or any of the parties above mentioned, and that the first time he ever saw Martha was on May 5th, when he arrived at the premises above described and found her dead; that George H. Parchen and the above-mentioned parties were in the room where the body was lying; that he had been out collecting bills for his brother George H. Parchen; that on occasions he aided his brother in treating his patients; that he received no money from Martha at any time and that he never treated her professionally on any occasion; that the only reason he gave money to the undertaker was to help George H. Parchen out.

The witness Bouldin testified that defendant Frank Parchen "said he shouldn't ever have taken the case, she was too far gone, and he said that he started the operation and realized he should not have started it, but said that George finished it up". This conversation was denied by Frank Parchen.

Frank Parchen departed from San Diego on May 16, 1939, with his wife and family and was apprehended in Oregon. He further testified that when he came to San Diego from Georgia in November, 1938, he was only on a visit and remained in San Diego to help his brother George H. Parchen in "doing adjustments at this office at 819 B street".

Appellant George Parchen did not take the witness stand to testify. The statements claimed to have been made by him stand uncontradicted in the record.

It is appellant's contention that the evidence is not sufficient to justify the conviction of appellant on the theory that he aided and abetted Frank Parchen in the commission of the offenses charged; that the evidence, taken in its most favorable light, would only establish the fact that the appellant George H. Parchen was an accessory after the fact and should have been charged as such.

After a careful review of the testimony, consisting of over 1200 pages, taken at the trial, we can say at the outset, that had the appellant been charged as an accessory after the fact, the evidence would have fully justified a conviction, but that is not the question before us. We must therefore determine whether there was sufficient evidence, direct or circumstantial, from which the jury could have properly determined that the appellant either directly committed the acts complained of or aided and abetted in their commission. Sec. 971, Penal Code. We must consider the fact that the appellant had been carrying on his profession at the location above described. Apparently all of the equipment was furnished by or belonged to appellant. There was no indication from the signs on the building that any person was operating therein as a chiropractor other than appellant. He was the only person held out as authorized to treat the sick and afflicted at that place of business. The offices were so arranged that passage through doors from one room to the other was possible without the knowledge of persons seated in the reception hall.

The district attorney forcefully argued that the jury would be justified in concluding from the evidence that both defendants Frank Parchen and George H. Parchen could have been present and assisted in procuring the abortion between the hours of 10 a. m. and 2 p. m. on May 5th. It was further argued that appellant having signed the death certificate, in which he stated that he had "attended deceased from May 1st, 1939, to May 5th, 1939", and having stated to the undertaker that "he had been attending her for five days", tended to indicate his prior knowledge of her condition and of the treatment given.

It was further argued that the statement accredited to appellant as having been made to the witness William Bouldin that "the Navy doctors had been hot behind him and he had quit and that *Frank had been taking care of it for him*" (italics ours), established knowledge on the part of appellant that Frank Parchen was so engaged in unlawfully performing such abortions and accordingly it could be properly said that appellant, even though not present, aided and abetted in the commission of the crime. Sec. 971, Penal Code.

[1, 2] Appellant saw fit to remain off the witness stand and allowed this testimony to go unchallenged. Under the circumstances of this case, we are impelled to the conclusion that the jury was justified in giving the fullest significance to the unchallenged admissions. The appellant's conduct and actions in endeavoring to dis-

pose of the body tended to establish his guilty knowledge of the crimes charged. The familiar rule that all matters going to the credibility of the witnesses and to the weight of their testimony, as well as all questions of conflicting evidence, are to be left to the determination of the jury, applies. People v. Hickok, 28 Cal.App.2d 574, 83 P.2d 39.

[3-6] We must therefore conclude that, although the evidence against appellant is not as conclusive as that against his co-defendant, the record is not devoid of substantial evidence, either circumstantial or direct, tending to connect appellant with the commission of the crimes charged as a principal. It is true that the law makes no distinction in the degree of proof required in either direct or circumstantial evidence, but requires that regardless of whether the evidence be direct or circumstantial or a combination of both, it must be sufficient to establish the guilt of defendant beyond a reasonable doubt, but on appeal, the findings of a jury on disputable questions of fact, whether supported by direct or circumstantial evidence or both, must be given full faith and credit, and it is only where, as a matter of law, there is no legal evidence supporting the charge that a reviewing court may disturb the verdict. On an appeal in a criminal case, the court must assume in favor of the verdict the existence of every fact which the jury could reasonably have deduced from the evidence, and then determine whether the guilt of the defendant is deducible therefrom; and where it is claimed that the evidence is insufficient to support the verdict and the evidence is entirely circumstantial, the question for the court to pass upon is whether there were facts before the jury to justify the inference of guilt. Tested by this rule we believe the evidence sufficient to support the verdict of the jury. People v. Leo Ekstrand, Jr., 28 Cal.App.2d 1, 81 P.2d 1045. See also, People v. Hickok, supra; People v. Collins, 4 Cal.App.2d 86, 40 P.2d 542; People v. Thompson, 16 Cal.App. 748, 117 P. 1033; People v. Looney, 9 Cal.App.2d 335, 49 P.2d 889; People v. Yant, 26 Cal.App.2d 725, 80 P.2d 506; People v. Baker, 25 Cal.App.2d 1, 76 P.2d 111.

Appellant next complains of the refusal of the trial court to give, on the ground that they were already covered in other instructions two of his proposed instructions. The first refused instruction deals with the recognized distinction between an accessory before the fact and an accessory after the fact, and elaborately restates the rule as he would have it apply to appellant. A similar instruction was proffered and likewise refused pertaining to the subject of the criminal liability of a principal for acts of his agent, which recites the rule to be that "before one may be convicted of a crime by reason of the acts of his agent, it must be clearly established by the evidence that he knowingly and intentionally aided, advised, or encouraged the commission of the crime committed by the agent * * *", and in support thereof cites People v. Doble, 203 Cal. 510, 515, 265 P. 184; People v. Gassaway, 28 Cal. 404. He contends that the court failed to instruct on this subject.

The record discloses that, prior to argument of counsel to the jury, the court gave the following instruction bearing on the questions presented:

(1) "You are further instructed that every person who, *after a felony has been committed,* harbors, conceals or aids a principal in such felony with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed said felony, or has been charged with said felony, or convicted thereof, is an accessory to said felony." (Italics ours.)

(2) "You are further instructed that if you find and believe from the evidence and beyond a reasonable doubt *that the defendant George H. Parchen was an accessory after the fact, as hereinbefore defined,* to the offense of abortion and at the same time from the evidence, you do not find the said defendant George H. Parchen guilty as a principal, as that term has hereinbefore been defined, of the offense of abortion, *then and in that event it is your duty to return a verdict of not guilty as to the defendant George H. Parchen.* * * *" (Italics ours.)

[7-10] A similar instruction was given pertaining to the offense of murder.

When the jury are fully and fairly instructed upon a subject it is not error for the trial court to refuse defendant's proposed instructions which are mere repetitions. The court is not required to state the law to the jury more than once, but may, as a general rule, refuse requested instructions which are fully covered by other instructions. A defendant in any given case is not entitled to have his own particular phrasing of the law adopted by the court or given to the jury. It is sufficient if the substance of the law applicable to his case is set forth by the court correctly in its instructions. People v. MacDonald, 24 Cal.App.2d 702, 76 P.2d 121. In addition to the giving of the above-mentioned instructions the district attorney in his argument emphasized the correct effect of those instructions. The jury was fully and fairly instructed that unless George H. Parchen could be convicted as a principal, he should be found not guilty. We think the instructions requested were repetitious and that their rejection by the trial court was proper and that the appellant herein had a fair and impartial trial; that he was convicted on competent and sufficient evidence, and that the judgment appealed from should be affirmed.

The judgment and order from which this appeal has been perfected are and each of them is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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37 Cal.App.2d 188

REEVES et al. v. PARAMOUNT PRODUCTIONS, Inc., et al.

Civ. 12546.

District Court of Appeal, Second District, Division 2, California.

Feb. 7, 1940.

Appeal and error 🔑627(2)

A motion to dismiss appeal would be granted where judgment of nonsuit was entered and notice thereof served on February 17, 1939, and plaintiffs filed notice of appeal on March 30, 1939, and motion to terminate proceedings for preparation of transcript on appeal was filed in the superior court on November 1, 1939, and granted on November 8, 1939, and neither reporter's nor clerk's transcript or engrossed bill of exceptions had been filed in superior court or District Court of Appeal. Rules for Supreme Court and District Courts of Appeal, rule 1, § 1.

Appeal from Superior Court, Los Angeles County.

Action by James Robert Reeves and others, by their guardian ad litem, Margaret I. Reeves, and another, against Paramount Productions, Inc., and others. From the judgment, the plaintiffs appeal.

Appeal dismissed.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., S. B. Robinson, Chief Asst. City Atty., and Kenneth K. Scott, and Everard L. McMurrin, Deputy City Attys., all of Los Angeles, for respondents City of Los Angeles and Department of Water and Power of City of Los Angeles.

Joe Crider, Jr., of Los Angeles, for respondent Paramount Productions, Inc.

McCOMB, Justice.

This is a motion by respondents City of Los Angeles and Department of Water and Power of the City of Los Angeles to dismiss the appeal upon the ground that appellants have failed to prepare or file a transcript or engrossed bill of exceptions within the time prescribed by rule I, section 1 of the Rules for the Supreme Court and District Courts of Appeal, 213 Cal. xxxv.

The conceded facts are:

February 17, 1939, a judgment of nonsuit was entered againt appellants and notice thereof served upon them; March 30, 1939, appellants filed a notice of appeal from said judgment; November 1, 1939, a motion to terminate the proceedings for the preparation of a transcript on appeal was served and filed in the superior court; and on November 8, 1939, the motion was granted.

A certificate of the clerk of the superior court has been filed here substantiating the foregoing facts and reciting that neither a reporter's nor clerk's transcript nor an engrossed bill of exceptions has been filed in the superior court. The records of this court show that no one of such documents has been filed here. Therefore the motion to dismiss the appeal must be granted. Martin v. Huntzinger, 13 Cal.App.2d 87, 56 P.2d 279.

The appeal is dismissed.

We concur: MOORE, P. J.; WOOD, J.

37 Cal.App.2d 122

KETCHUM v. PATTEE et al.

Civ. 2286.

District Court of Appeal, Fourth District, California.

Feb. 1, 1940.

Rehearing Denied Feb. 26, 1940.

Hearing Denied March 30, 1940.

1. Appeal and error 🔑882(3)

Where automobile accident case was tried by plaintiff on theory that he was not negligent and doctrine of last clear chance was not submitted to jury and no instruction on such doctrine was offered, the doctrine could not be considered on defendants' appeal.

2. Automobiles 🔑12

The term "improved portion of the highway," as used in provisions of Vehicle Code governing the stopping of automobiles on the highway, refers to a portion improved and ordinarily used for vehicular travel. Vehicle Code, §§ 582, 584, St.1935, pp. 190, 191.

3. Automobiles 🔑12

The section of Vehicle Code providing that upon all roads of sufficient width a vehicle shall be driven upon the right half of, and as close as practicable to, the right-hand curb or edge of such roadway, does not make it mandatory to drive on the right shoulder where an oiled or macadam or other substantial shoulder is constructed adjacent to paved portion of highway, but such section refers to edge of paved or ordinarily traveled portion of highway. Vehicle Code, § 525, as amended by St.1937, p. 619.

4. Automobiles 🔑12

The meaning of "main traveled portion of the highway," as used in sections of Vehicle Code governing the stopping of automobiles on the highway, depends upon factual situation rather than upon materials used or type of roadbed adopted in constructing highway, and, where paved lanes exist, the quoted expression ordinarily refers to such paved lanes, but it may include the shoulders also if they are ordinarily used for vehicular travel. Vehicle Code, §§ 81, 525, as amended by St.1937, pp. 617, 619, and §§ 526, 582, 584, St.1935, pp. 181, 190, 191.

[Ed. Note.—For other definitions of "Main Traveled Portion," see Words & Phrases.]

5. Appeal and error 🔑909(1)

In motorist's action for injuries sustained when motorist was struck by defendants' truck while motorist was getting out of his automobile after parking it near edge of paved three-lane highway outside of a business or residence district when automobile stopped on a foggy morning, District Court of Appeal could not assume that stopping on oiled shoulder came within purview of statutes governing stopping of automobiles on highway and was "negligence per se" where there was no evidence disclosing whether oiled shoulder was ordinarily used for vehicular travel. Vehicle Code, §§ 81, 525, as amended by St.1937, pp. 617, 619, and §§ 526, 582, 584, St.1935, pp. 181, 190, 191.

[Ed. Note.—For other definitions of "Negligence Per Se," see Words & Phrases.]

6. Appeal and error 🔑930(1)

On defendants' appeal from judgment based upon verdict for plaintiff in automobile accident case, District Court of Appeal was bound to view evidence in light most favorable to plaintiff and to see if there was any substantial evidence which would take case to jury on question of contributory negligence.

7. Automobiles 🔑245(11, 77, 83)

In motorist's action for injuries sustained when motorist was struck by defendants' truck while motorist was getting out of his automobile after parking it on shoulder of paved three-lane highway outside of a business or residence district when automobile stopped on a foggy morning, whether motorist was negligent in stopping where he did or in starting to alight from automobile after it was parked, and whether defendants were negligent, were for jury.

8. Automobiles 🔑226(2)

If jury in automobile accident case believed from the evidence that plaintiff was negligent, plaintiff's negligence was of no significance unless jury also believed from preponderance of evidence that such negligence proximately caused or contributed proximately to injury.

9. Negligence 🔑136(10)

When evidence is conflicting and reasonable men might differ as to inferences or conclusions which ought to be drawn from evidence on the subject, issue of proximate cause is for jury.

10. Appeal and error 🔑1064(1)

In automobile accident case, an instruction which embodied statute requiring adequate brakes on automobiles and specifying standard stopping distances and statute governing overtaking and passing of automobiles and statute concerning duty of motorists to sound a horn before overtaking automobiles proceeding in same direction, and which informed jury that violation of such statutes was negligence per se, was prejudicial to defendants under evidence. Vehicle Code, §§ 528, 670, St.1935, pp. 182, 222, and § 671, as amended by St.1937, p. 169.

11. Automobiles ⟹11

The statute governing the overtaking and passing of automobiles proceeding in same direction does not apply where automobile being overtaken and passed is parked. Vehicle Code, § 528, St.1935, p. 182, and § 671, as amended by St.1937, p. 169.

12. Automobiles ⟹11

"Proceeding," as used in statute prescribing rules governing the overtaking and passing of automobiles proceeding in the same direction, cannot be construed to mean an automobile headed in same direction as driver of overtaking automobile is traveling where automobile which is being overtaken is parked. Vehicle Code, § 528, St.1935, p. 182, and § 671, as amended by St.1937, p. 169.

[Ed. Note.—For other definitions of "Proceeding," see Words & Phrases.]

13. Automobiles ⟹151, 172(4)

When passing an automobile proceeding in same direction, a motorist's duty to sound horn is mandatory and failure to do so is negligence as a matter of law, but in other situations horn must be sounded only when reasonably necessary to insure safe operation, and failure to blow horn in such situations may or may not be negligence, depending upon circumstances. Vehicle Code, § 528, St.1935, p. 182, and § 671, as amended by St.1937, p. 169.

14. Automobiles ⟹246(19)

In motorist's action for injuries sustained when motorist was struck by defendants' truck while motorist was getting out of his automobile after parking it near edge of highway, jury should have been instructed that whether or not it was codefendant's duty to blow horn depended upon whether it was reasonably necessary under circumstances as shown by evidence. Vehicle Code, § 528, St.1935, p. 182, and § 671, as amended by St.1937, p. 169.

15. Automobiles ⟹147, 246(40)

In automobile accident case, question of defendant's negligence depended on whether defendant used reasonable care under circumstances disclosed by evidence, and not upon whether defendant complied with sections of Vehicle Code referred to in certain instructions. Vehicle Code, §§ 528, 670, St. 1935, pp. 182, 222, and § 671, as amended by St.1937, p. 169.

16. Automobiles ⟹245(2, 67)
Trial ⟹203(1)

Where evidence in automobile accident case was conflicting on issue of negligence by defendant as well as on issue of contributory negligence by plaintiff, it was duty of jury to determine such issues, but jury's deliberations on issues should have been guided by proper instructions.

17. Appeal and error ⟹1064(1)

Although an instruction which correctly states an abstract proposition of law but which is not applicable to facts of case may, under certain circumstances, be harmless, such an instruction is ground for reversal if it is calculated to mislead jury.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by T. B. Ketchum against William Pattee and another for personal injuries sustained in an automobile accident. From an adverse judgment, defendants appeal.

Reversed.

Brittan & Mack and Jack Bradley, all of Bakersfield, for appellants.

T. R. Claflin, and Morris B. Chain, both of Bakersfield, for respondent.

THOMPSON, Justice pro tem.

This is an appeal from a judgment based upon a verdict of a jury in an action for damages for personal injuries. On December 20, 1937, at about 6:45 a. m., plaintiff and respondent T. B. Ketchum left his home a few miles south of Bakersfield and proceeded in a Graham-Paige sedan south on Highway 99 to go to work. It was "a little bit misty" so he turned on his headlights and tail-light, which were still burning at the time of the accident in question. His motor stopped and he thought it was out of gas. He "kicked out the clutch" and coasted about 50 to 60 feet, where he applied his brakes and brought his automobile to a stop. He testified that he parked his automobile in a position on the west shoulder of the highway with the edge of the left fenders and running board about four inches west of the west lane of pavement. The traffic was light. At this point Highway 99 is outside of a business or residence district and it consists of three lanes of "ordinary rough non-skid pavement", the west lane and the middle lane each being 11 feet, 8 inches wide and the east lane being 12 feet wide. The pavement is flanked on each side by a shoulder of oiled macadam material with a dirt shoulder adjoining the oiled shoulders on each side of the highway, the dirt shoulder being "comparatively flat". A draftsman who measured the highway testified that the oiled shoulder was 7 feet wide and that the dirt shoulder was 9 feet wide from the west edge of the oiled shoulder to a row of young trees on the west side of the highway. Plaintiff, however, testified that his car was parked within two feet of the trees. When the sedan came to a stop plaintiff sat in the car for half a minute trying to determine what the difficulty was and what to do about it. He then decided to step out of the car and ascertain if the car was out of gas. He opened the left front door, which was about 3 feet wide and hinged on the front, and started to back out, and, while his left foot was on the running board and his right foot on the floor board in the car, he glanced toward the rear of the car and discovered the headlights of a truck, driven by defendant Harold McBride and owned by defendant William Pattee, directly to the rear of his automobile "from 6 to 15 feet" away and bearing down upon him. He yelled to the truck driver, but was almost immediately struck by the truck and seriously injured. He stated that the truck lights were "very dim". Immediately after the collision the sedan was standing parallel to the highway with its left side about 3 or 4 feet in the west lane, the right side on the west shoulder and broken glass and other debris, together with one of plaintiff's shoes, were lying at the left side of the car. Plaintiff's body was lying 20 feet in front of his automobile. No damage occurred to plaintiff's sedan except to the left front door and to the body in front of the door where it had been swung forward against the cowl. A bent metal brace and a broken clearance light on the front of the right side of the truck body constituted the total damage to the truck. A sharp conflict arises as to the atmospheric conditions at the time. Plaintiff testified that there was a high fog, but that he could see from 100 to 300 yards while the defendant driver maintained that the fog was low with only 20 to 30 feet of visibility. The captain of the highway patrol, who appeared at the scene of the accident shortly afterwards, testified that the visibility was from 100 to 150 feet. Defendant McBride testified that he was driving in the west lane of pavement 25 to 30 miles an hour and that he did not notice the tail-light on plaintiff's car, but he first saw the sedan when he was about 20 feet away; that plaintiff's car was parked about 2½ feet on the pavement; that he swerved his truck to the left, partly in the middle lane. At this instant, defendant said, the sedan door swung open and plaintiff alighted, getting one foot on the running board and one foot on the ground. He testified that his swerve was sufficient to clear the sedan and, while he tried to swerve again, he did not have time to clear the open door nor plaintiff's body.

Appellants rely upon four assignments of error in seeking a reversal of the judgment. The first is the contention that the evidence shows that plaintiff was guilty of contributory negligence as a matter of law, and the others relate to three parts of an instruction offered by plaintiff and given to the jury, each of which appellants assert constituted prejudicial error.

Two reasons are offered by appellants in support of their contention that plaintiff was guilty of contributory negligence as a matter of law, namely, first, because he parked his car on the highway within the meaning of the Vehicle Code, when it was practicable to park off the highway; and second, when he stepped out of the left door of his automobile he left a place of comparative safety and entered a place of peril without taking any precaution for his own safety.

[1] The case was tried by plaintiff on the theory that he was not negligent and the doctrine of last clear chance was not submitted to the jury, by instructions or otherwise, no instruction on that subject being offered. This, therefore, eliminates that doctrine from consideration on this appeal. Bence v. Teddy's Taxi, 101 Cal. App. 748, 753, 282 P. 392, 283 P. 86; Meincke v. Oakland Garage, Inc., 11 Cal.2d 255, 258, 79 P.2d 91.

Sections 582 and 584 of the Vehicle Code of 1935, in effect at the time of the accident involved, governed the stopping of vehicles on the highway, so far as the facts of this case are concerned. Section 582 provides: "Upon any highway outside of a business or residence district no person shall stop, park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of the highway when it is practicable to stop, park or so leave such vehicle off such part or portion of said highway."

Section 584 of said Vehicle Code provides: "The foregoing restrictions in this chapter shall not apply to the driver of any vehicle which is disabled while on the paved or improved or main traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such disabled vehicle upon such part or portion of said highway."

[2-5] The fact that plaintiff coasted his car 50 to 60 feet after his motor stopped indicates that he had sufficient momentum to park his car as far to the west as the space would permit. Much doubt has arisen as to the meaning of the phrase "paved or improved or main traveled portion of the highway", as used in said sections of the Vehicle Code. In the case of Silvey v. Harm, 120 Cal.App. 561, 568, 8 P.2d 570, 573, wherein the facts disclosed that there was a 20-foot pavement with an 8-foot dirt shoulder adjacent to the pavement, the court held that under those circumstances the expression "main traveled portion of the highway" had reference to the paved portion only where the pavement was wide enough for traffic and was mainly used for that purpose. The court said: "In an open country district normal traffic is ordinarily confined to the paved portion of the highway. The shoulders are used to serve in emergencies or during congested traffic." In Scalf v. Eicher, 11 Cal. App.2d 44, 50, 53 P.2d 368, 371, a case involving the rights and duties of a pedestrian on the highway, the court took occasion, in passing, to refer to a statute then in effect and similar to sections 582 and 584 of the Vehicle Code, and said: "This means that if there is a portion of the highway not frequently traveled, such portion is to be used if it can be done with safety. In many instances such part of the highway is a shoulder, and necessarily a portion of the highway." Section 81 of the Vehicle Code defines "highway" as follows: "'Street' or 'highway' is a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel." Generally speaking, all portions of highways in California are "improved" to some extent, but some portions are not improved nor designed for modern vehicular travel and are seldom used for such travel. We think the term "improved portion" of the highway mentioned in sections 582 and 584 of the Vehicle Code refers to a portion improved and ordinarily used for vehicular travel. Section 525 of the Vehicle Code provides that "upon all roadways of sufficient width a vehicle shall be driven upon the right half of, and as close as practicable to the right-hand curb or edge of such roadway". It cannot be said that this section of the Vehicle Code makes it mandatory to drive on the right shoulder where an oiled or macadam or other substantial shoulder is constructed adjacent to the paved portion. The section undoubtedly has reference to the edge of the paved or ordinarily traveled portion of the highway. Scalf v. Eicher, supra. In the instant case there can be no doubt as to what is meant by the paved portion of the highway, as there were three lanes of concrete pavement clearly marked for traffic in accordance with the provisions of section 526 of the Vehicle Code. This section provides that, where the roadway has been so divided and marked, "A vehicle shall be driven as nearly as is practical entirely within a single lane." It is apparent from the sections of the Vehicle Code and the authorities which have been cited above, that the meaning of the term "main traveled portion of the highway", as used in sections 582 and 584 of the Vehicle Code, must depend upon the factual situation in each particular case, rather than upon the materials used or the type of road bed adopted in constructing the highway. It is true that, where paved lanes exist, the expression "main traveled portion of the highway" ordinarily refers to such paved lanes, but it may include the shoulders also if they are ordinarily used for vehicular travel. There is no evidence in the present case which discloses whether the oiled shoulder was ordinarily or frequently used for vehicular travel or not so used, although the photographs in evidence indicate quite clearly that the oiled shoulders were easily available for such travel, and we cannot under the circumstances of this case assume that stopping on the oiled shoulder came within the purview of sections 582 and 584 of the Vehicle Code and was negligence per se.

[6, 7] Appellants next contend that plaintiff was guilty of contributory negligence because he left a place of comparative safety and entered a place of peril when he stepped out of the left door of his automobile without taking precaution for his safety, and cite numerous cases to sustain this point. However, most of these are cases involving city street collisions between automobiles and pedestrians in which the plaintiffs actually walked or ran in front of oncoming vehicles without first looking. The case at bar presents a different factual situation. While there is conflicting proof, it is this court's duty to view the evidence "in the light most favorable to the plaintiffs, and to see if there is any substantial evidence which would take the case to the jury on the question of contributory negligence". Rivera v. Hasenjaeger, 29 Cal.App.2d 431, 432, 85 P.2d 167. The jury may have believed from the evidence that plaintiff was not negligent in stopping his automobile on the shoulder of the highway, and that he was not yet out of the car when the collision occurred, but was partly in the car and partly on the running board. There are authorities which hold that it is not negligence per se to ride on a running board. Strong v. Olsen, 74 Cal.App. 518, 519, 241 P. 107; Yates v. J. H. Krumlinde & Co., 22 Cal.App.2d 387, 391, 71 P.2d 298. Again, the jury may have believed from the photograph in evidence showing the bent brace on the front of the truck body, which is in some distance from the right front corner of the truck bed, that the truck was traveling exceedingly close to the parked car and that a reasonable person, situated as plaintiff was, would not have anticipated that any vehicle would pass close enough to collide with him under the circumstances, in view of the proof to the effect that there was no north-bound traffic and that defendant had approximately 30 feet of paved highway and an additional 7 feet of oiled shoulder east of plaintiff's parked car on which to pass. Under the circumstances existing in this case the issue of whether or not plaintiff was negligent in stopping his car where he did stop it, or in starting to alight from it after it was parked, we think, was an issue of fact on which reasonable men might differ.

[8, 9] In any event, if the jury believed from the evidence that plaintiff was negligent, it was only one element of contributory negligence and was of no significance in the case unless they also believed from a preponderance of the evidence that such negligence proximately caused or contributed proximately to the injury. The issue of whether or not defendant was negligent was submitted to the jury and they might have believed that defendant was negligent and that his negligence was the sole proximate cause of the collision. When the evidence is conflicting and reasonable men might differ as to the inferences or conclusions which ought to be drawn from the evidence on the subject, the issue of proximate cause is also one for the jury to determine. Rivera v. Hasenjaeger, supra, 29 Cal.App.2d at page 433, 85 P.2d at page 167.

[10] As we have indicated above, the question of negligence on the part of the defendant and the question of contributory negligence on the part of the plaintiff were matters for the determination of the jurors and were properly submitted to them. A consideration of the instructions, therefore, becomes important. Plaintiff offered an instruction which was given by the court embodying the provisions of section 670 of the Vehicle Code requiring adequate brakes on motor vehicles and specifying standard stopping distances, and the jury was informed that a violation of this statute is negligence per se. This instruction was inapplicable to the facts of this case. The only evidence relative to the condition of the brakes was the testimony of the defendant driver who testified that the truck was fully equipped with hydraulic brakes all in good condition. There was no evidence that defendant attempted to stop the truck before the collision. He testified that he endeavored to avoid striking plaintiff's car by swerving the truck to the left; that he only touched the brakes lightly when he swerved and when he saw plaintiff, then drifted past the sedan for about 50 or 60 feet without applying his brakes, and then applied the brakes and stopped the truck off the traveled portion of the highway. There is no evidence whatever to indicate that the brakes were in any way defective or failed to function properly.

The same instruction included a recital of section 528 of the Vehicle Code as follows:

"Section No. 528 of the Vehicle Code says: 'The following rules shall govern the overtaking and passing of vehicles proceeding in the same direction, subject to the limitations and exceptions hereinafter stated:

"'(a) The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left thereof at a safe distance and shall not again drive to the right side of the roadway until safely clear of the overtaken vehicle.'"

[11, 12] The jury was also informed that a violation of said section 528 is negligence per se. This instruction and the statute referred to therein applies to drivers of vehicles overtaking and passing another vehicle proceeding in the same direction and has nothing to do with a situation where the car being overtaken and passed is parked. Counsel for respondent suggests that the word "proceeding", as used in said statute, means "headed or on his way". We cannot agree with that interpretation. The uncontradicted evidence, including the testimony of plaintiff himself, was that plaintiff's sedan was parked at the time of and for a short period before the accident. In the instant case this instruction was particularly inappropriate, for the plaintiff was in the act of alighting from his automobile when the accident happened, and defendant contended at the trial that, if plaintiff had not attempted to alight from the car and thus increase the hazard, the accident would not have happened, and defendant offered evidence to support this contention.

Appellants criticise the remainder of the same instruction and urge that it is prejudicial error. It is based on section 528, subdivision (b) of the Vehicle Code and is as follows: "The driver of a motor vehicle, when traveling outside of a business or residence district and under other conditions where necessary to insure safety, shall give audible warning before overtaking a vehicle proceeding in the same direction."

[13, 14] This instruction also applies only to a car which is overtaking a vehicle proceeding in the same direction. Section 671 of the Vehicle Code, which was not mentioned in the instructions, provides that "Every motor vehicle when operated upon a highway shall be equipped with a horn," and subdivision (b) thereof contains the following provision: "The driver of a motor vehicle when reasonably necessary to insure safe operation shall give audible warning with his horn. Such horn shall not otherwise be used." It will be noticed that, when passing a vehicle proceeding in the same direction, the duty to sound the horn is mandatory and failure to do so is negligence as a matter of law; but in other situations the horn must be sounded only "when reasonably necessary to insure safe operation", and failure to blow the horn in such situations may or may not be negligence, depending upon the circumstances of the particular case. In the case at bar, defendant did not recall blowing his horn. The jurors were told by that instruction that such failure constituted negligence as a matter of law. They should have been informed that whether or not it was his duty to blow his horn, depended upon whether or not it was reasonably necessary under the circumstances of the case as shown by the evidence. The instruction as given undoubtedly had the effect of withdrawing from the jury's consideration the question of whether or not defendant had time to blow the horn after discovering plaintiff's parked car in time to have prevented the injury, or any other circumstance which might have excused him from sounding the horn.

[15-17] "The question of negligence on the part of [defendant] depended upon whether or not he used reasonable care under the circumstances disclosed by the evidence", and not upon whether or not he complied with those sections of the code referred to in the instruction complained of. White v. Davis, 103 Cal.App. 531, 546, 284 P. 1086, 1092. The evidence was in conflict on the issue of negligence on the part of defendant as well as on the issue of contributory negligence on the part of plaintiff and it was the duty of the jury to determine these questions, but their deliberations on these issues should have been guided by proper and correct instructions. Duncan v. J. H. Corder & Son, 18 Cal.App. 2d 77, 82, 62 P.2d 1387; White v. Davis, supra. Although an instruction like the one complained of, which correctly states an abstract proposition of law but which is not applicable to the facts in the case, may under certain circumstances be harmless, still such an instruction is ground for reversal if it is calculated to mislead the jury. 24 Cal.Jur. pp. 830-832; Gregg v. McDonald, 73 Cal.App. 748, 760, 239 P. 373. The issues of negligence on the part of defendant and of contributory negligence on the part of plaintiff under the facts of this case were both such close questions

that we cannot say from the record that the instruction complained of did not play an important part in the deliberations of the jury and cause confusion in the minds of the jurors as to the law which was applicable to the case. Under all of the circumstances of the case we are of the opinion that the giving of the instruction complained of was error prejudicial to the appellant.

The judgment is reversed.

We concur: BARNARD, P. J.; MARKS, J.

HOWARD v. ADAMS et al. *

Civ. 12264.

District Court of Appeal, Second District, Division 2, California.

Jan. 30, 1940.

Hearing Granted March 30, 1940.

1. Contracts 🔑111

As respects enforceability of contract whereby aunt promised to support niece and her children in consideration of niece's obtaining a divorce in Nevada, that niece had already formed an intention to obtain a divorce neither instilled virtue into her promise nor raised it from status of a nullity to that of a valid covenant.

2. Contracts 🔑111

Where a promise to pay money is made as consideration for promisee's procuring a divorce or where money is payable only in event divorce be procured, consideration is immoral, and is void.

3. Contracts 🔑111

The marital status is the basis of the social order and agreements that tend to destroy or impair that status by encouraging divorce will not be enforced, policy of the law being against all such contracts and courts should refuse to enforce them.

4. Contracts 🔑111

A contract whereby aunt promised to support niece and her children if niece, who was California resident, would procure divorce in Nevada, waive her right to alimony support, maintenance, attorney's fees and court costs against husband, return to live with aunt and give her assistance, society and comfort, was illegal as against public policy, since niece's promise was to get a divorce and in so doing to violate public policy of California by visiting Nevada for purpose of gaining such decree and to violate laws of Nevada, niece having no intention of giving up California domicile.

5. Contracts 🔑111

A contract whereby aunt promised to support niece and her children if niece would obtain divorce in Nevada, waive alimony support and live with aunt and give her assistance, society and comfort was not enforceable on theory that public policy was not involved, promise not having been made by husband but by third person who was to suffer detriment, since offense to "public policy" is not determined by identity of offender, "public policy" being a course of social behavior whereby rational adherence to moral code is required of all who receive or assert a claim to the protection of the sovereignty.

[Ed. Note.—For other definitions of "Public Policy," see Words & Phrases.]

6. Contracts 🔑111

A promise which rests for its performance upon basic consideration of securing a divorce must fail.

7. Contracts 🔑111

As respects enforceability of contract based on consideration to procure a divorce, it is the policy of the law to encourage forgiveness of causes for divorce and to favor arrangements which tend to restore harmony between husband and wife and a renewal of conjugal relations, and such rule applies to third party agreements as well as to one between spouses.

8. Divorce 🔑12

The marriage relation in contemplation of California law is indissoluble except by solemn judgment of a court for some cause which, after severe scrutiny, the court shall find sufficient under the law to warrant the judgment.

9. Divorce 🔑327

Neither answer of husband nor any waiver or stipulation on his part could have conferred power upon Nevada court to award wife a valid divorce decree where wife had no intention of giving up her California domicile.

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*For subsequent opinion see 105 P.2d 971.

10. Divorce ⟹327

A wife's only means of gaining a legal "domicile" in Nevada so as to confer power upon Nevada court to award divorce decree was by a sincere intention to abandon domicile in California and by establishing in good faith her residence in Nevada with intention of permanently residing there.

[Ed. Note.—For other definitions of "Domicile," see Words & Phrases.]

11. Contracts ⟹138(2)

A contract whereby aunt promised to support niece and her children as long as niece lived if niece would procure divorce in Nevada and waive right to alimony support, maintenance, attorney's fees and court costs against husband and then live with aunt and give her assistance, society and comfort was not enforceable notwithstanding contract was partly performed, where contract was illegal as against public policy.

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by Vivian A. Howard against Lily B. Howard for breach of contract to support plaintiff and her children wherein, upon defendant's death, C. A. Adams and others as executors of the estate of Lily B. Howard, deceased, were substituted as parties defendant. From a judgment for plaintiff, defendants appeal.

Reversed with instructions.

Leonard Wilson, Walter G. Danielson, and Gibson, Dunn & Crutcher, all of Los Angeles, for appellants.

A. Brigham Rose, of Los Angeles, for respondent.

MOORE, Presiding Justice.

This action was instituted by plaintiff against Lily B. Howard, a distant relative of plaintiff's erstwhile husband. Just before the close of the trial, said defendant passed away and, upon the motion of her counsel, C. A. Adams was substituted as special administrator against whom proceedings were carried forward until the testamentary executors of decedent were substituted as defendants. While only thus distantly related, plaintiff and decedent had been intimate friends since the former's childhood. When plaintiff was seven years of age, decedent told her that she had adopted plaintiff and that she would always keep plaintiff with her. This she did until plaintiff's own marriage to Edward B. Howard.

On June 19, 1927, plaintiff was living with her said husband at their home in Los Angeles. They had three children, one girl six, and two boys, three and eight years of age. Believing that the abuses of her husband would justify a final separation, plaintiff advised decedent of her resolution to effect her purpose by obtaining a decree of divorce. Upon plaintiff's declaring her said intention, decedent protested to plaintiff the damage which decedent would suffer in her social and banking connections by reason of any divorce scandal, and proposed "if you go to Reno, Nevada, and procure a divorce and waive your right to alimony support, maintenance, attorney's fees and court costs against your husband and then return and live with me in my home and give me your assistance, society and comfort, and look after my home, I will support you for the rest of your life and I will support and educate your children". Whereupon plaintiff accepted the offer of decedent and, with monies supplied her by decedent, she journeyed to Reno, Nevada, for the single purpose of obtaining a divorce. She accomplished her purpose and promptly returned to her said home in Los Angeles in October of the same year. While plaintiff resided in her own home until about June 1, 1929, decedent gave her from $200 to $250 per month. After said date, decedent supported plaintiff and her children in decedent's home and gave plaintiff $150 per month until the middle of 1933. Though deprived of her said allowance, plaintiff and her children remained with decedent until July 6, 1936, on which date, following a quarrel with decedent's newly acquired husband, plaintiff was barred from said home.

Basing her claim upon said ouster, on the 6th day of February, 1937, plaintiff instituted this action for damages against decedent on account of the breach of said agreement. A verdict was returned in favor of the plaintiff for the sum of $120,800. Upon the hearing of the motion for a new trial, the court ordered a reduction of the judgment to $85,727, under pain of granting said motion.

The executors demand a reversal of the judgment upon the following grounds: (1) the agreement between decedent and plaintiff was void as against public policy; (2) said agreement was contrary to the statute of frauds and is not enforceable; (3) the action was abated with the death of the decedent; (4) the amount of damages awarded is grossly excessive and was a result of passion and prejudice of the jury; (5) the trial court committed prejudicial error by failing to limit the award of damages to the present value of future payments under the contract over plaintiff's life expectancy and by failure to make deductions for earnings by the plaintiff or her children; (6) plaintiff's counsel was guilty of misconduct so gross as to prevent a fair trial; (7) the errors complained of were incurable by a reduction of the amount of the verdict from $120,800 to $85,727.

That the consideration for the promise of decedent was plaintiff's said promise to sojourn for a season in Nevada for the sole purpose of obtaining a divorce is inescapable. Her counsel, in his opening statement, advised the jury that decedent said to plaintiff "you must go to my attorneys and they will agree to get a divorce in a hurry and if you go to Nevada and not stir up any notoriety * * * and go back there quietly and get your decree, I will support you and your children as long as you live and I will take care of the support of your children"; that "in acquiescence to this offer on the part of defendant aunt plaintiff agreed and did depart to Nevada and set up the customary residence that they do there, to get a hasty peaceful divorce, so to speak". In view of plaintiff's testimony, said utterance of her counsel is significant. Wrightson v. Dougherty, 5 Cal.2d 257, 54 P.2d 13; Paul v. Layne & Bowler Corp., 9 Cal.2d 561, 71 P.2d 817. Plaintiff testified: "I went to Reno, Nevada, to get my divorce at my aunt's request and under her agreement. It was upon that agreement that I went there and got it. At the time I got it my husband was not in Nevada but was right in Los Angeles where he always had been." Plaintiff's son, age nineteen, also testified: "Prior to going to Reno, I accompanied my mother, brother and sister to Aunt Lily's at 624 South Mariposa. Mother had black eyes and a bruised check. In a conversation there, my mother said she had been beaten by my father and my aunt said my mother would have to get rid of him and when mother said she was going to see some lawyer, my aunt said: 'You can't do that, it will be pretty hard on me; you will have to go to Reno; the publicity will hurt my bank; you will have to go to Reno'. When something was said about who was going to take care of my mother and the three children, my aunt said: 'Well, I will take care of all of you forever, if you go to Reno'."

From the foregoing evidence supplied by plaintiff and her son, supplemented by the emphatic announcement of her counsel, it is beyond dispute that plaintiff's promise to decedent was to get a divorce, and furthermore, she was to violate the public policy of California by visiting a sister state for the purpose of gaining such decree and was to violate the laws of Nevada in so doing. She had no intention of giving up her California domicile or of abandoning her home here. But, on the contrary, she planned to return to live with decedent and, in fact, did return to the very home she left before her departure for Nevada.

[1-3] Therefore, the consideration for decedent's promise was plaintiff's procurement of a divorce decree in Nevada and the release of her husband from the obligation in the future of supporting his wife and children. The fact that plaintiff had already formed an intention to obtain a divorce neither instills virtue into her promise nor raises it from the status of a nullity to that of a valid covenant. Neither is its quality improved by decedent's belated antagonism to divorce. Her esteem or lack of esteem of "divorce" performed no office in the logic of plaintiff; neither did it vaccinate the public weal against the contamination certain to flow from such an immoral accord. Where a promise to pay money is made as a consideration for the promisee's procuring a divorce or where the money is payable only in event the divorce be procured, the consideration is immoral, poisons the stream of the social conscience and is void. It is void "if its tendency is to cause a divorce to be obtained". Moore v. Moore, 3 Cir., 255 F. 497, 499. The marital status is the very basis of the social order and agreements that tend to destroy or impair that status by encouraging divorce will not be enforced. Ibid. The policy of the law is against all such contracts and the courts should refuse to enforce them "and, where differences have arisen which threaten disruption, public welfare and the good of society demand a reconciliation, if practicable or possible. * * * Therefore any agreement for divorce, or any collateral bargaining promotive of it, is considered unlawful and void". Newman v. Freitas, 129 Cal. 283, 61 P. 907, 910, 50 L.R.A. 548. In the

case of Pereira v. Pereira, 156 Cal. 1, 103 P. 488, 23 L.R.A.,N.S., 880, 134 Am. St.Rep. 107, where the husband promised his wife $10,000 if she would obtain a divorce decree, recovery of the money was denied because the consideration for his promise was void. In the case of Whiting v. Whiting, 62 Cal.App. 157, 216 P. 92, 96, the parties having attempted by prenuptial contract to fix the amount due the wife in event of divorce, when they appeared at last before the court for an order fixing her support, said contract was scorned as "a menace to the marriage relation" and tended to facilitate the dissolution of the marriage. In the case of Brown v. Brown, 8 Cal.App.2d 364, 47 P.2d 352, a promise of the husband to pay $12,500 if his wife should obtain a divorce, was void in that it tended to facilitate divorce and recovery was denied. Theisen v. Keough, 115 Cal. App. 353, 1 P.2d 1015; McCahan v. McCahan, 47 Cal.App. 173, 190 P. 458.

[4] In the case at bar, the promise of plaintiff to decedent was trebly grievous. Not only did she promise to obtain a divorce but she promised to waive the obligation of her husband to support his family and also she undertook falsely to declare her residence to be in Nevada. This release of her offending spouse from his obligation of her future support encouraged him to desist from opposing her action; discouraged the natural tendency to seek a pardon and a restoration to the affections of her who was entitled to all his loyalty, kindness and support. Regardless of any objection decedent may have entertained toward divorce, her intrusion into the affairs of plaintiff and her husband by her promises encouraged a divorce and that was a violation of public policy.

[5-7] Plaintiff argues that the principle above discussed is not involved because any promise made to plaintiff was not made by her spouse but by another who was not to be benefited by the performance of plaintiff and who was to suffer detriment in consequence of the divorce. Offense to public policy is not determined by the identity of the offender. Public policy is a course of social behavior whereby the rational adherence to the moral code is required of all who receive, or assert a claim to, the protection of the sovereignty. Public policy is the inarticulate background of the Penal Code. In the first place, decedent's proposal was definitely to advantage the wayward husband, for whom decedent was concerned, and her precedent conditions were designed to avoid hardships for him as well as embarrassments for herself. Consequently the corrupting effect of decedent's offer was as though it had fallen from the lips of the husband himself. As to decedent, she was not to suffer detriment for she had made her said offer in exchange for the society, comfort and assistance of plaintiff which she received. But so far as the state is concerned, irrespective of the fortunes of its constituents under such circumstances, its detriment is certain where its public policy is violated, its laws are evaded and its majesty is offended. It is such violation, evasion and offending that nullifies decedent's contract. Any promise which rests "for its fulfillment upon the basic consideration of securing a divorce" must fail. Smith v. McPherson, 176 Cal. 144, 167 P. 875, L.R.A.1918B, 66. It is the policy of the law to encourage forgiveness of causes for divorce and to favor arrangements which tend to restore harmony between husband and wife and a renewal of conjugal relations. Forster v. Cantoni, 19 Misc. 222, 44 N.Y.S. 241. And this applies to a "third party" agreement as well as to one between the spouses. 6 R.C.L. 772.

[8] To emphasize California's policy toward divorce, we may point out that the legislature has made its attainment reasonably difficult. Such are the handicaps that many a temporary storm, of sufficient violence to upset the domestic boat, is lulled and the survivors chart new seas. The marriage relation, in contemplation of California law, "is indissoluble except by the solemn judgment of a court for some cause which, after severe and jealous scrutiny, the court shall find sufficient under the law to warrant the judgment". 6 R.C.L. 772. Corroboration of the complainant's grievance is indispensable; finality of the decree is deferred for a year and now a process of conciliation has been introduced when, as here, children are involved, aiming to defeat divorce by a forgiveness of the offender and by a more intimate knowledge on the part of both of the one's rights and of the other's weakness.

It was this policy of California's sovereignty that was to be contravened by plaintiff's promise and her conformance with the conditions prescribed by decedent in requiring plaintiff to be divorced in Nevada. After remaining in Nevada for the limited period, she procured her decree readily. Believing her judgment to be valid, she returned to her California home where she might have attempted to celebrate another marriage at once, despite the law of this state which would have barred her march to the hymeneal altar for a year, had she prosecuted to a successful judgment in Los Angeles county her cause against her former spouse.

[9, 10] Her act in thus seeking her divorce in Reno being clearly a contemptuous avoidance of the public policy of this state of her home, it rendered her promise to decedent abhorrent to the law and wholly insufficient to support decedent's promise of lifelong support. Wood v. Estate of Wood, 137 Cal. 148, 149, 69 P. 981. Neither the answer of her husband nor any waiver or stipulation on his part could have conferred power upon the Nevada court to award her a valid decree. Estate of McNutt, Cal.App., 98 P.2d 253. Her only means of gaining a legal domicile there was by a sincere intention to abandon California and not to return and by establishing in good faith her residence in Nevada with the intention of permanently residing there. Ryder v. Ryder, 2 Cal.App.2d 426, 37 P.2d 1069. When she failed to do this, she defrauded the courts of Nevada.

[11] Basing her action for recovery here upon a contract which contempted the public policy of California and affronted its laws, she lays a false predicate for recovery. Having presented an agreement to violate the laws of Nevada and a design to defraud its courts, she is entitled to no relief. "Courts refuse all relief to one who asks compensation for the doing of an act which is conclusively presumed to be hurtful to public interests or morals." Berka v. Woodward, 125 Cal. 119, at page 125, 57 P. 777, at page 779, 45 L.R.A. 420, 73 Am.St.Rep. 31. "No court of justice can in its nature be made the handmaid of iniquity." Bank of United States, v. Owens, 2 Pet. 527, 538, 7 L.Ed. 508. "Whenever the illegality appears * * * the disclosure is fatal to the case. * * * Wherever the contamination reaches, it destroys. * * * the law will not lend its support to a claim founded upon its violation." Coppell v. Hall, 7 Wall. 542, 558, 19 L.Ed. 244. "Nor in such cases does it matter whether the contract has been partially * * * performed, or whether the consideration has passed or not. * * * 'If the plaintiff cannot open his case without showing that he has broken the law, the court will not assist him, whatever his claim in justice may be upon the defendant.' * * * no court shall lend its aid to a man who grounds his action upon an immoral or illegal act." Berka v. Woodward, supra.

In view of our sentiments as to the illegality of the contract sued upon, we deem it unnecessary to discuss the other assignments. The judgment is, therefore, reversed with instructions to dismiss the action.

I concur: WOOD, J.

I concur in the judgment: McCOMB, J.

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37 Cal.App.2d 164

MORTIMER v. YOUNG et al.

Civ. 12380.

District Court of Appeal, Second District, Division 2, California.

Feb. 5, 1940.

Hearing Denied April 4, 1940.

1. Brokers 🔑106

In action against broker for fraud in effecting exchange of properties, preventing plaintiff from showing that broker and another were partners was error.

2. Brokers 🔑102

A property owner who printed list of his properties for distribution to prospective purchasers and thereafter when approached by broker gave selling price and upon being informed that there were three brokers agreed to allow commission for each and gave one broker an option for which he received $10 was not liable to third person who sustained damages because of alleged fraud of broker in misrepresenting value of property and amount for which it was salable where property owner was dealing with all parties at arm's length and derived no advantage from alleged fraud.

3. New trial 🔑72

In passing upon sufficiency of conflicting evidence to sustain verdict a broad discretion

is placed in trial judge who has duty to weigh evidence and if satisfied that it is insufficient he may grant a new trial.

4. Appeal and error ⚷979(2)

The grant of new trial by trial court for insufficiency of evidence will not be disturbed on appeal unless there has been a manifest abuse of discretion.

5. New trial ⚷29

Whether a new trial should be granted for misconduct of counsel rests within discretion of trial court.

6. Appeal and error ⚷933(1)

On appeal from order granting new trial in action for broker's fraud in effecting exchange of properties all presumptions are in favor of regularity of order and appellate court must presume that court had matter of damages in mind when it made it's order. Civ.Code, § 3343.

7. Appeal and error ⚷979(2)

An order granting new trial in action for broker's fraud in effecting exchange of properties would not be reversed where there was substantial conflict in evidence on issue of amount of damages suffered by plaintiff and there was no showing of abuse of discretion. Civ.Code, § 3343.

◆

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Alice Mortimer against George D. B. Young and Nicholas Rodes to recover damages for fraud. From a judgment of nonsuit in favor of first named defendant and from an order granting last named defendant's motion for new trial, plaintiff appeals.

Affirmed.

Y. B. Arsen, of Los Angeles, for appellant.

George W. Zent, of Hollywood, for respondents.

WOOD, Justice.

Plaintiff commenced this action to recover damages alleged to have been caused by the fraud of defendants Rodes and Young. The trial court rendered judgment of nonsuit in favor of defendant Young and a jury returned a verdict against defendant Rodes in the sum of $3,210. Thereafter the court granted the motion of defendant Rodes for a new trial "on the ground of insufficiency of the evidence and other grounds". Plaintiff has appealed from the judgment of nonsuit and from the order granting a new trial.

The action was tried upon the second cause of action of the complaint, wherein it is alleged that plaintiff was the owner of a parcel of real estate in Inglewood of the value of $4,000; that defendant Young was the owner of a rooming house on Bronson avenue in the city of Los Angeles which had been listed for sale with Rodes as the agent of Young for the full purchase price of $9,000 out of which Young agreed to pay Rodes a commission; that Rodes falsely stated to plaintiff that the owner of the Bronson avenue property would not take less than $12,000 for the premises; that the actual value of the Bronson avenue property was only $6,000 and that the two defendants conspired to deceive and defraud plaintiff; that defendant Rodes assured plaintiff that the Bronson avenue property was yielding a monthly income of $200 per month whereas it was yielding less than $75 per month; that an exchange of the two properties was effected whereby plaintiff paid for the Bronson avenue property the sum of $12,000, one-half in cash and one-half by a note and trust deed on the Bronson avenue property.

[1] It appears from the evidence that three brokers were involved in the transaction. These brokers were defendant Rodes, H. J. Provencher and J. A. Faucher. They had offices together, Faucher testifying that although he was an "independent broker" he was working out of the office of Rodes on a commission basis. To the question, "What was your arrangement with Mr. Rodes," Faucher replied, "I was working on 60-40 per cent". It is claimed by plaintiff that Rodes and Provencher were partners but the court erroneously prevented plaintiff from proving the relationship between them.

Plaintiff's business affairs with Rodes began in September, 1927. A transaction contemplated at that time was not completed. Plaintiff told Rodes of her Inglewood property, which, after Rodes inspected it, was listed with him for sale or exchange.

The Bronson avenue property was brought to the attention of Rodes by Faucher, who testified, "I told him I had this property for sale at $9,000". Defendant Young had prepared a printed list of properties for sale, including the Bronson avenue property. Mr. Faucher testified that he knew the property only from the printed list he had received months before and that it was necessary for him to telephone to Young to learn if the property was still for sale. Faucher took Provencher to see Young on November 15, 1937, and on the same day Young gave Provencher an option to purchase the property for the sum of $9,000, out of which he agreed to pay brokers' commissions in the sum of $600, having been informed that there were three brokers in the transaction. Provencher testified that he "listed" the property for sale with Rodes on the same day at "$12,000 on trade or submit". On November 15, 1937, Rodes informed plaintiff that he had the Bronson avenue property to trade for her Inglewood property. Thereafter plaintiff, with Rodes and Faucher, inspected the Bronson avenue property and plaintiff signed a written offer to exchange her Inglewood property and the sum of $8,000 for the Bronson avenue property. The name of Young appears in the prepared contract signed by plaintiff but it does not appear that Young signed it. The transaction was later completed by escrow instructions in which plaintiff made the exchange with Provencher named as the owner of the Bronson avenue property. In the final transaction plaintiff received the Bronson avenue property in exchange for the Inglewood property, giving a trust deed on the Bronson avenue property in the sum of $6,000 and the sum of $2,000 in cash, less a small discount which is of no consequence in this discussion. Rodes was named as grantee in the deed from plaintiff. Thereafter Rodes borrowed from Young the sum of $2,000, giving the Inglewood property as security, and later sold the Inglewood property to another party.

Plaintiff testified that Rodes told her that the sum of $12,000 was "Mr. Young's price and he won't take a cent less". Rodes testified that he told plaintiff that he had the property "listed for sale for $12,000, or exchange".

[2] The court did not err in granting defendant Young's motion for a nonsuit. For aught that appears in the evidence Young was dealing with all the parties concerned at arm's length. He printed a list of his properties for distribution to prospective purchasers and thereafter was approached by a broker who was told his selling price. Upon being informed that there were three brokers he agreed to allow $200 commission for each of the three brokers. The fact that he gave one of the brokers an option, for which he received the sum of $10, does not establish a conspiracy between him and any of the three brokers. Young did not personally meet either Rodes or plaintiff until after the transaction was completed. He received nothing for his property over and above the price he had placed upon it. There is no proof that he derived any advantage from the fraud which plaintiff alleges was practiced upon her.

[3-5] A more serious question is presented by the appeal from the order granting the new trial. Notwithstanding the court's error in excluding proof of the relationship between Rodes and Provencher, the record furnishes abundant proof of fraud on the part of Rodes; but we are confronted with the well-established rule that, where the evidence is conflicting, in passing upon the sufficiency of the evidence to sustain a verdict a broad discretion is placed in the trial judge. It is his duty to weigh the evidence and if satisfied that it is insufficient he may grant a new trial. The action of the court in granting a new trial for insufficiency of the evidence will not be disturbed on appeal unless there has been a manifest abuse of discretion. Gordon v. Roberts, 162 Cal. 506, 123 P. 288. The record before us discloses a substantial conflict in the evidence on several material matters. Moreover, defendants cite numerous instances in which counsel for plaintiff was guilty of misconduct, especially in bringing before the jury evidence which had been properly excluded by the court. The trial court is in a better position than the reviewing court to decide the prejudicial effect, if any, a litigant suffers by reason of misconduct of counsel.

[6, 7] An additional reason for denying a reversal of the order is found in the unsatisfactory condition of the evidence on the subject of the amount of damages suffered by plaintiff. An expert witness for defendant testified that plaintiff's property was of the value of $2,100 but plaintiff presented no evidence whatever to establish the value of her property. Defendant's expert witness testified that the Bronson avenue property was of the value of $10,065 but plaintiff's expert witness testified that this property was of the value of $6,500. One defrauded in the exchange of property is entitled to recover "the difference between the actual value of that with which the defrauded person parted and the actual

value of that which he received, together with any additional damage arising from the particular transaction". Civ.Code, sec. 3343. All presumptions are in favor of the regularity of the order appealed from and we must presume that the court had the matter of damages in mind when it made its order. Parker v. Brown, 13 Cal.App.2d 501, 57 P.2d 183. There was manifestly a substantial conflict in the evidence on the issue of the amount of damages suffered by plaintiff, and there being no showing of an abuse of discretion, this court may not reverse the order of the trial court. Koyer v. McComber, 12 Cal.2d 175, 82 P.2d 941.

The judgment and the order granting a new trial are affirmed.

We concur: MOORE, P. J.; McCOMB, J.

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37 Cal.App.2d 169

HARMON v. SAN JOAQUIN LIGHT & POWER CORPORATION.

Civ. 6274.

District Court of Appeal, Third District, California.

Feb. 5, 1940.

Rehearing Denied March 6, 1940.

1. Electricity 🔑19(3)

In action against electric power company for injuries caused by contact with sagging electric wire, burden of proving plaintiff's contributory negligence was on defendant.

2. Electricity 🔑19(5)

In action against electric power company for injuries caused by contact with sagging electric wire, evidence *held* sufficient to support jury's implied finding that plaintiff was not contributorily negligent in raising his hand, so as to bring it in contact with wire, while riding horse in driving herd of cattle along highway.

3. Damages 🔑132(14)

A jury's verdict, awarding $32,500 damages to 26-year-old cowboy for badly burned ankle, necessitating repeated skin graftings, serious injuries to arm, ankle, hip, and back, confining him in hospital for 42 days, compelling him to use crutches for three months and cane for indefinite time, and preventing him from performing efficient labor, playing violin, and riding horse with comfort or endurance, serious permanent impairment of his eyesight and hearing, and brain injury or deterioration, was not excessive.

4. Appeal and error 🔑994(2), 1003

In action for injuries claimed to have seriously affected plaintiff's hearing, test of his ability to hear by propounding questions to him in low tone of voice at considerable distance on his cross-examination as witness was addressed to his credibility and weight and sufficiency of evidence, which questions were almost exclusively within jury's province, with which appellate court may not ordinarily interfere.

5. Damages 🔑208(1)

In personal injury suit, it was jury's province to reconcile conflict created by receipt in evidence of photographs and moving pictures, tending to show that plaintiff's ability to run, walk or ride horse and his hearing and eyesight were not seriously impaired by injuries sustained, as witnesses testified, or to determine weight and sufficiency of evidence on such questions.

6. Appeal and error 🔑1001(1)
Damages 🔑208(1)

In personal injury suit, questions raised by oral testimony and moving pictures of plaintiff as to whether he suffered impairment of vision, pain, and severe muscular disability as result of injuries, were for jury, with whose conclusions, supported by physicians' testimony, in plaintiff's favor, appellate court will not interfere.

7. Damages 🔑127

The purchasing power of money in times of inflation or depression must be considered in determining whether judgment awarding damages for personal injuries is excessive.

8. Damages 🔑96

The jury has wide discretion in determining what sum of money will reasonably compensate person for injuries sustained by him.

9. Appeal and error 🔑1004(1)

The mere fact that judgment on jury's verdict awarding damages for personal injuries appears to be large does not warrant appellate court in determining that verdict was result of jury's passion or prejudice, but such result should clearly appear from record to warrant interference with jury's finding on such ground.

10. Appeal and error ⟹1066
Trial ⟹253(9)

In personal injury suit, instruction that, when facts making res ipsa loquitur doctrine applicable are established, burden of meeting such presumption of negligence is on defendant, that it need not be overcome by preponderance of evidence, but defendant need only produce sufficient evidence to balance presumption, and that verdict should be for plaintiff, if jury is convinced by preponderance of evidence that defendant was guilty of negligence proximately causing injuries after considering "all of the evidence" bearing on his negligence, including such presumption, was neither erroneous nor prejudicial to defendant, as it was not formula instruction requiring inclusion of all necessary elements of entire theory on which plaintiff sought to recover damages.

◆

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action by A. L. Harmon against the San Joaquin Light & Power Corporation to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals.

Affirmed.

Thomas J. Straub, W. H. Spaulding, and John J. Briare, all of San Francisco, and F. H. Pearson, of Fresno, for appellant.

Joseph Barcroft, of Madera, and Swanwick, Donnelly & Proudfit, of Los Angeles (Tom W. Henderson, of Los Angeles, of counsel), for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant has appealed from a judgment of $32,500 rendered pursuant to the verdict of a jury. The damages were awarded for personal injuries sustained as a result of inadvertently coming in contact with a sagging high-power electric wire carrying 12,000 volts of electricity.

The appellant contends that the judgment is excessive; that the court erred in giving to the jury an instruction on the subject of res ipsa loquitur, and that the plaintiff was guilty of contributory negligence.

The defendant maintains and operates a high-power electric system in Madera county, including a plant and apparatus with poles and wires extending along a public highway called "Dairyland Road". The wires carried a load of 12,000 volts of electricity. For some time prior to the accident one of the wires, which had become dislodged from a cross-arm, was permitted to remain sagging within a dangerous proximity of the ground. On June 2, 1937, the plaintiff, while riding a horse and driving a herd of cattle along that highway, in attempting to guide the cattle, raised his right arm and inadvertently came in contact with the high-power wire. The electricity passed through his body, killing his horse and six cows. He was violently thrown to the ground unconscious and thereby sustained serious injuries.

The implied finding of the jury is not disputed to the effect that the defendant was guilty of negligence in permitting an uninsulated electric wire carrying a load of 12,000 volts of electricity to remain suspended along a public highway sagging within eight and a half feet of the ground.

[1,2] It is suggested that the plaintiff was guilty of contributory negligence in raising his hand, from his position on horseback, so as to bring it in contact with a sagging electric wire which was plainly visible in the daylight. The burden of proving that the plaintiff was guilty of contributory negligence was on the defendant. 19 Cal.Jur. 697, § 119. The jury determined that issue against the defendant. That implied finding is adequately supported by the evidence. There is no evidence the plaintiff saw that sagging wire, or that he knew it was charged with electricity. He was engaged in driving a herd of 175 cattle along the highway. Some of the cows became excited and ran in the wrong direction. In the emergency, seeking to turn them in the proper course, the plaintiff spurred his horse forward, yelling at the cows and raising his hand to attract their attention and guide them back in line with the herd. In doing so his wrist inadvertently came in contact with the drooping wire. Instantly there was "a big noise like thunder". The horse and rider were violently thrown to the ground, together with six cows. This is a sufficient showing to exempt the plaintiff from contributory negligence as a matter of law.

[3] We may not say as a matter of law that the judgment of $32,500, under the circumstances of this case, is excessive, or that it was the result of passion and prejudice on the part of the jurors. Prior to the accident, the plaintiff was a vigorous, able-bodied young man twenty-six years of age. He then had no physical ailments. His regular occupation was that of a cowboy. He was an expert rider, and played the violin proficiently. He was considered a "tophand" on a stock range and in handling cattle. He was also a rodeo performer.

The injuries to the plaintiff were very serious. It is marvelous that 12,000 volts of electricity could pass through the body of a human being without killing him, especially under circumstances which resulted in the death of the horse, and six cows which had no immediate contact with the rider of the horse. The plaintiff was unconscious for some time after the accident. He remained in the hospital for forty-two days thereafter. He was compelled to use crutches for three months and a cane for an indefinite time. His ankle was badly burned, necessitating repeated skin-graftings. He suffered great pain. There is evidence that he received serious injuries to his right arm, his ankle, his hip and his back, that he suffered a 75 per cent loss of motion in the ankle, a 50 per cent loss of flexibility of his right arm, and a loss of muscular control, preventing him from performing efficient labor and from playing his violin. He could no longer ride a horse with comfort or endurance. He continued to suffer pain from his hip and ankle. His eyesight and his hearing were seriously and permanently impaired. Five medical experts testified to the serious injuries which he received. Doctor C. C. Cowan, who examined his eyes and his ears by means of scientific instruments, testified that he had suffered a loss of vision approximating 50 per cent of his normal sight; that his loss of hearing in the right ear was about 40 per cent, and that of the left ear about 25 per cent of the normal condition; that these defects of sight and hearing were not only permanent but progressive, that is, it was getting worse. He said that the impairment of plaintiff's sight and hearing indicated that his brain cells were affected and that his mind might be affected. Doctor D. H. Ransom testified that the injuries to plaintiff's arm, leg and ankle resulted in a 25 per cent disability which he considered "permanent". Doctor B. E. McDowell testified with respect to plaintiff's eyes that the use of glasses would not correct his defect of eyesight; that the drainage communicating with the "brain cells, or the nerve cells in the brain are very much affected by that to a large extent, *to a large extent destroyed*"; that he suffered "brain injury or brain deterioration," which "could go on to blindness", and total deafness, and which might result in impairing his mind. The doctor said that his vision and his hearing were getting worse. Some of the physicians testified that his vision was confined to a narrow radius, and to a limited distance. Nonexperts testified that since his accident the plaintiff was unable to do hard work; that he could ride and get about only with great difficulty. One witness said that: "Now, he is sluggish, he can hardly get around, and he can't stand nothing no way. It seems like just a little walk or anything gets him out. * * * He is always laying around the bed"; that "He was quite a hand to read. * * * [Now] he can't read to do any good, just large print. If he gets any letters or something like that, some of the boys would read it for him;" that he could no longer ride the range, or rope a steer for branding purpose as he formerly could, and that he was unable to play his violin with his former skill.

There is a serious conflict of evidence regarding all of the foregoing asserted injuries. But upon a careful reading of the record, prompted by the size of the judgment and the strenuous attack upon its alleged excessiveness, we are persuaded the judgment is adequately supported by the evidence.

[4] The appellant relies on the result of the cross-examination of plaintiff, and upon photographs and several reels of moving pictures to establish "conclusive evidence" that his ability to run, walk or ride a horse were not impaired by the injuries sustained and that neither his hearing nor his eyesight was seriously affected. It is argued that the cross-examination of the plaintiff in the presence of the jury demonstrated the fact that he could clearly hear questions propounded to him in a low tone of voice at a considerable distance. It is apparent that test of plaintiff's ability to hear was addressed to the credibility of the witness and to the weight and sufficiency of the evidence. The jury was far better qualified to determine that question

than is this court. The jurors observed that experiment and we did not. Those questions were addressed almost exclusively to the province of the jury. We may not ordinarily interfere with the province of the jury in that regard. They were properly instructed that they must render a verdict solely in accordance with the evidence adduced and that they should not permit passion or prejudice to govern their decision.

[5] The respondent severly criticizes the circumstances under which the photographs and moving pictures were taken. It is not necessary to discuss that question. It is undoubtedly true that pictures which absolutely refute the conclusion to be drawn from oral testimony regarding a particular fact should be conclusive on that particular subject. But the pictures which were received in evidence in this case merely created a conflict. It was the province of the jury to reconcile that conflict if possible, or to determine the weight and sufficiency of the evidence in that regard.

Moving pictures should be received as evidence with caution, because the modern art of photography and the devices of an ingenious director frequently produce results which may be quite deceiving. An article in the February Readers Digest, entitled "Tricked Into Acting", is an illustration of that fact. Telescopic lenses, ingenious settings of the stage, the elimination of unfavorable portions of a film, an angle from which a picture is taken, the ability to speed up the reproduction of the picture and the genius of a director may tend to create misleading impressions.

[6] In the present case the moving pictures throw no light on the plaintiff's alleged deafness. The pictures are not conclusive on his limitation of vision. The doctors testified that his vision was limited in distance and radius. The pictures do show him in the act of catching a ball thrown to him by a young lady. But we are unable to determine the distance or direction from which the ball was tossed to him. It is possible that the young lady stood quite close to him, and that she took particular pains to toss the ball within the narrow radius of his vision as testified to by the physicians. The plaintiff may have been inspired to exert himself to make a favorable showing of his ability under the circumstances in spite of pain and his disabilities. Naturally, pictures will not reproduce the pain which may be endured by a subject. Serious muscular disability may become apparent only after a period of strenuous exertion. These were all questions for the determination of the jury. There is ample oral evidence to support the findings of the jury in that regard. Reputable physicians testified positively that the plaintiff possessed serious defects and that the injuries were permanent. Under such circumstances we are not disposed to interfere with the conclusions of the jury.

[7-9] Numerous other cases have been cited to demonstrate the contention that the verdict in this case is excessive. It is impossible to reconcile the amounts of judgments in various suits for damages in personal injury cases. The circumstances and ailments in various cases differ so radically. The purchasing power of money in times of inflation or depression is an element to be considered in determining whether a judgment is excessive. The jury has a wide discretion in determining what sum of money will reasonably compensate one for injuries sustained. The mere fact that a judgment appears to be large does not warrant a court of review in determining that a verdict is the result of the passion or prejudice of a jury. That fatal result should clearly appear from the record. We are unable to say, as a matter of law, that the judgment in this case is so excessive as to warrant us in interfering with the finding of the jury.

[10] The court properly instructed the jury on the subject of res ipsa loquitur that when facts have been established which make that doctrine applicable, the burden "of meeting such presumption" of negligence is cast upon the defendant. That was not a "formula instruction", requiring the inclusion of all the necessary elements of the entire theory upon which the plaintiff seeks to recover damages. Douglas v. Southern Pacific Co., 203 Cal. 390, 264 P. 237. The instruction in the present case properly asserted that the presumption created by proof of facts raised by the doctrine of res ipsa loquitur did not have to be overcome by a *preponderance* of evidence, but on the contrary it declared that it was necessary for the defendant to produce only sufficient evidence to "balance the presumption". The court then said: "If, after a consideration *of all of the evidence in the case* bearing upon the defendant's alleged negligence,

including such presumption, you are convinced *by a preponderance* of the evidence that the defendant was negligent, and that such negligence was the proximate cause of the injuries, if any, sustained by the plaintiff, your verdict should be for the plaintiff."

The jury was elsewhere fully and properly instructed with respect to the doctrine of contributory negligence. The challenged instruction was neither erroneous nor prejudicial.

The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

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37 Cal.App.2d 158

OCEAN PARK BATH HOUSE & AMUSEMENT CO. v. PACIFIC AUTO PARK CO. et al.

Civ. 12466.

District Court of Appeal, Second District, Division 2, California.

Feb. 5, 1940.

Corporations 🔑**499**

Under Franchise Tax Act, suspending power, right and privileges of delinquent corporate taxpayer except for change of corporate name, delinquent corporate taxpayer could not defend action against it, and hence could not appeal from adverse judgment. Gen.Laws 1931, art. 8488, § 32.

Appeal from Superior Court, Los Angeles County; Orlando H. Rhodes, Judge.

Action by the Ocean Park Bath House & Amusement Company against the Pacific Auto Park Company and others. From judgment for plaintiff, the named defendant appeals. On plaintiff's motion to dismiss the appeal.

Appeal dismissed.

Carl C. Katleman and A. A. Rotberg, both of Los Angeles, for appellant.

Louis Lieber, Jr., of Los Angeles, for respondent.

WOOD, Justice.

Respondent has presented a motion to dismiss the appeal. It appears from a certificate of the secretary of state that on January 6, 1938, the Franchise Tax Commissioner, pursuant to the provisions of section 32 of the California Bank and Corporation Franchise Tax Act, submitted a report wherein appeared the name of appellant corporation as having failed to pay, prior to the time prescribed by said section 32, the tax or any portion or installment thereof as computed and levied under said act and that in accordance with section 32 the suspension of the corporate powers, rights and privileges of the appellant corporation became effective upon the recordation of the report in the office of the secretary of state. It further appears from the certificate that appellant corporation has not been reinstated pursuant to the provisions of the act.

It is provided in section 32 of the California Bank and Corporation Franchise Tax Act (Deering's Gen.Laws, Act 8488) that for failure to pay the taxes levied thereunder, "the corporate powers, rights and privileges of the delinquent taxpayer, if it be a domestic corporation, shall be suspended and shall be incapable of being exercised for any purpose or in any manner except for the purpose of amending the articles of incorporation to set forth a new name, and the officers, directors and stockholders or members of any such corporation may take such action in their respective capacities as may be required by law in order to amend the articles of incorporation for such purpose * * *." In Boyle v. Lakeview Creamery Co., 9 Cal.2d 16, 68 P.2d 968, 970, the issue now before us was before the Supreme Court for determination and it was there held that "the appellant corporation has lost the right to defend the suit in question, and since it has no right to defend, it has no right to appeal from an adverse decision". In view of this decision of the Supreme Court the motion to dismiss the appeal must be granted.

The appeal is dismissed.

We concur: MOORE, P. J.; McCOMB, J.

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